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.

SYNTHESIS REPORT

presented by

Jacob van de Velden (London)

July 2007
# Table of Contents

## Introduction ................................................................. 1

(i) The background to the study .............................................. 1
(ii) The Commission's mandate for the study .................................. 3
(iii) The outcome of the study .................................................. 4
(iv) Guide to the project CD-ROM ............................................. 5
(v) The methodology of the study ............................................. 6
(vi) The synthesis report ....................................................... 7

## Executive summary of the synthesis report ...................... 8

(i) The role of Public Documents in the process of recognition of EC rights by the Member States ................................................................. 8
(ii) The role of Public Documents in the EC context of free movement and civil justice .................................................................................. 9
(iii) The acceptance, recognition and effect of Public Documents for evidentiary purposes ................................................................. 10
(iv) The Legalisation of Public Documents .................................... 11
(v) The compatibility of Legalisation with EC law ...................... 12

## Summary of the conclusions of the study ......................... 15

(i) The role of Public Documents in the process of recognition of EC rights by the Member States ................................................................. 15
(ii) The role of Public Documents in the EC context of free movement and civil justice .................................................................................. 18
(iii) The acceptance, recognition and effect of Public Documents for evidentiary purposes ................................................................. 22
(iv) The Legalisation of Public Documents .................................... 30
(v) The compatibility of Legalisation with EC law ...................... 38
(vi) Suggested measures at the EC, international and national level ...... 47

## Recommendations .......................................................... 49

(i) Introduction ........................................................................... 49
(ii) Recommendations .................................................................. 49
Outline of the report

1.02 The role of Public Documents in the process of recognition of EC rights by the Member States

1.03 The role of Public Documents in the EC context of free movement and civil justice

1.04 The acceptance, recognition and effect of Public Documents for evidentiary purposes

1.05 The legalisation of Public Documents

1.06 The compatibility of legalisation with EC law

1.07 Suggested measures at the EC, international and national level

Part I. The role of Public Documents in the process of recognition of EC rights by the Member States

1.01 Introduction

(a) The persistence of administrative formalities

(b) EC rights exist independent from their recognition

(c) The harmonisation of conditions and formalities for recognition

(i) The burden of proving EC rights

(d) An example: the process of recognition of an EC right of residence

(e) No harmonisation?

1.02 The proof that may be required

(a) Proof of the conditions under which an EC right exists
(i) The rationale behind the requirement of proof.................................66

1.03 The means of evidence that must be accepted........................................66

(a) Introduction........................................................................................................66

(i) Harmonisation?...............................................................................................67
(ii) Imprecise harmonisation?..............................................................68
(iii) No harmonisation?...............................................................................68

1.04 The EC concept of appropriate means of evidence.................................69

(a) Introduction........................................................................................................69

(b) The EC Standard of Proof..................................................................................69

(i) Sufficiently objective ..............................................................................70
(ii) Leaving no doubts..................................................................................70
(iii) Satisfactory for purposes of verification.............................................71

(c) Guiding principles.............................................................................................71

(i) EC loyalty and effectiveness of EC law .................................................72
(ii) Equal treatment......................................................................................72

1.05 Public documents considered as an appropriate means of evidence.........74

(a) Introduction........................................................................................................74

(b) Objective source of information.....................................................................74

(c) Reliable source of information......................................................................74

(d) Durable source of information......................................................................74

1.06 The role of Public Documents in context of EC law..................................75

(a) Legal diversity in the member States ..............................................................75

(i) Note on the surveys conducted in the course of the study: difficulties
    experienced by European citizens and companies in relation to the
    cross-border use of Public Documents.........................................................76
(b) Imprecision of EC instruments ..........................................................77

   (i) The description of means of evidence in modern EC instruments......78

Part II. The role of Public Documents in the EC context of free movement and civil justice ......................................................79

2.01 Introduction ..................................................................................79

2.02 Beneficiaries of EC rights ..............................................................80

   (a) EC nationals ..................................................................................80

      (i) Union citizens ............................................................................80

      (ii) EC companies ..........................................................................81

2.03 EC free movement cases ..............................................................82

   (a) Associated rights of free movement .............................................82

      (i) Free movement of goods ..........................................................82

      (ii) Unrestricted entry and residence for EU citizens and their family ....103

      (iii) Unrestricted entry and residence for workers .........................113

      (iv) Taxation of migrant workers ..................................................122

      (v) Unrestricted entry and residence for self-employed persons ........126

      (vi) Unrestricted establishment ......................................................127

      (vii) Refund of VAT to not established taxable persons .................136

      (viii) Unrestricted provision of services .......................................140

      (ix) Recognition of professional qualifications ..............................143

      (x) Social security ..........................................................................158

2.04 EC civil justice cases .................................................................164

   (a) Introduction ................................................................................164

   (b) Associated rights of civil justice ...............................................164

      (i) Access to justice ......................................................................164

      (ii) Effective justice ......................................................................167

      (iii) Enforcement of decisions EC Institutions in the Member States ....190
Part III. The acceptance, recognition and effect of Public Documents for evidentiary purposes in the Member States.................192

3.01 Introduction .............................................................................................................192

(a) Public documents ..................................................................................................192

(b) Distinction between Public Documents and acts of public authority ............193

(c) The function of Public Documents......................................................................199

(d) The administration of Public Documents.........................................................199

   (i) Differences between judicial and administrative administration..........199
   (ii) Point for reflection in EC context: more lenient application (US) .........204

3.02 The acceptance of Public Documents for the purpose of being admitted into evidence in judicial and administrative situations..............................................205

(a) Introduction.................................................................................................205

(b) The proof of the authenticity of Public Documents.........................................205

   (i) Introduction ..........................................................................................205
   (ii) The proof of authenticity of domestic Public Documents .....................210
   (iii) The proof of authenticity of foreign Public Documents ......................211

(c) The Burden of Proof if the authenticity of a Public Document is challenged......215

   (i) Domestic Public Documents....................................................................215
   (ii) Foreign Public Documents......................................................................216
   (iii) The Burden of Proof under international agreements..........................217

(d) Ancillary requirements of form and language.................................................222

   (i) Introduction ..........................................................................................222

(e) The form in which Public Documents are accepted ........................................222

   (i) The form in which domestic Public Documents are accepted ...............222
   (ii) The form in which foreign Public Documents are accepted....................223
   (iii) Point for reflection in the EC context: general acceptance of certified copies of Public Documents in addition to originals (U.S.) ....................224
3.03 The recognition of the legal status of a Public Document for evidentiary purposes

(a) Introduction............................................................................................................ 229
   (i) The validity of Public Documents................................................................. 229

(b) The recognition of domestic Public Documents for evidentiary purposes .......... 234
   (i) Automatic recognition for evidentiary purposes (civil law) ....................... 234
   (ii) Admissibility of evidence (common law)...................................................... 235

(c) The recognition of foreign Public Documents for evidentiary purposes .......... 235
   (i) Admissibility of evidence (common law)...................................................... 236
   (ii) The requirement of reciprocity.................................................................... 237
   (iii) Point for reflection in the EC context: admissibility (US)............................ 238

3.04 The proof for which Public Documents are admissible into evidence .......... 239

(a) Introduction............................................................................................................ 239
   (i) Point for reflection: concerns of validity or public policy in relation to the
       act of public authority that is recorded in a Public Document may prevent
       the Public Document’s use as a means of evidence to prove the
       existence of an EC right................................................................................. 240

(b) The proof for which domestic Public Documents are admissible into evidence.... 245
   (i) Example: German civil status documents...................................................... 246

(c) The proof for which foreign Public Documents are admissible into evidence .... 246
   (i) Point for reflection in the EC context: full faith and credit (US).................... 247

3.05 The evidential value of Public Documents ......................................................... 248

(a) Introduction............................................................................................................ 248
   (i) The ALI/UNIDROIT principles of transnational civil procedure................. 248
(ii) Public document generally have a privileged evidential value........248

(iii) The law that determines the evidential value of foreign Public Documents........................................................................................................249

(b) The evidential value of domestic Public Documents....................................................251

(i) The evidential value of foreign Public Documents....................................................252

Part IV. The legalisation of Public Documents...........................................................254

4.01 Introduction ...............................................................................................................254

(a) The concept of legalisation ......................................................................................254

(i) The concept of legalisation in international agreements........................................255

(b) The Member States’ legal practice ..................................................258

(i) The lack of a clear legal framework for legalisation .............................................259

4.02 Legalisation of Public Documents outside the scope of EC law and international agreements.................................................................259

(a) Introduction ...............................................................................................................259

(i) Note on the surveys conducted in the course of the study ..................................262

(b) The table of bi- and multilateral agreements that abolish legalisation ..................262

(c) Legalisation in accordance with domestic rules and requirements ......................263

(i) Introduction ...............................................................................................................263

(ii) Legalisation depends on the availability of specimen signatures and seals ..........264

(iii) General trends in the practice of legalisation in the Member States.................266

(d) Proof provided by legalisation ..................................................................................268

(e) Proof provided by the legalisation by another Member State.........................270

(i) Point for reflection in the EC context: self-authentication (U.S.)........271

(f) The legalisation of domestic Public Documents by the Member States.............271

(i) Austria ........................................................................................................271

(ii) Belgium ........................................................................................................272

(iii) Cyprus ............................................................................................................273
(iv) Czech Republic .................................................................................................................. 274
(v) Denmark ............................................................................................................................. 274
(vi) Estonia ................................................................................................................................ 275
(vii) Finland ............................................................................................................................... 275
(viii) France ............................................................................................................................... 275
(ix) Germany .............................................................................................................................. 276
(x) Greece .................................................................................................................................... 277
(xi) Hungary .................................................................................................................................. 278
(xii) Ireland .................................................................................................................................. 278
(xiii) Italy ..................................................................................................................................... 279
(xiv) Latvia ................................................................................................................................... 279
(xv) Lithuania ............................................................................................................................... 280
(xvi) Luxembourg.......................................................................................................................... 281
(xvii) Malta .................................................................................................................................... 281
(xviii) Netherlands ......................................................................................................................... 281
(xix) Poland ................................................................................................................................ 282
(xx) Portugal .................................................................................................................................. 282
(xxii) Slovak Republic ................................................................................................................... 283
(xxii) Slovenia ................................................................................................................................ 283
(xxiii) Spain .................................................................................................................................. 284
(xxiv) Sweden ................................................................................................................................ 285
(xxv) United Kingdom ................................................................................................................... 285
(xxvi) Point for reflection in the EC context: authentication of domestic documents (U.S.) .. 286

(g) The legalisation of foreign Public Documents by the Member States .....................287

(i) Austria ..................................................................................................................................... 287
(ii) Belgium .................................................................................................................................. 288
(iii) Czech Republic .................................................................................................................... 288
(iv) Denmark ................................................................................................................................ 289
(v) Estonia .................................................................................................................................... 289
(vi) France ................................................................................................................................... 289
(vii) Germany .............................................................................................................................. 290
(viii) Greece .................................................................................................................................. 290
(ix) Hungary ................................................................................................................................. 290
(x) Ireland ..................................................................................................................................... 291
(xi) Italy ......................................................................................................................................... 292
(xii) Latvia ..................................................................................................................................... 292
(xiii) Lithuania .............................................................................................................................. 292
(xiv) Malta ..................................................................................................................................... 293
(xv) Netherlands ............................................................................................................................ 293
(xvi) Poland .................................................................................................................................. 294
(xvii) Portugal ............................................................................................................................... 294
(xviii) Slovak Republic ................................................................................................................ 294
(xix) Slovenia ................................................................................................................................ 295
(xx) Spain ...................................................................................................................................... 295
(xxii) UK ......................................................................................................................................... 296
(xxii) Point for reflection in the EC context: authentication of foreign documents (U.S.) ................................................................................................................................. 296
4.03 Legalisation of Public Documents under EC law and international agreements

(a) EC law .........................................................................................................................297
    (i) Goods ..................................................................................................................297
    (ii) Entry and residence for Union citizens and their family members ...... 298
    (iii) Workers and self-employed persons ...........................................................298
    (iv) Taxation of migrant workers ........................................................................299
    (v) Recognition of professional qualifications .................................................299
    (vi) Services and establishment ............................................................................299
    (vii) Refund of VAT to non-established taxable persons..............................300
    (viii) Social security ...............................................................................................300
    (ix) Access to justice ..............................................................................................301
    (x) Effective justice ...............................................................................................301
    (xi) Enforcement of decisions of several EC Institutions .............................303

(b) The London 1968 Convention ...............................................................................303

(c) CIEC Conventions .................................................................................................303
    (i) Introduction .......................................................................................................303
    (ii) CIEC Conventions that exempt Public Documents from legalisation .......306

(d) The Brussels 1987 Convention ...............................................................................310
    (i) Administrative cooperation to replace legalisation .....................................311
    (ii) The Interaction of the 1987 Convention with other Conventions ..........311

(e) The Hague Conference on private international law .............................................312
    (i) The Hague 1993 Convention on Protection of Children and Co-operation in respect of Intercountry Adoption .................................................................312
    (ii) The Hague 1954 Convention on Civil Procedure .........................................313
    (iii) Hague Conventions that exempt documents from legalisation ..........314

(f) The implementation of the Hague 1961 Convention by the Member States........318
    (i) Introduction .......................................................................................................318
    (ii) Background of the Convention ....................................................................319
    (iii) Objective of the Convention .........................................................................320
    (iv) Review of the Convention .............................................................................320
    (v) The scope of the Convention .........................................................................324
    (vi) The Apostille formality ..................................................................................328
    (vii) The Apostille formality as implemented by the Member States ..............332
    (viii) The competent authorities under the Hague 1961 Convention ...............333
    (ix) The organisation of the competent authorities by the Member States ....339
    (x) The Apostille register .....................................................................................346
    (xi) The Apostille registers as maintained in the Member States .................347
4.04 Difficulties associated directly or indirectly with legalisation

(a) Introduction

(b) General difficulties

(i) Legal diversity
(ii) Heterogeneity of Public Documents
(iii) Heterogeneity of public authorities
(iv) Heterogeneity of competent authorities
(v) Diversity of public administration systems
(vi) Diversity of public registration systems
(vii) Diversity of authentication and substantive verification systems
(viii) Diversity of languages
(ix) Unclear which documents are required abroad
(x) Incorrect implementation of formalities
(xi) Lack of information
(xii) Lack of eGovernment
(xiii) Lack of trust in foreign public authorities
(xiv) Lack of trust in the reliability of foreign public registers

(c) Difficulties concerning the Hague 1961 Convention

(i) General
(ii) The Apostille
(iii) Documents for which an Apostille is issued
(iv) Competent authorities
(v) The Apostille formality
(vi) The Apostille register
(vii) The use and effect of Apostilles

(d) Difficulties concerning legalisation under domestic law
Part V. The compatibility of legalisation with EC law .......................380

5.01 Introduction .............................................................................................................380

(a) The legal framework ..............................................................................................380

(b) Outline ...................................................................................................................381

5.02 Legalisation considered as a discriminatory measure .........................................382

(a) The prohibition of discrimination in the Treaty .......................................................382

(b) The scope of application of the Treaty ..................................................................382

(c) Defining discrimination: intention and effects ..........................................................383

(d) Defining discrimination: equal treatment ...............................................................384

   (i) Is the criterion for legalisation based on nationality? ........................................384

   (ii) Does the criterion correlate closely with nationality? .......................................385

   (iii) Is the criterion for legalisation based on a factor that is objectively justified? ..........................................................................................................................388

   (iv) A further complicating factor: the discrimination between Member States ........392

(e) Conclusion .............................................................................................................394

5.03 Legalisation considered as a restriction ...............................................................395

(a) Introduction .............................................................................................................395

   (i) Four conditions ..................................................................................................396

(b) Is the requirement of legalisation liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty? .................................................397

   (i) The legalisation requirement considered as a measure that is liable to hinder or make less attractive the exercise of fundamental freedoms. 398

   (ii) The legalisation formality considered as a measure that is liable to hinder or make less attractive the exercise of fundamental freedoms. 400
(c) Is the requirement of legalisation applied in a non-discriminatory manner? ........401

(d) Does the requirement of legalisation pursue a justified aim?.........................402

(i) Can legalisation be justified on the grounds set out explicitly in the Treaty?.........................................................................................................................403

(ii) Can legalisation be justified by overriding reasons in the public interest? .........................................................................................................................404

(iii) Are there EC harmonising measures to ensure that the interests involved with legalisation are protected? ..........................................................405

(e) Is the requirement of legalisation proportional to the justified aim it pursues? ......416

(i) Is the requirement of legalisation a suitable measure?...............................417

(ii) Is the requirement of legalisation a necessary measure?.........................417

(iii) Certain examples..................................................................................421

(f) Conclusion.............................................................................................................426

Part VI. Suggested measures at the EC, international and national level.................................................................428

6.01 Overview of suggested measures ..........................................................................428

(a) Measures at the EC level ......................................................................................428

(i) European Central Register ..........................................................................428

(ii) European Standard Information Sets..........................................................428

(iii) European Standard Forms.......................................................................428

(iv) European Standard of Proof ..................................................................429

(v) Conversion of the 1987 Convention into a European Regulation ..........429

(vi) European Communication and Exchange of Information System .......429

(vii) Differentiation between Document Types as regards potential Measures .................................................................................................................429

(viii) Designation of central authorities..............................................................429

(ix) Complete or increased abolition of legalisation requirements ..........430

(x) Further harmonization of legalisation requirements..................................430

(b) Measures at the intergovernmental level ..............................................................430

(i) Coordination of the International Legal Framework in the EU ...............430

(ii) The Hague 1961 Convention and the eApostille Pilot Programme........430

(iii) Closer co-operation between parties to multi-lateral instruments .......431

(iv) Transparency..........................................................................................431

(c) Measures at the national level..............................................................................431
(i) Public Information System ................................................................. 431
(ii) Guidelines and information for public authorities ......................... 431
(iii) Improved availability and accessibility of Competent Authorities...... 432
(iv) Decrease the number of authorities involved in legalisation .......... 432
(v) Record of signatures ....................................................................... 432
(vi) Introduction of e-services ............................................................... 432
(vii) Introduction of dedicated legislation with regard to national legalisation procedure ................................................................. 433
INTRODUCTION

(i) The background to the study

This study, which was undertaken from March 2006 until July 2007, forms part of the European Commission's work under the 2005 Framework programme for judicial cooperation in civil matters. With the aim of further creating a proper functioning European area of justice, freedom and security, a number of exploratory studies on civil judicial cooperation are being undertaken to throw light on existing barriers to the four freedoms of the internal market and the effective exercise by citizens and businesses of the rights conferred on them by EC legislation.

The terms of reference for the project, the Commission describes the background of the study as follows:

“The increased complexity of modern society and the frequency of legal situations in which citizens cross the borders of Member States of the European Union in exercising the freedoms enshrined in the Treaties, notably the freedom of movement and the right to settle and work in a Member State other than that in which they were born and raised, make it necessary to examine the conditions and restrictions which may impede or adversely affect the exercise of these freedoms and the rights associated with them.

An example of one such condition is that, for matters such as employment, civil status, immigration, citizenship and various other matters of administrative or public law, or in order to protect or assert their civil rights, citizens are required to present formal or other documents issued in one Member State to authorities or legal agencies in another in order to achieve what they wish in this regard.

This may relate to court orders, other papers, documents vouching birth, marriage or divorce, contracts of various kinds, documents relating to property, professional and educational certificates and diplomas and documents relating to wills or succession. Very often such documents are not accepted by the relevant authorities or agencies unless they have been legalised or been authenticated by some other such formality.

It is possible to insist on these Legalisation formalities, and even occasionally those required when drawing up documents authenticated by a notary or otherwise, as well as instruments used in trade and commerce, before citizens and commercial entities including limited companies can settle, trade or be established in another Member State, even though they are not strictly necessary under EC law (for example the Brussels I Regulation) or other improvements such as the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. These may,
therefore, constitute a barrier, administrative burden or impediment to the exercise of those rights enshrined in the Treaty, including the right of the freedom of establishment in another Member State. In the light of this it is necessary to look at the 1. nature and 2. frequency of such problems, the 3. possible solutions in the context of the Treaty freedoms, as well as 4. the creation of a common area of law and justice in the Union.”

The project initiated with an Advisory Board meeting in London on 7 March 2006 to discuss the structure and the content of the draft questionnaire designed by the Institute and to be used for the Member States’ national reports. Following the meeting, the questionnaire was formatted in such a way so as to provide a clear and comprehensive study of the Member States’ legal practice in relation to the cross-border use of Public Documents. It was accompanied by an explanatory memorandum which further clarified the objectives and legal framework of the study, as well as provided detailed explanation of all the individual questions of the questionnaire. The completed questionnaire was dispatched to the National Rapporteurs on 12 May 2006 and they were given two months to complete it.

Following the questionnaire’s dispatch, an expert meeting on the future of Legalisation in the EU was held on 26 June 2006. The purpose of the meeting was to ensure the participation of the relevant stakeholders in the project and to encourage their active roles. The participants list included both National Rapporteurs and members of the Advisory Board, and in addition representatives from organisations throughout Europe, including the new Member States.

The team of researchers at the British Institute involved with the execution of the study consisted of Professor Cees van Dam (project director), Mr Jacob van de Velden (project manager and general rapporteur), Ms Justine Stefanelli (research fellow and assistant rapporteur), Mr Hugo Warner (research fellow), Ms Marsela Maci (research fellow), Mr Daniele Borghetti (research assistant), Ms Miranda Desavorgnani (research assistant) and Ms Natasha Nakai (research assistant).

The National Rapporteurs were chosen because they were particularly well placed to identify and subsequently approach their domestic stakeholders with specific inquires aimed at retrieving information, and to assess whether the current formalities in their respective Member State cause difficulties in practice. The following experts have prepared national reports: Professor Paul Oberhammer and Dr Tanja Domej (Austria), Professor Marcel Storme (Belgium), Ms Agatha Katsis (Cyprus), Professor Monika Pauknerova (Czech Republic), Dr Ana Lopez-Rodriguez (Denmark), Mr Kari Käsper (Estonia), Sakari Laukkanen (Finland), Professor Etienne Pataut (France), Professor Burkhard Hess, assisted by Mr Marcus Mack and Ms Kirsten Mees (Germany), Professor Stelios Koussoulis1 with the assistance of Mr Alexander Fessas (Greece), Dr Gabor Palásti (Hungary), Ms Maire Ni Shuilleabháin (Ireland), Mr

---

1 Professor Stelios Koussoulis (1959) passed away unexpectedly at the age of 48. Professor Koussoulis was professor at the Athens University Law School.
Emanuele Calo and Professor Andrea Giussani with the assistance of Mr Daniele Borghetti (Italy), Elina Bedanova (Latvia), Ms Inga Sapokaite with the assistance of Mr Karolis Granickas (Lithuania), Katia Manhaeve (Luxembourg), Dr Ivan Sammut (Malta), Ms Sabine Verbeek-Meinhardt (the Netherlands), Mariusz Maciejewski (Poland), Ms Sofia de Abreu Ferreira (Portugal), Ms Tatiana Hackova, assisted by Ms Luciana Polaczykova (Slovakia), Ms Ana Stanic (Slovenia), Professor Alegría Borrás, with the assistance of Mr Javier Areste Gonzalez (Spain), Dr Eric Bylander and Professor Torbjörn Andersson (Sweden), Mr Nigel Ready (United Kingdom) and Ms Justine Stefanelli (U.S.).

(ii) The Commission’s mandate for the study

On the basis of the terms of reference of the project as set out by the European Commission, the objectives of the study were to identify: (1) those rules of law and procedures which apply in the Member States and require documents to be legalised on entry to each Member State before they are fully valid; (2) how the -Hague Convention of 1961 is applied by the Member States of the EU; (3) the methods and techniques used by the Member States to legalise documents required in other States; (4) the documents for which these rules and procedures are applicable; (5) the number or frequency of instances in which issues of Legalisation arise and the circumstances in which this occurs; (6) the difficulties experienced by citizens as a result of the requirements for Legalisation being applied; and (7) suggestions on how steps taken at European level can improve the situation to the benefit of the citizens of Europe.

The study goes beyond the remit given in the original description of the project, which focused on Legalisation. The reason for this is that the early materials from the questionnaire and the initial research by the Institute revealed a situation as regards the use and acceptance of Public Documents within the Member States that required a broader exploration. Although the use and acceptance of Public Documents is linked to Legalisation, being a method of authentication of such documents, the real problem of discrimination in mostly the administrative practices in the Member States regarding the identification and application of the EC freedoms was about the use and acceptance in general of Public Documents and their authentication, of which Legalisation was only one aspect. The decision of the Institute to ensure the execution of the mandate of the Commission and in addition the extension of the study to cover important areas and questions not previously considered by the Commission is only for the benefit of future policy thinking in all the different sectors of EC law implicated by the Study.
(iii) The outcome of the study

The final study prepared by BIICL, in meeting the requirements of the Commission, identifies issues and areas relevant in the light of EC law, many not previously considered. The result is a comprehensive legal and empirical analysis of the use of Public Documents in the EC not restricted to an analysis of Legalisation requirements.

The study examines the role of Public Documents in the process of recognition of EC rights by the Member States (part I of the synthesis report) and it describes the role of Public Documents in the EC Treaty contexts of free movement and civil justice (part II of the synthesis report).

In addition, the study provides a comparative analysis of the legal practices in twenty-five Member States concerning: (1) the acceptance, recognition and effect of Public Documents for evidentiary purposes (part III of the synthesis report); and (2) the Legalisation of Public Documents (part IV of the synthesis report).

Implementation by the Member States of the different legal regimes concerning the Legalisation of Public Documents that exist at national, EC and international levels is evaluated (part II and IV of the synthesis report, the comparative table and explanatory memoranda 1 to 4). Furthermore, the difficulties that arise in relation to the use of Public Documents between the EC Member States are identified and specified per Member State (see explanatory memorandum 5).

Finally, the study explores the compatibility of Legalisation requirements and the formalities that these involve with EC law (see part V of the synthesis report) and suggests measures to address the difficulties that arise in relation to the use of Public Documents as between the EC Member States (part VI of the synthesis report, the conclusions of the synthesis report and the policy recommendations).

Besides the national reports for the EC Member States and the comprehensive synthesis report, BIICL in the context of the study has produced two significant comparative tables: (1) a table on bi- and multilateral agreements between the Member States; and (2) a table on the legal practice of the Member States in relation to domestic and foreign Public Documents.

Moreover, in the course of the study BIICL has delivered several explanatory memoranda concerning: (1) the implementation of EC law, and Legalisation and Apostille formalities; (2) bi- and multilateral agreements between the member States; (3) the study surveys; (4) identified difficulties concerning the cross-border use of Public Documents; and (5) the measures suggested by the National Rapporteurs at the EC, national and international level to address the identified difficulties concerning the cross-border use of Public Documents.
(iv) Guide to the project CD-ROM

The CD-ROM provided to the Commission with the hard copy study documents contains all the relevant study documents in 6 numbered folders: 1. REPORT; 2. COMPARATIVE TABLES; 3. EXPLANATORY MEMORANDA; 4. NATIONAL REPORTS; 5. INTERNATIONAL AGREEMENTS; and 6. SURVEYS ANALYSIS.

The REPORT-folder contains the complete Synthesis Report as well as the report in its five separate parts. Here also are case law notes on all the ECJ cases referred to in the Synthesis Report. The COMPARATIVE TABLES-folder contains a table entitled Public Documents Practice which concerns the effect of Legalisation in practice in each of the Member States, as well as a comparative look at US practice. It also contains the explanatory memorandum regarding the bi- and multilateral agreements table which is located in the INTERNATIONAL AGREEMENTS-folder.

The EXPLANATORY MEMORANDA-folder contains explanatory memoranda for each of the tables included with the study documents. There are twelve (12) in total. The NATIONAL REPORTS-folder contains the finalised versions of all 25 national reports in PDF format. The INTERNATIONAL AGREEMENTS-folder contains PDF copies of each of the international agreements referred to in the bi and multi-lateral agreements table, as well as the table of bi and multilateral Legalisation agreements referred to above. This is an interactive clickable document that seeks to provide the user with an overview of the status of Legalisation amongst the Member States based on the international agreements that have been identified by both the rapporteurs and the Institute. It also contains the search results generated by the Institute during its evaluation of the different agreements which apply between the Member States.

The SURVEYS ANALYSIS-folder contains the citizens and companies surveys previously referred to which seek to demonstrate the real and practical difficulties experienced by both citizens and companies during their daily use of Public Documents. The surveys were available in English, French, German, Italian, Polish and Spanish and all are included in this folder.
(v) The methodology of the study

The study initiated with the preparation by the Institute of a study questionnaire. This questionnaire was prepared by Mr Jacob van de Velden in cooperation with and under supervision of two project consultants: Professor Jukka Snell (Swansea University) and Mr Andrew Dickinson (Visiting Research Fellow). Prior to the dispatch of the questionnaire the project Advisory Board scrutinised the questionnaire and provided the researchers with feedback on prior drafts of the questionnaire.

The national reports, which were prepared by national experts, were analysed by the British Institute and the National Rapporteurs received feedback on their initial reports. In addition an additional questionnaire was completed by the National Rapporteurs to address certain ancillary issues that arose in the process of evaluating the national reports. Eventually, the Institute analysed and compiled all the information provided by the National Rapporteurs in a comparative table.

The study is based on a comparative analysis of the legal practice of twenty-five EU-Member States, including Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. The comparative analysis further included the legal practice in the U.S. The analysis of the legal practice of the U.S. is included in the comparative table and features in the synthesis report for purposes of reflection.

A large part of the analytical research was conducted centrally at the British Institute. Firstly, a comprehensive study was made of the relevant EC primary and secondary legislation and the case law of the European Court of Justice in order to: (1) clarify the role of Public Documents in the process of recognition of EC rights by the Member States, (2) identify the role of Public Documents in the EC context of free movement and civil justice, and (3) examine the compatibility of the requirement of Legalisation and the formalities that it involves with EC law. In addition,

Secondly, the Institute conducted a comparative analysis of all bi- and multilateral international agreements that concern the issue of Legalisation of Public Documents between the Member States. The relevant bilateral agreements concern either all types of Public Documents, civil matters, family law matters, commercial matters, social security matters, employment matters, criminal matters, tax matters or IP matters. The pertinent multilateral agreements include conventions concluded in the framework of the Hague Conference on Private International Law, the Council of Europe and the International Committee on Civil Status.

In addition to the national reports, the Institute also obtained data through stakeholder surveys targeted directly at citizens or companies who use Public Documents abroad, or people who are involved in the
process of the cross-border use of Public Documents. The surveys were designed to demonstrate the legal and practical difficulties related to the requirement of Legalisation and indeed and focused on real life situations with which citizens and companies are confronted and with which they can identify themselves quite easily. The surveys were widely available online and were available in six of the Union’s official languages (English, French, German, Italian, Polish and Spanish). In addition, the National Rapporteurs have identified country-specific difficulties.

Lastly, the National Rapporteurs have also been of assistance to the Institute in the process of identifying possible measures to address the difficulties that arise in relation to the use of Public Documents between the EU Member States.

For the purpose of managing the project, the Institute developed a project website, which is accessible for the public (www.biicl.org/Legalisation/). Moreover, the Institute successfully introduced the use of a project extranet, which is accessible for the National Rapporteurs, the members of the Advisory Board, and the European Commission. The extranet was used to inform all the participants in the project on the progress of the study and to make easily available the national reports, as well as any relevant documentation such as European and domestic case law, feedback on the national reports, the interim report and literature.

**(vi) The synthesis report**

The synthesis report is in six parts: (1) The role of Public Documents in the process of recognition of EC rights by the Member States (1.02); (2) The role of Public Documents in the EC context of free movement and civil justice (1.03); (3) The acceptance, recognition and effect of Public Documents for evidential purposes (1.04); (4) The Legalisation of Public Documents (1.05); (5) The compatibility of Legalisation with EC law (1.06); and (6) Suggested measures at EC, international and national levels (1.07).
EXECUTIVE SUMMARY OF THE SYNTHESIS REPORT

(i) The role of Public Documents in the process of recognition of EC rights by the Member States

- The process of recognition of an EC right may involve the requirement for a person to provide certain specific proof of factual circumstances under which the entitlement to the EC right exists. The EC Burden of Proof is, in principle, on the person claiming the right.

- If the conditions for recognition of EC rights are harmonised, Member States are not allowed to make recognition subject to other conditions, no discretion to recognise an EC right exists if all applicable conditions under EC law are fulfilled and the means of evidence provided for must be accepted as well as any other appropriate means.

- The EC Standard of Proof requires that Member States establish the fulfilment of requirements under EC law for the existence of an EC right on the basis of the evidence provided in a particular case. Authorities are not permitted to lower EC standards of proof unilaterally.

- Appropriate means of evidence for the purpose of proving EC rights must satisfy three conditions, they must: (1) be sufficiently objective; (2) leave no doubts; and (3) be satisfactory for purposes of verification. Public Documents derive from an objective source and represent a reliable and durable source of information. This makes them the most appropriate means of evidence for proving EC rights.

- In the absence of harmonisation, Member States must themselves assess whether an EC right must be recognised. The means of evidence provided for under national law have to be in line with the principle of EC loyalty (Article 10 EC), and the principles of effectiveness and equal treatment.

- Legal diversity between the Member States as regards the means of evidence that are required undermines the principle of legal certainty in the EC legal order. EC instruments often fail to clarify precisely the means of evidence that must be accepted by the Member States.
(ii) The role of Public Documents in the EC context of free movement and civil justice

- Public Documents fulfil an indispensable function for the purpose of ensuring that EC rights can be exercised effectively by their beneficiaries. Public Documents differ depending on the subject matter to which they relate and a wide variety of Public Documents are relevant under EC law.

- The indispensable function of Public Documents can be confirmed for the following areas: (1) free movement of goods; (2) free movement of Union citizens and their family members; (3) free movement of workers and self-employed persons; (4) freedom of establishment; (5) free movement of services; (6) mutual recognition of professional qualifications; (7) income tax of non-resident migrant workers; (8) social security; (9) refund of VAT for non-established taxable persons; (10) access to justice (legal aid) in civil and commercial matters for citizens and businesses; (11) effective justice in civil and commercial matters, including insolvency proceedings, for citizens and businesses; (12) effective justice for citizens in matrimonial matters and matters of parental responsibility.

- The harmonisation of the form and substance of Public Documents is a development at EC level where their use is necessary for the proper functioning of the internal market and the civil justice area. This trend is not reflected equally in all analysed areas of EC law and in certain areas no harmonisation has taken place at all.

- Mutual cooperation and assistance between Member State authorities is a legal fact in many areas of EC law in relation to the administration of Public Documents originating in other Member States. Besides constituting a general principle of EC law, several EC instruments contain specific measures to ensure that such cooperation becomes a matter of fact in practice. In certain areas cooperation and assistance is not or insufficiently developed.
(iii) The acceptance, recognition and effect of Public Documents for evidentiary purposes

- The principal function of a Public Document is to provide factual proof of acts of a public authority recorded therein. Public Documents are generally accepted in the Member States subject to: (1) proof of their authenticity; (2) the production of the document in a particular form; and (3) the production of a (certified) translation of the document.

- Domestic Public Documents are presumed to be authentic without additional proof. In case of doubt the purported author of the document is usually contacted directly through administrative cooperation. Foreign Public Documents generally require some proof of authenticity. Legalisation is generally accepted as an appropriate means of evidence, but not always required.

- The division of the burden of disproving the authenticity of Public Document differs between Member States. In relation to domestic documents it usually on the party or public authority who challenges the authenticity. For foreign Public Documents it is commonly on the party wishing to rely on the document.

- Member States generally accept originals and certified copies of Public Documents. Simple photocopies are therefore not commonly accepted. EC law sometimes requires the Member States to accept simple photocopies.

- Certified translations are usually required before Public Documents are accepted. EC law does not address the issue in a uniform manner. In some areas, documents in any official language of the EC institutions must be accepted, while in other areas translations may be required.

- Domestic documents that purport to be Public Documents are automatically recognised as such for evidentiary purposes in a majority of the Member States. Most Member States do not require further conditions for recognition of foreign Public Documents apart from Legalisation.

- Domestic and foreign Public Documents are admissible as evidence as factual proof of the act of public authority recorded therein, including what is officially decreed, declared, or witnessed therein. Sometimes Domestic Public Documents are in addition admissible as proof of the validity of public acts recorded therein and the legal acts and relationships that were prerequisite for their execution.
In most Member States domestic and foreign Public Documents have a privileged evidential value which is stipulated by law in shifting the Burden of Proof in relation to those issues for which the document is admissible into evidence.

(iv) The Legalisation of Public Documents

‘Legalisation’ and ‘authentication’ are synonymous terms in that both concern the certification and verification of the authenticity of a Public Document. Legalisation does not concern a document’s validity or accuracy or that of the act of public authority recorded therein.

Legalisation usually establishes a legal presumption of a foreign Public Document’s authenticity. Public Documents emanating from a third country that have already legalised or accepted by another Member State, are accepted only in a minority of Member States without Legalisation.

The fragmentation at the national, European and international level of the legal framework concerning the issue of Legalisation affects legal certainty for both users of Public Documents and administrative and judicial officials.

Legal certainty is further affected by the fact that the practice of Legalisation is sometimes unregulated or merely contained in internal ministerial guidelines not aimed at binding the competent domestic authorities.

Legalisation in accordance with internal rules and procedures of the Member States is increasingly rare under influence of EC legislation and international agreements, which often abolish the requirement altogether between one or more Member States or in relation to specific types of documents.

EC law regulates the issue of Legalisation on a sectoral basis, generally in an inconsistent and piecemeal manner. International agreements between the Member States have further reduced the importance of legalisation, but have also significantly fragmented the legal framework concerning legalisation.

Seven Member States have mutually abolished entirely the requirement of Legalisation by applying provisionally the Brussels Convention of 25 May 1987 Abolishing the Legalisation of Documents in the Member States of the European Communities.
The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents replaced existing Legalisation formalities with a simplified (Apostille) formality. The system introduced by the Convention as implemented by the Member States causes certain difficulties for users of Public Documents and does not adequately protect the Member States’ interest of fraud prevention in relation to foreign Public Documents.

(v) The compatibility of Legalisation with EC law

The requirement of Legalisation of foreign Public Documents, including the formality it involves, does not amount to direct discrimination (conversely, charging a different rate for Legalisation depending on the applicant’s nationality, as some Member States do, is directly discriminatory). The requirement is, however, indirectly discriminatory, since it is a measure that is intrinsically liable to affect non-nationals more than nationals in relation to the exercise of fundamental freedoms guaranteed by EC law.

Member States do not only discriminate between domestic and foreign Public Documents, but also between the documents of different Member States as far as Legalisation is concerned. EC law allows for some degree of differential treatment between domestic and foreign Public Documents if this is proportionate to the objective differences between domestic and foreign Public Documents. In practice, however, the conditions and procedures for authentication of Public Documents do not vary significantly between the Member States.

In general, authorities are not familiar with the requirements applicable to foreign Public Documents in the country of origin, including their signatures, seals and stamps. This cannot, however, justify discrimination between domestic and foreign Public Documents. Member States’ domestic authorities are at the same time “EC authorities” (Article 10 EC) and are to be guided by mutual trust when asked to rely on Public Documents that have been executed by authorities of another Member State. On the other hand, it must be acknowledged that the establishment of mutual trust between authorities in this area depends on measures at EC level aimed at familiarising authorities with the form and substance of Public Documents of other Member States. The maintenance of mutual trust relies on measures to facilitate mutual cooperation and assistance between the Member States’ authorities.

Notwithstanding the consideration of Legalisation as an indirectly discriminatory measure, Legalisation equally qualifies as a restrictive measure that is liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by EC law. The requirement of Legalisation for foreign public documents implies a negative presumption as regards authenticity.
of foreign Public Documents. It therefore constitutes a procedural measure that governs actions at law intended to safeguard individuals’ EC rights. The practical formalities regarding Legalisation also constitute a restriction. Legalisation creates extra transaction costs and delays, applies only in cross-border situations and is often perceived as complicating the exercise in practice of EC fundamental freedoms.

- The requirement of Legalisation of foreign Public Documents thus requires a justification on grounds set out in the Treaty or by overriding reasons in the public interest provided they are not protected by harmonising EC measures. The fundamental aim of Legalisation is fraud prevention. This aim cannot easily be associated with the Treaty exceptions, but is recognised as an overriding reason in the public interest under EC law. Secondary EC law, on the other hand, protects, in many areas, the interests involved with Legalisation through the harmonisation of form and substance of Public Documents and, in addition, through facilitating cooperation and assistance between the Member States.

- The principle of proportionality requires that restrictive measures adopted by Member States be appropriate to secure the attainment of the justified objective they pursue and that the measures adopted do not go beyond what is necessary in order to attain it. Legalisation is, however, not a suitable measure to prevent fraud in relation to the cross-border use of Public Documents. First, the formalities themselves are sensitive to fraud. Secondly, the system used are not necessarily up to date and are flawed (e.g. signature comparison whereas in practice no signature is alike). Third, systems for administrative cooperation are at best only rarely used.

- Legalisation neither is a measure that is strictly necessary for fraud prevention. Necessity involves two related issues: (1) the rationale for imposing the restriction must be principally the pursuance of its justified aim, i.e. the requirement of Legalisation cannot be justified if the measure is inspired principally by the wish to increase state income (as is the case in some Member States) or the wish to limit the administrative burden or expenditure involved with administrative cooperation; and (2) there may not exist less restrictive alternatives for the restrictive measure, i.e. the national restrictive measures will be lawful only if the interest which they seek to protect cannot be protected as effectively by measures which restrict less intra-EC free movement and civil justice. In this regard, Member States have a duty to recognise the equivalence between their legal systems and the Member States have a duty to cooperate.

- The Member States must therefore recognise measures taken by other Member States to ensure the authenticity of their public documents that are equivalent to domestic ones and they must further communicate directly with the authorities of the Member State of origin to verify the
authenticity of a document executed in that state or to obtain the information that is required to this end. Subject to the practicality of those requirements, which has in many areas been facilitated by measures at the EC level, the requirement of Legalisation cannot be justified.

- An apparent problem for the proportionality of the requirement of Legalisation for foreign Public Documents is its abstract nature and general application. A less restrictive approach is that Public Documents executed by the authorities of other Member States are accepted unless their authenticity is seriously in doubt because of concrete evidence relating to the individual case.
SUMMARY OF THE CONCLUSIONS OF THE STUDY

(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.
(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.

(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.

(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 formalitity; (2) unfamiliarity of the administering public 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 languages 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.

(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.

**(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.
RECOMMENDATIONS

(i) Introduction

The recommendations listed below reflect the conclusions as described in the Synthesis Report of the study on the difficulties faced by citizens and economic operators because of the obligation to legalise documents within the Member States of the European Union, and the possible options for abolishing or simplifying this obligation.

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

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

(ii) Recommendations

The conditions under which EC rights exist and the formalities that may be imposed by the Member States prior to their recognition have in many areas been harmonised at the EC level. It is suggested, nonetheless, that the existing EC legislation in the field of free movement and civil justice be revised.

In the interest of legal certainty for beneficiaries of EC rights and the public authorities competent for the recognition of those rights, there is a need to clarify the EC Burden of Proof and the EC Standard of Proof in relation to EC rights to be applied by the Member States.

The clarification of the EC Burden of Proof in relation to EC rights may be achieved through the introduction of rules that clearly distribute the burden of proving the factual circumstances under which EC rights exist between the Member States and the persons claiming those rights.
It is suggested that the EC Burden of Proof ought to shift from the person claiming an EC right to the authority that is competent for its recognition, if the person claiming the EC right adduces the appropriate means of evidence to establish his/her claim.

Measures to clarify the EC Standard of Proof may include the precise description of the proof that may be required by the Member States of the factual circumstances under which EC rights exist and, in particular, the means of evidence that must be accepted by the Member States as appropriate to this end.

The elucidation of the EC Standard of Proof should further reflect the consistent case law of the European Court of Justice that the Member States may not make the recognition of an EC right subject to the production the means of evidence explicitly provided for in EC legislation if the facts required for the recognition of the EC rights that are claimed in a particular case can be proved unequivocally by other means.

Public Documents fulfill an indispensable evidentiary function in the EC context in relation to rights guaranteed under EC law. Public Documents are a particularly appropriate means of evidence, which are generally accepted by the Member States for the purpose of proving the factual circumstances under which EC rights exist: (1) they derive from an objective source; (2) they represent a reliable source of information; and (3) they constitute a durable source of information. It is suggested that the indispensable evidentiary function of Public Documents in relation to EC rights be emphasised and facilitated in current and prospective EC legislation.

Electronic Public Documents and paper-based Public Documents will co-exist in the EC, at least for the foreseeable future. Therefore, it is suggested that the mutual acceptance of both types of documents ought to be facilitated between the Member States.

With a view to enhancing the acceptance of Public Documents between the Member States, the trend at the EC level towards the harmonisation of the form and, where appropriate, the substance of Public Documents ought to be promoted in a consistent manner in all areas of EC law concerned with free movement and civil justice.

In addition, again with a view to enhancing the acceptance of Public Documents between the Member States, the mutual cooperation and assistance between Member State authorities in relation to the administration of foreign Public Documents, which exists already to lesser or greater extent in numerous areas of EC law, should be improved and facilitated at the EC level, in particular, in areas where they are not or insufficiently developed.
Achievements at EC level in the field of e-Government may assist in the process of ensuring the acceptance of paper-based Public Documents, since it will allow for an efficient administrative cooperation through electronic methods. Progress in this area exists mainly in the field of inter-operable essential infrastructure services that allow for secure communications between administrations and the cross-border access to registers.

Foreign Public Documents are generally accepted by the Member States subject to: (1) proof of their authenticity; (2) the production of the document in a particular form; and (3) the production of a (certified) translation of the document. It is suggested that certain measures at the EC level ought to be considered to address several problems that exist in practice concerning these conditions.

In order to prove the authenticity of foreign Public Documents, Legalisation is a measure often imposed by the Member States. The requirement of Legalisation, however, including the formality it involves, constitutes an indirectly discriminatory measure and can equally be characterised as a restriction, depending on the area of EC law in question.

The aim of fraud prevention is recognised as an overriding reason in the public interest that may justify such indirectly discriminatory measures and restrictions that are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by EC law and fraud prevention is, indeed, a principal aim of Legalisation, since it enables the verification of a foreign Public Document’s authenticity.

Nonetheless, in relation to many areas of EC law the interest of fraud prevention involved with Legalisation is already protected through measures contained in secondary EC instruments (i.e. through the establishment of harmonised Public Documents and administrative cooperation between the Member States).

Even in situations where EC law does not protect these interests, Legalisation cannot be justified, because in the way it is presently applied, the measure is not suitable to secure the attainment of the justified objective it pursues and it goes beyond what is necessary in order to attain its objective. In order to address this issue, a combination of measures to be taken at the EC level is suggested:

(1) Legalisation ought to be abolished in areas of EC law where the justified interest of fraud prevention is adequately protected through measures at the EC level, i.e. through the harmonisation of Public Documents and the establishment of cooperation between authorities;

(2) in areas where EC law does not (yet) adequately protect the interests involved with legalisation, the appropriate measures, i.e. the harmonisation of Public Documents and the establishment of cooperation between authorities, ought to be introduced progressively at the EC level; and
(3) in situations where such measures are not (yet) feasible or desirable, the requirement of Legalisation, including the formality it involves, should be harmonised at the EC level to ensure that it is adapted to be more appropriate to secure the attainment of its justified objective and does not go beyond what is necessary to this end.

In relation to the last suggested measure, the harmonisation at the EC level of the Apostille formality to address a number of the shortcomings of the system introduced by the 1961 Apostille Convention, as applied by the member States, should be considered, as well as the coordinated participation of the Member States in the eApostille program of the Hague Conference on private international law.

In areas of EC law where the justified interest of fraud prevention is adequately protected through measures at the EC level, it is suggested that the burden of proving the authenticity of a foreign document that purports to be a Public Document that was executed in another Member State ought to shift from the person who requires this document for the purpose of proving his/her EC right to the authority that is responsible for the recognition of that right.

Member States that currently discriminate between other Member States in terms of the requirement of or the exemption from Legalisation ought to be reminded that this practice must be ceased immediately, because it constitutes an unjustifiable (indirectly) discriminatory measure. The same applies for Member States that currently discriminate between the nationals of other Member States in terms of the costs that are charged for the Legalisation formality.

In relation to Third State Public Documents that have been accepted in one Member State, a measure at the EC level is suggested requiring the other Member States to equally accept those documents, subject to the condition that the measures of the Member State that accepted those documents are adequate to protect the legitimate interests of the other Member States to ensure those documents’ authenticity in the light of the aim of fraud prevention.

In relation to third state Public Documents that purport to be Public Documents that were previously accepted in another Member State, it is also suggested that the burden of proving the authenticity of such documents ought to shift from the person who requires this document for the purpose of proving his/her EC right to the authority that is responsible for the recognition of that right.

In relation to the second (form) and third (language) conditions that generally apply in the Member States before foreign Public Documents are accepted, the study has concluded that issues concerning the requirement of the production of foreign Public Documents in a certain form and the requirement of a (certified) translation are not addressed in a uniform manner at the national level nor at the EC level. This has resulted in avoidable uncertainty for users of Public Documents and the authorities that are asked to
administer such documents. It is suggested that uniform requirements ought to be established at the EC level.
OUTLINE OF THE REPORT

1.02 The role of Public Documents in the process of recognition of EC rights by the Member States

The analysis of the first part centres on the role of Public Documents as a part of the process of recognition of EC rights by the Member States. Initially, the report addresses the nature of the process of recognition of EC rights by the Member States, indicating the proof that may be required by the Member States of the factual circumstances under which EC rights exist, as well as the means of evidence that must be accepted by the Member State as proof of those circumstances.

Further, we clarify the EC concept of “appropriate means of evidence” for the purpose of proving EC rights. Finally in this part, Public Documents are considered as a particularly appropriate means of evidence for proving the factual circumstances under which EC rights exist.

1.03 The role of Public Documents in the EC context of free movement and civil justice

In the second part, the role of Public Documents in substantive EC law is examined and, in particular, secondary EC legislation that harmonises the conditions for the exercise of EC rights and the formalities for their recognition.

The priority in this part is the identification of situations where, on the basis of EC law, citizens and companies may be required by the Member States to provide proof of the fulfilment of the necessary conditions necessary for claiming an EC right.

To begin with, most different areas of EC free movement law are evaluated. These areas include free movement of goods, free entry and residence of Union citizens and their family members, free movement of workers, freedom of establishment, and free movement of services.

Subsequently, we turn to the EC area of civil justice. Here, the report addresses the relevant EC instruments in relation to what we refer to as access to justice and effective justice. In addition, we touch on a number of specific areas, including income tax matters for migrant workers, the refund of VAT to non-established taxable persons, the recognition of professional qualifications, and social security.
One of the major benefits of this study is that, for the first time, most relevant situations are identified as in the areas of free movement and civil justice, where citizens and companies may have to rely on foreign Public Documents as a means of evidence in the process of proving their legitimate claim to EC rights.

1.04 The acceptance, recognition and effect of Public Documents for evidentiary purposes

The report continues in its third part with a comparative analysis of the legal practice of twenty-five Member States in relation to the acceptance, recognition (or admissibility) and effect of Public Documents for their use as a means of evidence. Throughout, the legal practice between the constituent States of the U.S. is highlighted for the purpose of reflection with a view to contrasting the practice between the EU Member States.

At the outset of this part, the most frequent sources of Public Documents are identified and a necessary distinction is made between Public Documents and acts of public authority, followed by a description of the function that all Public Documents have in common as a means of evidence, regardless of the wide variety of documents that qualify as a “Public Document”. In addition, some attention is given to the differences in administration of Public Documents between judicial authorities and administrative authorities.

Secondly, a comparative analysis is made of the conditions that apply in the Member States before Public Documents are accepted for the purpose of being admitted into evidence in judicial and administrative situations. Throughout, the legal practice in the Member States is described both in relation to foreign and domestic Public Documents.

The first condition for acceptance that is discussed is the requirement of proof of the authenticity of Public Documents, which, for documents originating abroad, may involve the requirement of legalisation. A connected question that is evaluated concerns the Burden of Proof when the authenticity of a Public Document is challenged.

In connection with the issue of proof of authenticity and the burden of proving authenticity, a potential practical difficulty is pointed out, which is that by abolishing the requirement of legalisation, a number of international agreements deprive the users of foreign documents of an accepted means of proving authenticity without clearly shifting the Burden of Proof from the users to the authorities by specifying compulsory administrative cooperation with the country of a document’s origin. The non-compulsory nature of the provision for administrative cooperation for the verification of the authenticity of documents,
thereby leaving the problem of the Burden of Proof in relation to the authenticity of a document unresolved, is considered as a systemic weakness in those agreements.

The second condition in fact involves two ancillary requirements for the acceptance of Public Documents by the Member States. The first concerns the form in which Public Documents are accepted (i.e. original, certified copy or simple photocopy). The second requirement, which is relevant only for foreign Public Documents, is the necessity of producing a (certified) translation of the Public Document.

The issue of compulsory translation of documents constitutes a particular problem for the international use of Public Documents, even more so, because translations of Public Documents sometimes constitute Public Documents themselves or require certification by a public official. This has the effect of multiplying formalities and costs. The requirement of translations under domestic law is especially relevant in the area of free movement, since EC law does not generally address the issue. In EC instruments in the field of civil justice, the issue is usually addressed, but not in a uniform manner. The availability of effective judicial and administrative remedies against decisions of authorities refusing to accept Public Documents is dealt with next in this section.

Thirdly in this part, the report provides a comparative analysis of the requirements that apply in the Member States before the legal status (i.e. the “Public Document” status) of a Public Document as a means of evidence is recognised.

First, the issue of validity of Public Documents is addressed. The validity of a Public Document is distinguished from the validity of the act of public authority that may be recorded in a Public Document. The question of the validity of a Public Document may involve an evaluation of the requirement that a public official who executes a Public Document must be competent to act. Moreover, the scrutiny over the validity of a Public Document may entail an evaluation of its compliance with certain formal requirements that have to be met when the document is drawn up.

Equally in this section, we compare the treatment of domestic with foreign Public Documents. For foreign Public Documents, the report further compares the relevant conflicts rules of the Member State that determine the law applicable to the validity requirements of Public Documents originating abroad.

Lastly in this part, we compare the effects produced by foreign and domestic Public Documents in terms of the proof for which they are admissible into evidence. Mention is made in this section of the problem, which in itself is outside the scope of the study, that concerns the validity of the public policy of a Member State in relation to a foreign act of public authority, which is recorded in a Public Document, and how it may prevent the effective use of Public Document as a means of evidence to provide the necessary proof of the actual existence of a right guaranteed under EC law.
To conclude, the last section is dedicated to an examination of the evidential value attributed in the Member States to Public Documents as a means of evidence. For foreign Public Documents this includes an evaluation of the applicable conflicts rules in the Member States that determine the law applicable to the question of evidential value of foreign Public Documents.

### 1.05 The legalisation of Public Documents

The fourth part of the report features a comparative analysis of the legal practice of the Member States in relation to legalisation. The first section introduces the concept of legalisation from different perspectives, including the Hague 1961 Apostille Convention, as well as other international agreements and the domestic legislation of the Member States.

The part continues with a comparative analysis of the legalisation practice of the Member States in accordance with domestic law, i.e. in situations outside the scope of relevant EC instruments and international agreements. It is considered that such situations are virtually non-existent in the EC context and reference is made to the high number of relevant international bi- and multilateral agreements that have been analysed in the comparative table of agreements, which is annexed to this report, and to the relevant EC instruments that address the issue of legalisation. Nonetheless, the formalities under domestic law are fully analysed with a view to their importance in relation to third countries and a full account is given of the trends in the legalisation practice of the Member States.

Legalisation is characterised as a formality that depends heavily on the availability of specimen signatures of the persons who are competent to certify Public Documents. Elsewhere in the report, the reliance of the legalisation formality on specimen signatures is identified as a potential weakness. It is further reported that the practice of a number of Member States in relation to legalisation is unregulated or merely contained in (internal) ministerial guidelines aimed at binding only the relevant domestic competent authorities, which may affect legal certainty both for users of Public Documents and for competent authorities in the Member States.

Subsequently, the effect of legalisation is evaluated as proof of a foreign Public Document’s authenticity. In this regard, it is also assessed whether the Member States are inclined to accept documents that have been legalised by the competent authorities of another Member State. Again, the legal practice in the U.S. is highlighted for purposes of reflection. In particular, attention is given to the concept of “self-authentication” of State documents, which implies that certain documents are automatically considered authentic without the need of extrinsic evidence to prove authenticity.
Subsequently, the legalisation of Public Documents under EC law and international agreements is evaluated. First, an overview is given of the rules on legalisation in EC instruments in the area of free movement and subsequently, civil justice. With some exceptions (e.g. instruments in relation to goods and social security), EC instruments on free movement do not address the issue of legalisation.

A trend is identified in recent EC legislation to require Member States to accept simple photocopies of documents as \textit{prima facie} proof of the fulfilment of conditions, which cannot be legalised by their very nature. This trend is restricted to certain types of documents and there is generally provision for an exception to this obligation which allows Member States to require other forms where such a requirement is justified by an overriding reason relating to the public interest, including public order and security and the combating of fraud, for which legalisation may be considered a justifiable measure.

In EC instruments in the civil justice area, the treatment of legalisation is different, more explicit and uniform. Document that are within the scope of those instruments and which circulate between the Member States are generally exempt from legalisation, as far as they satisfy the conditions necessary to establish their authenticity. It is further considered whether legalisation of decisions of EC Institutions is required before those decisions can be enforced in the Member States.

Subsequently, the report discusses the approach adopted on the issue of legalisation requirements in a considerable number of Hague Conventions, the London 1968 Convention, a large group of CIEC Conventions, and the Brussels 1987 Convention. There is a clear trend in those agreements towards the progressive suppression of the requirement of legalisation.

A key benefit of the study is that, for the first time, the international legal framework concerning legalisation has been clarified and made more accessible and transparent. The result of this major effort is a comprehensive comparative database of all bi- and multilateral agreements that apply between twenty-five Member States and that exempt Public Documents from the requirement of legalisation.

The table, which is delivered as a separate part of the study shows, for example, that bilateral agreements between the Member States, which exempt documents from legalisation requirements, are very common in the relations of the Member States, besides the relevant corpus of multilateral agreements. In practice, so many agreements with the aim of abolishing legalisation apply between the Member States, that the question appears justified whether legalisation would be of any significance in practice, if all pertinent agreements would be properly implemented.

The Hague 1961 Apostille Convention is an international agreement which is used frequently in the Member States. In 2006, an estimated 2.7 million Apostilles were issued by the competent authorities in the Member States. Consequently, the implementation of the Convention by the Member States is
evaluated in some detail. First, the interpretation of the scope of the Convention is evaluated, followed by an assessment of the formality for the issuance of Apostille certificates. Second, the organisation by the Member States of the Competent Authorities under the Convention is compared, and then the maintenance and use of Apostille registers by the Competent Authorities in the Member States for the purpose of verifying the authenticity of Apostille certificates. Thirdly, the legal effect rendered by the Member States to an Apostille certificate in terms of evidence is addressed. For the purpose of comparison, some information on the implementation of the Convention in the U.S. is again provided.

The last section of this part features an overview of the difficulties that have been identified in the course of the study. The difficulties are divided into general difficulties, difficulties concerning the Hague 1961 Convention, and difficulties concerning legalisation under domestic law.

1.06 The compatibility of legalisation with EC law

In this part, the compatibility of the requirement of legalisation and the formalities it involves are scrutinised on the basis of EC law.

In the first section, the requirement of legalisation for foreign Public Documents is considered as a directly or indirectly discriminatory measure. Initially, the prohibition of discrimination is defined and its scope of application evaluated. Subsequently, it is analysed whether the criterion used for the application of the requirement of legalisation is directly discriminatory or indirectly discriminatory. A complicating factor in the analysis is highlighted which results from the analysis of the legal framework for legalisation, which is largely based on bi- and multilateral agreements. It is assessed whether the fact that Member States discriminate depending on the Member State of a Public Document’s origin is a relevant factor in dealing with the question of compatibility.

The second section involves an assessment of legalisation as a restriction that is liable to hinder or make less attractive the exercise of fundamental freedoms. In this section it is first considered whether the requirement of legalisation for foreign Public Documents or the formality it involves qualifies as a restriction, i.e. a measure that is liable to hinder or make less attractive the exercise of fundamental freedoms.

Subsequently, the requirement of legalisation is evaluated on the basis of four conditions. First, it is considered with reference to the section on discrimination whether the requirement of legalisation of foreign Public Documents can be characterised as a directly discriminatory measure.
Second, the possible justifications for the requirement of legalisation are analysed on the basis of
grounds set out explicitly in the Treaty or overriding requirement in the general interest. This section
includes an evaluation of relevant EC harmonising measures that could ensure that the interests involved
with legalisation are protected.

Lastly, it is checked whether the requirement of legalisation is proportional to the justified aim it pursues in
that, first, the requirement of legalisation is a suitable measure for securing the attainment of the objective
which it pursues and, second, whether the measure does not go beyond what is necessary in order to
attain the objective it pursues.

1.07 Suggested measures at the EC, international
and national level

The last part of the report gives an overview of possible measures that can be considered with a view to
addressing the difficulties caused for European citizens and companies who require the use of Public
Documents abroad. First, possible measures at the EC level are considered, followed by measures at the
international level, and finally measures at the national level.
PART I. THE ROLE OF PUBLIC DOCUMENTS IN THE PROCESS OF RECOGNITION OF EC RIGHTS BY THE MEMBER STATES

1.01 Introduction

(a) The persistence of administrative formalities

Prior to the exercise of EC free movement rights, Member States may require EC nationals to comply with certain administrative formalities in order to have those rights recognised.2

The persistence of administrative formalities for the recognition of EC rights has been justified on two grounds. Firstly, such formalities enable the national authorities to have precise information of movements of population in their respective territories.3

Secondly, they enable the authorities in the Member States to be convinced of the actual existence of the factual circumstances under which entitlements to EC rights exist in particular cases.4

(b) EC rights exist independent from their recognition

Notwithstanding the persistence of administrative formalities, EC rights are conferred on their beneficiaries directly, either directly by the Treaty or through secondary EC legislation adopted for their implementation.5 In other words, EC rights exist independently from their recognition by the Member States.6 Accordingly, any administrative formalities that have to be complied with in the Member State where the EC right is to be recognised are merely of a declaratory nature.7

In Royer, an early case concerning the right of nationals of a member-State to enter the territory of another member-State and reside there for the purposes intended by the Treaty, the Court confirmed this

---

2 Case C-215/03 Salah Oulane v Minister voor Vreemdelingenzaken en Integratie [2005] ECR I-1215 49
3 Case 8/77 Concetta Sagulo, Gennaro Brenca et Addelmadjid Bakhouche [1977] ECR 01495 4
4 See the conclusion of Advocate General Geelhoed in Case C-1/05 Yunying Jia v Migrationsverket [2007] 00000 98
6 See also the Conclusion of Advocate General Colomer for Case C-408/03 Commission of the European Communities v Kingdom of Belgium [2006] ECR I-02647 48, where he states that: “(...) the directives (...) oblige applicants to provide the relevant documents, and to assume the burden of proving that they fulfil the requirements for the grant of the permit. However (...) all that has to be demonstrated in the procedure in question is that the conditions for it to be valid are satisfied, hence the declaratory nature of the procedure. I have already pointed out that the issue of a residence permit merely certifies an earlier right.”
7 Case C-363/99 Danielle Roux v The State (Belgium) [1991] ECR I-273 26; see also Case C-459/99 Mouvement contre le racisme, l’antisémitisme et la xénophobie ASBL (MRAX) v Belgian State [2002] ECR I- 6991 74
as follows: “The grant of [a residence] permit is therefore to be regarded not as a measure giving rise to rights but as a measure by a member-State serving to prove the individual position of a national of another member-State with regard to provisions of EC law.”

(c) The harmonisation of conditions and formalities for recognition

In Danielle Roux\(^8\), the Court found that, if the precise conditions for the exercise of EC rights and the formalities for their recognition have been harmonised at the 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.

Furthermore, the competent authorities in the Member States have no discretion in their decision to recognise an EC right if all conditions under EC law have been fulfilled for the existence and exercise of an EC right.\(^9\)

(i) The burden of proving EC rights

A person who claims the entitlement to EC right has the burden of proving the existence of the basic conditions for its existence.\(^10\) In a recent case, Commission v Belgium\(^11\), the Advocate General observed that: “(…) [T]he directives (…) oblige applicants (…) to assume the burden of proving that they fulfil the requirements for the grant of the permit. However (…) all that has to be demonstrated in the procedure in question is that the conditions for it to be valid are satisfied, hence the declaratory nature of the procedure. (…) the issue of a residence permit merely certifies an earlier right.”

(d) An example: the process of recognition of an EC right of residence

The case, Salah Oulane, from which we derive the following example concerned the recognition by the national authorities in the Netherlands of the right of a French national to exercise his EC right of residence on Dutch territory.

---

\(^8\) Case C-363/89 [n 7] 26
\(^9\) Case 8/77 [n 3] 8
\(^10\) Case C-120/05 Heinrich Schulze GmbH & Co. KG i.L. v Hauptzollamt Hamburg-Jonas [2006] ECR I-10745 29; See in more detail the conclusion of Advocate General Léger in Case C-120/05 [n 17] 61
\(^11\) Case C-215/03 [n 2] 17; Case 48/75 Royer [1976] ECR 497 31; and Case C-376/89 [n 5] 12

See the Conclusion of Advocate General Colomer in Case C-408/03 Commission of the European Communities v Kingdom of Belgium [2006] ECR I-02647 48
A French national resided in the Netherlands for approximately three months for a holiday. However, after being apprehended by the Dutch authorities on grounds of suspicion of illegal residence, he was unable to prove his identity by means of any valid identity documents.

The Frenchman stated that he was French and that he was staying in the Netherlands for a holiday. Notwithstanding this information, the Dutch authorities detained him with a view to deportation. The Frenchman was eventually released after presenting a French identity card to the Dutch authorities.

However, after some time, he was again detained because, once more, he was unable to produce any proof of his identity. This time, he challenged the Dutch decision to deport him by bring the issue before the Dutch courts. The Dutch court referred a question to the Court of Justice on the compatibility of the relevant Dutch laws and practices with EC law.

The Court held that the French national was to be treated as a recipient of services under EC law, and accordingly enjoyed an EC right of residence in the Netherlands, because the freedom to provide services contained in Article 49 EC includes the freedom for recipients of services to go to another Member State in order to receive a service there, and tourists must be regarded as recipients of services.12

1) Implementing EC legislation

The precise conditions for the exercise of the EC right of residence and the formalities for its recognition were harmonised at the EC level and laid down in Directive 73/148/EEC on the abolition of restrictions on movement and residence within the EC for nationals of Member States with regard to establishment and the provision of services.13

Under Directive 73/148, the right of residence coincides with the duration of the period during which services are provided. In the case of the French national the period of residence in the Netherlands was shorter than three months which implied that the Dutch authorities were allowed to require the French

12 Case C-215/03 [n 2] 37
national to report his residence and to provide proof of his identity and nationality (see Article 4(2) of the Directive).

2) The Dutch state’s right to insist on the prior recognition of the EC right

The Court confirms that the Frenchman’s EC right of residence is directly conferred on him by the Treaty in the process of evaluating the conditions of the Directive. However, the Court also acknowledges the right of the Dutch state to insist on the compliance of the French national with certain administrative formalities prior to actually recognising his right.

This right of the Netherlands exists in spite of the fact that the French national’s EC right of residence in the Netherlands in itself exists independently from the fulfilment of any administrative formality in the Netherlands.

In other words, the process for the issuance by the competent Dutch authorities of a residence permit under Regulation 73/148 cannot be seen as a measure giving rise to rights but must be seen as a measure serving to verify the individual position of the French national with regard to provisions of EC law concerning the exercise of an EC right of residence.

(e) No harmonisation?

In the absence of harmonising measures, the Court has stipulated in Sandoz, a case involving an exception to the free movement of goods on grounds of the protection of human health, that when a Member State adopts a measure restricting intra-EC free movement (e.g. a prior authorisation procedure involving a requirement of proof), while invoking a Treaty exception for its justification (e.g. the protection

---

14 The nature of the EC right of residence and the conditions for its exercise were left unchanged in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States by which Directive 73/148 was repealed (see Articles 5(5) and 6(1) of the Directive).

15 See the Case C-215/03 [n 2] 17; Case 48/75 [n 5] 31; and Case C-376/89 [n 5] 12

16 Case C-215/03 [n 2] 49

17 Case C-215/03 [n 2] 17 and 18; see also Case C-138/02 Collins [2004] ECR I-0000 40; If the residence of the French national in the Netherlands were to exceed three months, the Dutch authorities could require the French national to apply for a residence certificate establishing the right of residence. For the grant of a residence certificate, the Directive stipulates that the Dutch authorities could not require any other proof in the process of recognising the right of residence that a valid identity card or passport identity documents and proof that he “comes within one of the classes of person referred to in Articles 1 and 4” of the Directive (see Article 6 of the Directive). In those circumstances the French national would have to prove the fact that he was a national of a Member State wishing to go to another Member State as a recipient of services (see Article 1(b) of the Directive)

18 Case 174-82 Officier van Justitie v Sandoz BV ECR 22-24
of human health based on Article 30 EC), it must check in each instance that the contemplated measure satisfies the criteria of that provision and that it is proportional.

This implies that, although the national authorities may, in so far as they do not have it themselves, ask persons claiming an EC right to produce the necessary information in his possession to establish whether the conditions for the existence of an EC right are met, the authorities must themselves assess, in the light of all the relevant information, whether authorisation must be granted pursuant to EC law.

Consequently, EC law does not permit national rules which subject authorisation to market to proof by the importer that a product in question is not harmful to health, although this is without prejudice to the right of the national authorities to ask the importer to submit all the information in his possession needed to assess the facts.

1.02 The proof that may be required

(a) Proof of the conditions under which an EC right exists

In Salah Oulane19, a case concerning services, the Court held that recipients of services, who are nationals of one Member state and who wish to exercise their right of residence in another Member State, may be required by the Member State of destination to fulfil certain administrative formalities before their right that is guaranteed under EC law is recognised.

The court clarified that those formalities may involve a requirement to provide certain proof of the existence of the factual circumstances under which the entitlement to the EC right exists, in the particular case this involved the obligation for the EC national to prove his identity and nationality to the competent authorities of the Member State in which the right of residence was sought.

In the particular case, these requirements derived unambiguously from secondary EC legislation, i.e. Directive 73/148/EEC20, which harmonised the precise conditions for the exercise of EC rights for nationals of Member States with regard to establishment and the provision of services and the formalities for their recognition.

---

19 Case C-215/03 [n 2] 21
Based on the Directive, the right of residence coincides with the duration of the period during which services are provided. For a period of residence shorter than three months, the national authorities of the Member State in question (Netherlands) were allowed to require the national to report his residence and to provide proof of his identity and nationality (see Article 4(2) of the Directive).  

(i) The rationale behind the requirement of proof

According to the Court, the rationale behind this requirement in the Directive is twofold: in the first place, the requirement is aimed at resolving problems relating to evidence of the right of residence for both European nationals and for national competent authorities by providing one clear means of evidence that may be used by EC nationals to prove their rights.

Secondly, the aim of the requirement is to establish the maximum in terms of proof that Member States may require from persons claiming the EC right of residence that is guaranteed in the Directive. Consequently, the Member States must recognise the right of residence immediately after the person claiming the right produces the indicated means of evidence (i.e. a valid passport or identity card) and must refrain from requiring additional proof.

1.03 The means of evidence that must be accepted

(a) Introduction

In Yunying Jia, the Court stated that in the process of recognising an EC right, it is important that the competent authorities of the Member States are convinced of the existence of the factual circumstances under which the entitlement to this right exists, and thus confident for the purpose of its recognition.

In this respect, it is important to answer the question what means of evidence are to be considered appropriate by competent authorities in the Member States to confidently recognise an EC right. The Court’s case law allows us to answer this question in general terms.

---

21 The nature of the EC right of residence and the conditions for its exercise were left unchanged in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States by which Directive 73/148 was repealed (see Articles 5(5) and 6(1) of the Directive).

22 Case C-215/03 [n 2]

23 Case C-215/03 [n 2]

24 See Case C-1/05 [n 4] 98
(i) Harmonisation?

The answer depends on the question whether or not EC measures have comprehensively harmonised the conditions for the exercise of EC rights and the formalities for their recognition, including the question what means of evidence can be demanded by a Member State before recognising the EC right claimed.

1) The means of evidence provided for in the relevant EC instrument

In *Danielle Roux*\(^25\), the Court concluded that in situations where EC measures have harmonised the conditions for the exercise of EC rights and the formalities for their recognition, the Member States are prohibited from making the recognition subject to other conditions than those expressly provided for by the applicable EC rules.

In other words, if an EC instrument provides which means of evidence may be used and must be accepted, the Member States are not free to impose other or additional requirements. The means of evidence provided for under EC law must be accepted.

\(^25\) Case C-363/89 [n 7] 26
2) **Any appropriate means of evidence**

Besides, in *MRAX*\(^{26}\), the Court has further indicated that the recognition of an EC right may not be made subject to the production the means of evidence explicitly provided for in the relevant EC instrument, where the facts required for the recognition of the EC rights in question can be proven unequivocally by other means.

**(ii) Imprecise harmonisation?**

Subsequently, we have to consider the situation where the conditions for the exercise of EC rights and the formalities for their recognition have been harmonised, but that the relevant EC instrument does not specify (clearly) the admissible means of evidence.

1) **Any appropriate means of evidence**

The Court held in *Salah Oulane*\(^{27}\), that if an EC instrument does not define precisely the means of evidence that can be demanded by a Member State, EC law requires the Member State to accept any means of evidence, provided it is appropriate.

In other words, a person claiming an EC right falling with the scope of a particular EC instrument, which is imprecise as regards the means of evidence to be used, may use any appropriate means of evidence and those means must be accepted by the authorities competent for the recognition of the right claimed.

**(iii) No harmonisation?**

Lastly, we consider the situation in which EC rules are absent. In those circumstances, the national authorities have to base their decision on national law. It must, however, be borne in mind that the means of evidence provided for under domestic legislation may not undermine either the scope or the effectiveness of EC law.

1) **Principle of equivalence and effectiveness**

In *FMC and others*\(^{28}\), the Court stipulated that, in accordance with settled case law, those means must not be less favourable than those governing similar domestic procedures (principle of equivalence) nor

---

\(^{26}\) Case C-459/99 *MRAX* [2002] ECR I-6591 62

\(^{27}\) Case C-215/03 [n 2] 57; the Court refers in particular to Case C-363/89 Danielle Roux v The State (Belgium) [1991] ECR I-273 15-16
render virtually impossible or excessively difficult the implementation of EC legislation (principle of effectiveness). Such procedural rules would affect the exercise of rights conferred by the EC legal system.

1.04 The EC concept of appropriate means of evidence

(a) Introduction

In relation to areas where the conditions for the exercise of EC rights and the formalities for their recognition have been harmonised, irrespective of whether or not the EC instrument in question specifies clearly the admissible means of evidence, the relevant question is: what constitutes an “appropriate means of evidence”?

This question is of mutual importance for those who claim EC rights and those who are competent for their recognition. In an international context, involving different legal systems, the question is even more significant, because citizens and companies on the one hand and public authorities on the other hand may be familiar with particular - often dissimilar - means of evidence.

Subjective unfamiliarity with a particular means of evidence that originates in a different Member State should not generally be considered an adequate ground for its refusal as unsuitable. Subjective unfamiliarity with a means of evidence executed in a foreign jurisdiction does not bear on its objective suitability to provide the proof required for the purpose of recognising an EC right. The EC context involves by its very nature the coexistence of different legal systems, and thus different means of evidence.

(b) The EC Standard of Proof

In Heinrich Schulze GmbH\(^\text{29}\), however, the Court stressed that national authorities are not permitted to unilaterally lower EC standards of proof. Accordingly, a national authority that is responsible for the proper implementation of EC law must 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. For instance, as indicated above, in the absence of sufficiently probative evidence the

---

\(^{28}\) Case C-212/94 FMC and Others [1996] ECR I-389 49-52

\(^{29}\) Case C-120/05 [n 10] 29; See in more detail the conclusion of Advocate General Léger in Case C-120/05 [n 17] 61
Standard of Proof is in no way reduced by the fact that a beneficiary is unable to provide the appropriate evidence, even if that is by reason of force majeure.\(^{30}\)

We will explain below that in the EC legal system a means of evidence used for the purpose of proving an EC right, must be meet three requirements to be deemed appropriate, i.e. to meet the EC Standard of Proof: (1) the means of evidence must be sufficiently objective; (2) it must leave no doubts; and (3) it must be satisfactory for purposes of verification.

\(\text{(i)}\, \textbf{Sufficiently objective}\)

The first requirement, concerning the objective nature of the means of evidence, may be taken to relate to the source of the means of evidence. For example, in Yunying Jia\(^{31}\), a case concerning the proof required for the recognition of an EC right of residence, the Court identified two extremes: on one side, documents of the competent authority of the country of origin or the country from which the applicant came that provide the required proof (particularly appropriate), and on the other side, mere statements of an EC national on behalf of a person claiming the entitlement to an EC right (inappropriate). The Advocate General in Yunying Jia, phrased the requirement as follows: “A simple declaration by the EC citizen (…) is not, in itself, sufficiently objective (…)”\(^{32}\).

\(\text{(ii)}\, \textbf{Leaving no doubts}\)

The second requirement, that a means of evidence must leave no doubt, is based on the fact that the Court has indicated in Salah Oulane\(^{33}\), that an appropriate means of evidence provides “unequivocal proof” of a person’s claim to an EC right. In other words, means of evidence that provide unequivocal proof are to be considered appropriate by national authorities in the process of recognition of an EC right.

Taken literally, the term “unequivocal proof” requires that a means of evidence leaves no doubt as to the existence of the conditions required for the recognition of the EC right in question. This interpretation of the term as requiring the absence of doubt is supported by the terminology used of the term in other language versions of the Court’s judgment in Salah Oulane: “sans aucune equivoque” (French); “zweifelsfrei” (German); “senza alcun equivoco” (Italian); “inequivocamente” (Spanish); and “ondubbelzinning” (Dutch).

\(^{30}\) Case C-120/05 [n 10] 29
\(^{31}\) See Case C-1/05 [n 4] 42
\(^{32}\) See the opinion of Advocate General Geelhoed in Case C-1/05 [n 4] 98
\(^{33}\) Case C-215/03 [n 2] 26; see further Case C-459/99 [n 7] 69
This requirement relates closely to the basic interest that the authority competent for the recognition of an EC right ought to be convinced of the existence of the basic conditions under which the entitlement to the EC right exists.

1) Some scope for discretion to ask for corroborating evidence

If doubts remain after the production of an appropriate means of evidence, it cannot be said that the competent authority is convinced of the existence of the basic conditions under which the entitlement to the EC right exists. In those circumstances, the competent authority must be able to require additional means of evidence, in accordance with the detailed rules laid down by national law.

The following observation of the Advocate general in Yunying Jia\(^{34}\) is instructive in this respect: "a document issued by the national authorities of the country of origin is certainly a valuable source of proof, although it may not always be conclusive. It, therefore, should not be excluded that where, according to the national authorities, such an official statement does not suffice, they should be able to require additional evidence."

(iii) Satisfactory for purposes of verification

We turn to the last requirement: a means of evidence must be satisfactory for the purpose of verification. In Heinrich Schulze GmbH\(^{35}\), a recent case concerning the right (...), the Court held that, in the absence of documentary evidence, national authorities must take into consideration other types of evidence which may be just as satisfactory for the purpose of the verification, in accordance with the detailed rules laid down by national law, of course provided that those rules again respect the scope and effectiveness of EC law.

The requirement that a means evidence must be satisfactory for the purpose of verification implies that the source of the proof provided must be enduring in that an authority is able to verify the reliability and adequacy of the proof for a certain minimum of time.

(c) Guiding principles

There are a number of EC principles that should guide the authorities in the Member States when considering whether a particular means of evidence can be considered as appropriate to prove the existence of the EC right for which it is relied on as proof.

---

\(^{34}\) See the opinion of Advocate General Geelhoed in Case C-1/05 [n 4] 98

\(^{35}\) Case C-120/05 [n 10] 26
(i) EC loyalty and effectiveness of EC law

The first principle is that of EC loyalty, which applies to the Member States in general (see Article 10 EC). For example, national courts must, to the full extent of its discretion under national law, interpret and apply domestic law in conformity with the requirements of EC law\(^{36}\), and that where such an application is not possible, the national court must apply EC law in its entirety and protect rights which the latter confers on individuals, disapplying, if necessary, any contrary provision of domestic law.\(^{37}\)

On the other hand, as indicated above, those means provided for under the detailed rules laid down by national law must not be less favourable than those governing similar domestic procedures (principle of equivalence) nor render virtually impossible or excessively difficult the implementation of EC legislation (principle of effectiveness), in order not to affect the exercise of rights conferred by the EC legal system.\(^{38}\)

1) The ability to provide evidence without undue administrative constraints

A relevant example of the principle of effectiveness can be found in *Tin Cap*\(^{39}\), a case concerning the compatibility with Article 43 EC of legislation of a Member State which restricts the ability of a resident company to deduct, for tax purposes, interest on loan finance granted by a direct or indirect parent company which is resident in another Member State or by a company which is resident in another Member State and is controlled by such a parent company, without imposing that restriction on a resident company which has been granted loan finance by a company which is also resident.

The Court held that such legislation is precluded, unless, amongst other conditions, it allows taxpayers to produce, *without being subject to undue administrative constraints*, evidence as to the commercial justification for the transaction in question.

(ii) Equal treatment

The second principle concerns equal treatment. Article 12 EC prohibits all discrimination on grounds of nationality. The other Treaty provisions that prohibit discrimination (e.g. Article 49 EC) are specific expressions of this principle.\(^{40}\) By way of example we can refer to the case of *Salah Oulane*. The Court held in relation to the exercise of an EC right of residence that EC law does not prevent a Member State

\(^{36}\) Case 157/86 *Murphy and Others* [1988] ECR 673 11; and Case C-262/97 *Engelbrecht* [2000] ECR I-7321 39

\(^{37}\) Case 157/86 [n 36] 11; Case C-224/97 *Ciola* [1999] ECR I-2517 26; and Case C-262/97 [n 36] 40

\(^{38}\) Case C-212/94 *FMC and Others* [1996] ECR I-389 49-52

\(^{39}\) Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007] ECR 00000

\(^{40}\) Case C-215/03 [n 2] 35
from carrying out checks on compliance with the obligation to be able to produce proof of identity at all times, *provided that it imposes the same obligation on its own nationals* as regards their identity card.\(^{41}\)

The Court stressed that, in the light of the principle of equal treatment, the Member States are not allowed to discriminate between nationals and other EU nationals as regards the means of proof that are accepted in order to prove the same fact. In other words, it is contrary to Article 49 EC for nationals of a Member State to be required in another Member State to present a valid identity card or passport in order to prove their nationality, when the latter State does not impose a general obligation on its own nationals to provide evidence of identity, and permits them to prove their identity by any means allowed by national law.

Another example can be found in another important case, *Martinez Sala*\(^{42}\). In this case a Spanish woman resident in Germany was the victim of discrimination in the handling of a benefit application. She was asked for a resident permit, which she was still waiting for from the authorities, while a national would not have been asked for such a permit. The fact that she could show that she could show she was entitled to live in Germany should have been enough. The Public Document was not necessary. This case makes it clear that even this kind of procedural discrimination, which can be expected to occur very widely, is discrimination in the sense of the Treaty. The court said:

> “a citizen of the European Union (…) can rely on Article 6 [now 12] of the Treaty in all situations which fall within the scope *ratione materiae* of EC law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.”

\(^{41}\) Case C-215/03 [n 2] 34; the Court refers to Case 321/87 *Commission v Belgium* [1989] ECR 997 12 and Case C-24/97 *Commission v Germany* [1998] ECR I-2133 13

\(^{42}\) Case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I 2691 63
1.05 Public documents considered as an appropriate means of evidence

(a) Introduction

In Yunying Jia\(^{43}\), discussed above, the Court held that documents of the competent authority of the country of origin or the country from which the applicant came that provide the required proof are a particularly appropriate means of evidence.

Public documents represent a particularly appropriate means of evidence in the EC context. If we return for a moment to the EC Standard of Proof, we can establish that there are several reasons that justify this conclusion. The EC Standard of Proof requires that a means of evidence is sufficiently objective, that it leaves no doubts, and that it is satisfactory for purposes of verification.

(b) Objective source of information

In the first place, Public Documents derive from a particular source: a public authority. This characteristic provides them with an element of objectivity as a means of evidence. In the absence of corruption, the public official who executes the document is independent from the person who will use it in another Member State for the purpose of proving the existence of his entitlement to an EC right.

(c) Reliable source of information

Secondly, the Member States’ systems of public administration can generally be considered a reliable source of information. Public authorities will normally verify the substance of the documents they execute and, in principle, they are also in the best position for doing so, since they are able to rely on a specialised organisation and usually a system of public registers.

Accordingly, a Public Document is a means of evidence that can be trusted to provide unequivocal proof of its substance, and a foreign authority should be able to confidently rely on it to resolve any doubts it may have in a particular case.

(d) Durable source of information

Lastly, the Member States’ systems of public administration are generally not only reliable as a source of information, but also as a durable source of information that will not easily disappear. This makes

\(^{43}\) See Case C-1/05 [n 4] 42
document that stem from this system particularly satisfactory for the purpose of subsequent verification of the authenticity of the document itself or the accuracy of its substance.

1.06 The role of Public Documents in context of EC law

In Dafeki\textsuperscript{44}, a case concerning the free movement of workers, the Court held that: “[t]he exercise of the rights arising from freedom of movement for workers is not possible without production of documents relative to personal status, which are generally issued by the worker's State of origin”.

The role of Public Documents as a means of evidence is significant in all areas of EC law where the exercise of rights guaranteed under EC law depends on the prior recognition of those rights by the Member States and thus the provision of proof that the basic conditions for the existence of the EC right are satisfied.

One of the benefits of this report is that, for the first time, the role of Public Documents has been evaluated for all areas of free movement, involving persons, goods and services, and, in addition, for the area of civil justice. In both areas the role of Public Documents as a means of evidence is indispensable.

(a) Legal diversity in the member States

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

By way of example, we can refer to documents used and accepted in the Member States as evidence of a person’s civil status, which may be relevant for the purpose of proving an EC right of residence derived from Directive 2004/38/EC. The Directive indicates that a partner of a Union citizen may be required to produce proof of the existence of a durable relationship with the Union citizen (see Article 8(5)(f) in conjunction with Article 3(2) of the Directive).

In the Member States roughly three different types/categories of documents are used as evidence to prove a person’s civil status: (1) birth and marriage certificates (Austria, Czech republic, Estonia, Greece, Hungary, Ireland, Latvia, Luxembourg, Malta, Poland, Slovak Republic, and UK); (2) so-called “livrets de

\textsuperscript{44} Case C-336/94 Eftalia Dafeki v Landesversicherungsanstalt Wurttemberg [1997] ECR I-6761 19
famille” (France, and Luxembourg); and (3) (certified) extracts from the civil status register (Finland, Germany, Slovenia, and Spain).

The reference to “livrets de famille” indicates shows that legal diversity between the Member States as to the documents used to prove civil status may also be influenced by the existence of international agreements such as the CIEC Convention introducing an international family record book (Convention No 15), which applies between Greece, Italy, and Luxembourg, and the CIEC Convention on the recognition and up-dating of civil status booklets (Convention No 24), which applies between France, Italy, and Spain. These agreements have introduced an additional means of evidence suitable to prove a person’s civil status.

The differences between Member States as regards the means of evidence that are required and executed as proof of the same fact cause problems related to a lack of legal uncertainty and predictability, which results from the fact that a person is able to use certain means of evidence to prove the existence of an EC right in one Member State, but is subsequently unable to use the same means of evidence to prove the EC right in another Member State.

(i) Note on the surveys conducted in the course of the study: difficulties experienced by European citizens and companies in relation to the cross-border use of Public Documents

In the survey designed for the purpose of the study, the respondent citizens were asked whether they experienced any difficulties other than those specifically related to legalisation.

13.83% of the 43% of respondent citizens who answered that they experienced other difficulties in the process of using their document abroad said they were unaware which documents would be required abroad. For instance, one respondent citizen indicated a lack of transparency of the procedures relating to the necessary documents:

“I have a British birth certificate issued by a British Consulate in Germany. Over the years I have worked and studied in Belgium, Germany and France, and own a flat in France. In nearly every case the birth certificate has been a source of major problems - from French authorities who demand a recent "extract" (i.e. a copy from the original Register in Düsseldorf) to Belgian authorities who want a certificate of authenticity from a German lawyer."

Inconsistency among authorities and lack of clarity regarding the requirements was also cited:
“One division within the authority was willing to accept a certified copy of the document without translation (as it was in English), whereas another division insisted on having the document translated although I was permitted to translate it for them myself having refused (on grounds of principle and pointing out the EU law implications) to obtain and pay for a certified translation.”

“I found that in Ireland there was a lack of clarity as to the documents required and the necessary format; also the requirements changed depending on who I spoke to. I know other non-EU citizens who had to go back to their home-states on a number of occasions to get documents or have them formalised - and they did not know in advance what they needed to do. Some people have applied for citizenship and thought they had all of the right documents submitted. Then later they would be told they needed an extra document - when that was not clear at the time. Also for non-EU citizens living in Ireland it is very frustrating to have to apply for a visa to travel to other EU Member States because Ireland is not signed up to Schengen. This can take 3 weeks.”

Over 60% of the companies surveyed (62.60%) answered yes when asked if they experienced any other difficulties using their document abroad. Over 15% each said that it was either unclear which documents were necessary abroad or that there were conflicting requirements in the countries involved.

(b) Imprecision of EC instruments

The study has clarified in relation to EC rights associated with free movement and civil justice, what exactly is the role of Public Documents as a means of evidence. To a certain extent secondary EC legislation reflects the existing legal diversity between Member States.

Some EC instruments are comprehensive; they indicate exactly what kind of proof may be required and, in addition, the type of Public Document that must be accepted as an appropriate means of evidence to provide that proof. Furthermore, these instruments often harmonise the form of Public Documents that may be required by the Member States, or they establish new “EC Public Documents” altogether.

This occurs mainly in areas where the practice of the Member States was already pretty much uniform prior to any harmonisation at the EC level. For example, ahead of harmonisation at the EC level, the Member States by and large accepted valid passports or identity cards as proof of a person’s identity and nationality. Consequently, EC instruments generally indicate specifically a valid passport or identity card as the means of evidence that can be required by the Member States as proof of a person’s identity and nationality.

Frequently, however, EC instruments indicate what kind of proof may be required by the Member States in the process of recognising the existence of EC rights, but they refrain from clarifying precisely which...
means of evidence must be accepted as appropriate by the Member States. Consequently, when implementing those instruments, the Member States are left with a degree of discretion in that they may decide autonomously what appropriate means of evidence are. Thus, legal diversity remains.

We have indicated previously that under EC law the Member States must accept any means of evidence that are appropriate to unequivocally prove the existence of an EC right. We also concluded that this obligation exists notwithstanding the fact that an EC instrument may provide expressly for a specific type of evidence, such as a valid identity card or passport.

In addition, the Court has recently stressed in *Salah Oulane*\(^ {45}\) that, in case of a lack of precision of the provisions of an EC instrument as regards the admissible means of evidence, the required proof may be adduced by any appropriate means. In other words: if an EC instrument does not define precisely the means of evidence that can be demanded by a Member State, EC law requires the Member State to accept any means of evidence, provided it is appropriate.

(i) The description of means of evidence in modern EC instruments

In more recent EC instruments this issue of legal uncertainty in relation to the means of evidence that may be used in the process of recognition of EC rights by the Member States has been expressly acknowledged.

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States\(^ {46}\), which replaced Directive 73/148/EEC on the abolition of restrictions on movement and residence within the EC for nationals of Member States with regard to establishment and the provision of services\(^ {47}\), states in its preamble that: “The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members”.

\(^{45}\) Case C-215/03 [n 2] 57; the Court refers in particular to Case C-363/89 [n 2] 15-16; See also Case C-1/05 [n 3] 41


The text of the Directive reflects this intention by referring to comprehensive lists of documents. For example Article 8 of the Directive indicates that: “(…) Member States may require the following documents to be presented: (a) a valid identity card or passport; (b) a document attesting to the existence of a family relationship or of a registered partnership; (…)”.

Further inspection of the text of the Directive shows that the provisions of the Directive do not reflect sufficiently the intention of the Commission to specify the supporting documents that may be required by the Member States. For example, in relation to the procedure for issuing registration certificates the Directive uses the term “a document attesting to” to describe the relevant means of evidence that may still be required (see Article 8(5)(b) of the Directive).

Besides, the Directive generally uses terms as “documentary evidence that” and “proof of the existence of” (see in particular Articles 8(5) and 10(2) of the Directive). These terms do not identify the type of documents they apparently refer to in a sufficiently clear way. This would have been the case if they referred to specific documents, for example a marriage certificate, birth certificate, certificate of enrolment, business license certificate, health certificate, etc.

When drafting the Directive, the European Commission may have underestimated the effect of the fact that the Member States implemented the provisions of the Directive into their domestic laws by referring to the specific domestic documents that are commonly used to “attest”, constitute “documentary evidence of”, or provide “proof of” a particular fact relevant in the process of implementing the Directive.

On the other hand, a detailed description of documents in a Directive may produce disadvantages for the beneficiaries of EC rights in that it apparently limits the different means of evidence available to prove their rights.

PART II. THE ROLE OF PUBLIC DOCUMENTS IN THE EC CONTEXT OF FREE MOVEMENT AND CIVIL JUSTICE

2.01 Introduction

EC free movement concerns goods, persons, services and capital. In this terminology, the “person” concept has a particular meaning, since it covers two categories of economic migrants: workers and independent economic operators seeking to establish themselves. Additionally, EC free movement may concern Union citizens.
Consequently, when speaking of EC free movement cases, we are effectively looking at free movement as guaranteed under EC law of goods, services, capital, employed or self-employed workers or, more generally, Union citizens.

Leaving aside citizenship (Article 17 EC), three types of EC free movement cases concern persons: freedom of movement of workers (Article 39 EC); freedom of establishment (Article 43 EC); and freedom of providing services (Article 49 EC). In relation to services, the beneficiary of an EC right can be either the "provider" of the service, or the "receiver".

EC legal integration in the field of freedoms of movement of persons is progressive and expansive by nature. Originally, primary law on freedoms of movement only concerned the economic operator. Such restriction was natural in the light of the objective and status of legal integration in the European Economic EC.

Today, EC freedoms of movement relate to all persons, irrespective of the economic or non-economic aims of their cross-border activity. Consequently, relevant EC cases for the purpose of this report are those within the scope *ratione materiae* of EC law which involve the exercise of the fundamental freedoms guaranteed by the Treaty.48

### 2.02 Beneficiaries of EC rights

**(a) EC nationals**

**(i) Union citizens**

EU citizens are defined by reference to their nationality of a Member State (Article 17(1) EC). Accordingly, this term has an inclusive meaning: it covers potentially any individual, i.e. economic and non-economic migrants. Formally, the Treaty provisions on citizenship are outside the chapter on the internal market. However, in terms of content, they reflect closely the rules of the internal market freedoms. Further, they complement the system of free movement in that they have their own bearing only if the remaining Treaty provisions on free movement are inapplicable in a particular case. From the point of view of a person outside his professional activity, we can distinguish freedom of movement of Union citizens (Article 18 EC) and, as already referred to above, freedom to receive services (Article 49 EC).

---

48 Case C-148/02 Carlos Garcia Avello v Belgian State [2003] ECR I-11613 24
1) **Family members of Union citizens**

The benefit of free movement extends, by virtue of secondary EC law to the members of a Union citizen’s family, spouse/partner, children and ascendant dependants as far as they cannot claim self-standing rights of free movement under EC law.

(ii) **EC companies**

In relation to freedom of movement in terms of establishment (see Article 48 EC) and the provision of services (see Article 55), companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the EC are treated in the same way as natural persons who are nationals of Member States. “Companies or firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making (see Article 48 EC second paragraph).
2.03 EC free movement cases

(a) Associated rights of free movement

(i) Free movement of goods

1) The EC’s Customs Union

The movement of goods within EC’s customs union(s) is not based on the goods’ originating status but on the fact that they comply with provisions on free circulation. The EC is based on a Customs Union in relation to exports out and imports in the EC’s Customs territory. The EC’s Customs Union constitutes a merger of the customs territories of the Member States with the effect that customs duties and non-tariff barriers are eliminated between the members of the union for substantially all trade.

Besides, a common customs tariff applies (i.e. the sum of all EC provisions fixing import and export duties and duty exemptions with regard to specific goods, including agricultural, anti-dumping and preferential duties, tariff quotas and tariff suspensions) and common rules apply for non-tariff barriers (e.g. non-tariff measures established in the framework of the common commercial policy, such as import or export surveillance or safeguard measures, quantitative import or export restrictions, import or export prohibitions – see Article 1(7) CCIP) for substantially all trade with non-member countries (see Article XXIV GATT and Article 23 EC).

The EC further has custom unions with three countries: (1) Turkey; (2) Andorra; and (3) San Marino. Some products originating in those countries do not fall within the scope of the customs union and remain subject to a system of preferential treatment based on origin, which also applies in relation to countries in the pan-Euro-Mediterranean zone.

In relation to goods originating in a country not part of the EC Customs Union territory or a country with which the EC has a customs union, there are two kinds of origin - non-preferential and preferential - and the customs treatment of goods at importation is determined by the origin they have.

49 The Customs territory of the EC consists of the territories of the Member States (with some exceptions) and the territorial waters, the inland maritime waters and the airspace of the Member States and the territory of the Principality of Monaco, except for the territorial waters, the inland maritime waters and the airspace of those territories which are not part of the customs territory of the EC.
The EC’s common customs tariff comprises the preferential tariff measures contained in agreements which the EC has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment (see Article 20(3)(d) Regulation No 2913/92). The rules on preferential origin lay down the conditions governing acquisition of origin which goods must fulfil in order to benefit from the preferential treatment and are determined in those agreements (see Article 27(a) Regulation No 2913/92).

**a) Rules of origin**

The EC’s Customs Code contains two basic concepts to determine the origin of goods namely 'wholly obtained' products and products having undergone a "last substantial transformation" (see Articles 23 and 24 of Council Regulation No 2913/92). The Customs Code provides that goods wholly obtained in a single country are originating in this country (see Article 23 of Regulation No 2913/92). In practice this will be restricted to mostly products obtained in their natural state and products derived from wholly obtained products.

When two or more countries are involved in the production of a good, the origin of the good must be determined in accordance with the Customs Code, which provides, as follows, that: "Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture" (see Article 24 of Council Regulation No 2913/92).

In general the criterion of last substantial transformation is expressed in three ways: (1) by a rule requiring a change of tariff (sub)heading in the HS nomenclature; (2) by a list of manufacturing or processing operations that do or do not confer on the goods the origin of the country in which these operations were carried out; (3) by a value added rule, where the increase of value due to assembly operations and incorporation of originating materials represents a specified level of the ex-works price of the product.

**a. Preferential origin**

Preferential origin is conferred on goods from particular countries when they have fulfilled certain criteria and confers certain benefits on goods traded between countries that have agreed such an arrangement.

---

50 The Nomenclature governed by the Convention on the Harmonized Commodity Description and Coding System, commonly known as "HS Nomenclature", is an international multipurpose nomenclature which was elaborated under the auspices of the World Customs Organization (WCO). At present there are 116 Contracting Parties to this Convention, however, it is applied by more than 190 administrations worldwide, mostly to set up their national customs tariff and for the collection of economic statistical data.

The European Union and its member states together represent a block of 28 Contracting Parties to the aforementioned Convention. The HS Nomenclature comprises about 5,000 commodity groups which are identified by a 6-digit code and arranged according to a legal and logical structure based on fixed rules. The Combined Nomenclature of the European EC (EC) integrates the HS Nomenclature and comprises additional 8-digit subdivisions and legal notes specifically created to address the needs of the EC.
usually entry at a reduced rate or free of duty [e.g. (1) Generalised System of Preferences (“GSP”, which includes Developing Countries on the basis of non-reciprocal preferential treatment); (2) European Economic Area (“EEA”, including EC, Iceland, Norway and Liechtenstein based on the 1994 EEA Agreement), (3) System of Pan-Euro-Mediterranean Cumulation (EC and the Member States of the European Free Trade Association - Iceland, Liechtenstein, Norway and Switzerland), Turkey and countries which signed the Barcelona Declaration, namely Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and the Palestinian Authority of the West Bank and Gaza Strip, and Faroe Islands), (4) Western Balkans (Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia and Serbia and Montenegro, which are all part of the Stabilisation and Association process), (5) Countries of Africa, the Caribbean and the Pacific (“ACP”, which includes the EC and 77 African, Caribbean and Pacific States), (6) Overseas Countries and Territories (“OCT”, which includes countries and territories constitutionally linked to Denmark, France, the Netherlands and the United Kingdom), (7) South Africa (based on the bilateral Trade Development and Co-operation Agreement which establishes a free trade area between the EC and South Africa), (8) Latin America (Mexico and Chile), (9) Others (Faroe Islands, Ceuta and Melilla).

 Preferential origin criteria generally demands that goods undergo more working or processing than is required to obtain non-preferential origin. However, wholly obtained goods can also benefit from preferential origin status.

 In order to have preferential origin goods must fulfil the conditions of the specific Origin Protocol to the individual agreements between the countries involved concerning the definition of the concept of "originating products". Generally, this means that the goods must either be wholly obtained or undergo a certain amount of working or processing. Annexed to each origin protocol is a list of the working or processing each product must undergo in order to obtain preference. Origin Protocols are usually divided up into sections, which cover all aspects of the origin system, including "Proof of origin" and “Arrangements for administrative co-operation”.

 While the provisions of individual bilateral agreements may vary in certain details, most preferential origin arrangements have a number of common provisions and the objective of all preferential origin arrangements is the same. Nonetheless, one has to look at the specific provisions of each individual arrangement besides looking at the common provisions usually found in preferential origin arrangements (i.e. any instances where the rules of the particular arrangement differ from the common provisions, or where that information needs to be complemented).

 Essentially, the definition of the concept of ‘originating products’ and the specific methods of administrative cooperation is contained in a Protocol to each bilateral agreement. The commonalities and differences between the agreements will not be further discussed in this report other than by way of
example in relation to the methods of administrative cooperation in the process of verification of
documents proving the origin of a good (see below). An overview of the specific global agreements and to
the origin protocols can be found in a list of arrangements maintained by the European Commission.51

b. Non-preferential origin

Non-preferential origin merely confers an "economic" nationality on goods and does not confer any
benefit on them. Non-preferential origin is obtained either by the goods being wholly obtained in one
country or, when two or more countries are involved in the manufacture of a product, origin is obtained in
the country where the last substantial, economically justified working or processing is carried out.

Non-preferential origin is used, for example, in determining whether or not goods are subject to anti-
dumping measures or quantitative restrictions and for statistical purposes. It can also be used to
determine origin in the context of the "origin marking" (i.e. the "made in" label) of goods.

2) Public documents associated with the operation of EC’s Customs
Union(s)

Within the EC context, the application of the wrong customs and tariff regime due to inaccurate or false
information on the origin of goods is liable to adversely affect the General Budget of the European
Communities, which is based in part on revenue from EC customs duties.

Consequently, in the framework of any customs procedure, customs authorities need to determine the
origin of goods as any duties and/or equivalent charges or any customs restrictions or obligations
applicable to them will depend on their origin.

If origin can be described as the "economic" nationality of goods, proofs of origin could be compared to
their "passports" or "identity cards". Proofs of origin do just that, they prove that the goods they
accompany have fulfilled the origin requirements.

EC customs declarations in writing made in the framework of the normal customs procedure must be
accompanied by all the documents required for implementation of the provisions governing the customs
procedure for which the goods are declared (see Article 62(2) Regulation (EEC) No 2913/92).

In relation to goods entering the EC, one of the primary objectives besides the proper functioning of the
internal market is to prevent fraud and irregularities in the EC’s customs procedures, as far as the
determination of the origin of third country goods is concerned.

As far as relevant for the purpose of this study, the control measures by the national customs authorities to prevent fraud and irregularities in relation to the determination of the origin of goods concerns the verification of the authenticity of documents that are produced as a means of evidence to prove the origin of goods (see generally Article 4(14) Regulation (EEC) No 2913/92).

The implementing provisions of the EC’s Customs Code provide, for example, that import duties will not be repaid or remitted where the only grounds relied on in the application for repayment or remission are presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be forged, falsified or not valid for that purpose, even where such documents were presented in good faith (Article 904(c) of Regulation No 2454/93).

The implementing provisions of the EC’s customs code specify the documents that are required in the process of the EC’s customs procedure for which third country goods are declared. The documents required may differ depending on the preferential or non-preferential origin of goods and sometimes depending on the type of goods declared. Besides, the implementing provisions stipulate the form and contents of EC Certificates of Origin required in third countries in relation to goods originating in the EC.

**a) Goods with a preferential origin**

When goods are claimed to have a particular preferential origin, the customs authorities of the importing country must therefore be satisfied that the claim is correct and thus a proof of that origin is normally required. Origin Protocols describe the kinds of proofs of origin available to traders and set out the procedures to be adopted for issuing those proofs of origin. A preferential certificate of origin is a document attesting that goods in a particular shipment are of a certain origin under the definitions of a particular bilateral or multilateral Free Trade Agreement. Proofs of origin must be submitted to the customs authorities of the Member State of importation in accordance with the procedures laid down in the EC’s Custom Code.

**i) Movement Certificate EUR.1**

Products originating in countries, groups of countries or territories for which the EC has adopted unilaterally tariff preferences (e.g. countries in the pan-Euro-Mediterranean zone and ACP countries, with the exception of GPS countries – see below- and the overseas countries and territories associated with the EC) benefit from the tariff preferences on submission of a Movement Certificate EUR.1 (see Article 109(a) of Regulation No 2454/93).

For the EUR.1 certificates to be accepted by the national authorities in the Member States, the beneficiary country must communicate to the Commission the names and addresses of the governmental authorities situated in their territory which are competent to issue EUR.1 certificates, together with
specimen impressions of the stamps used by those authorities, and the names and addresses of the relevant governmental authorities responsible for the control of EUR.1 certificates (see Article 121(1) of Regulation No 2454/93).

The stamps received by the Commission are valid as from the date of receipt by the Commission of the specimens. The Commission subsequently forwards the information to the customs authorities of the Member States. When these communications are made within the framework of an amendment of previous communications, the Commission will indicate the date of entry into use of the new stamps according to the instructions given by the competent governmental authorities of the beneficiary countries or territories (see Article 121(1) of Regulation No 2454/93).

In relation to EUR.1 certificates to be executed by the customs authorities of the Member States, the Commission is responsible for sending to the beneficiary countries or territories the specimen impressions of the stamps used by the customs authorities of the Member States for the issue of EUR.1 certificates (see Article 121(2) of Regulation No 2454/93).

A movement certificate EUR.1 may be rejected for 'Technical reasons' because it was not made out in the prescribed manner. Reasons include, as far as relevant here, the certificate was not stamped and signed, the certificate is endorsed by a non-authorized authority, the stamp used is a new one which has not yet been notified, or the certificate presented is a copy or photocopy rather than the original (see, for example, Article 18 of the EC-Switzerland Agreement Origin Protocol).

The document will be marked 'DOCUMENT NOT ACCEPTED', stating the reason(s), and then returned to the importer in order to enable him to get a new document issued retrospectively. The customs authorities, however, may keep a photocopy of the rejected document for the purposes of post-clearance verification or if they have grounds for suspecting fraud.

a. **EUR-MED Certificate**

With the introduction of the Euro-Mediterranean free trade area (EU-MEFTA), which is partially in place, the EUR.1 certificate will be replaced by the EUR-MED certificate for countries that are part of this Free Trade Area. The EU-MEFTA is based on the Barcelona Process and European Neighbourhood Policy (ENP). The Barcelona Process, developed after the Barcelona Conference in successive annual meetings, is a set of goals designed to lead to a free trade area in the Middle East by 2010.

It is envisioned that a free trade area with Rules of Origin with Pan-Euro-Mediterranean cumulation will be created. It will cover the EU, the EFTA, the EU customs unions with third states (Turkey, Andorra, San Marino), the EU candidate states, the partners of the Barcelona Process and possibly at a later stage all of the European Neighbourhood Policy partners.
Recently, the European Commission has presented a draft in which certificates of origin will be replaced by declarations of origin instead. These declarations will not have to be stamped by the competent authority and can also be submitted electronically to the importer.

ii) A.TR. Movement Certificates

In the framework of the Customs Union between the EC and Turkey, the import formalities applicable in the two territories are considered as having been complied with in the exporting State by the validation of the document necessary to enable the free circulation of goods (see Article 4(1) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee laying down detailed rules for the application of Decision No 1/95 of the EC-Turkey Association Council).52

The document that constitutes a means of evidence to prove that the necessary conditions for implementation of the provisions on free circulation are met are to be issued by the customs authorities of Turkey or of a Member State (see Article 5 of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee). This document is the so-called A.TR Movement Certificate (see Article 6 and Annex I of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

A.TR. movement certificates, which are submitted to authorities of the importing state, may only be endorsed by the issuing authorities in the exporting state where they can serve as the documentary evidence required for the purpose of free circulation. Accordingly, the issuing customs authorities must take any steps necessary to verify the status of the goods and the fulfilment of the other requirements of the applicable requirements, and they must also ensure that the certificates are duly completed (see Article 7 of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

The certificates are to be made out in one of the official languages of the EC or in Turkish and in accordance with the provisions of the national law of the exporting State. When certificates are made out in Turkish, they must also be made out in one of the official languages of the EC. They are to be typed or hand-written in block letters in ink and measure 210 × 297 mm. The paper used for drawing up the certificate must be white, sized for writing, not containing mechanical pulp and weighing not less than 25 g/m², and it must have a printed green guilloche pattern background making any falsification by mechanical or chemical means apparent to the eye (see Article 9 of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee). The authorities of the importing state may require a translation of the A.TR certificate (see Article 10 of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

52 See the Agreement of 12 September 1963 establishing an association between the European Economic EC and Turkey and Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the customs union.
a. Methods of administrative cooperation

In the framework of administrative cooperation, the customs authorities of the Member States of the EC and of Turkey are to provide each other, through the European Commission, with specimen impressions of stamps used in their customs offices for the issue of A.TR. movement certificates and with the addresses of the customs authorities responsible for verifying those certificates (see Article 14(1) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

Besides, the EC and Turkey are to assist each other, through the competent customs authorities, in checking the authenticity of A.TR. movement certificates and the correctness of the information given in them (see Article 14(2) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

Verifications of A.TR. movement certificates are to be carried out at random or whenever the customs authorities of the importing State have reasonable doubts as to the authenticity of the certificates. For the purposes of verification, the customs authorities of the importing State must return the A.TR. movement certificate to the customs authorities of the exporting State giving, where appropriate, the reasons for the enquiry (see Article 16(1) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

Verification is to be carried out by the customs authorities of the exporting state and the customs authorities requesting the verification are to be informed of the results of this verification as soon as possible. These results indicate clearly whether the documents are authentic and whether the goods concerned may be considered as in free circulation in the customs union (see Article 16(5) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

If in cases of reasonable doubt there is no reply within 10 months of the date of the verification request or if the reply does not contain sufficient information to determine the authenticity of the document in question or the real status of the goods, the requesting customs authorities will, except in exceptional circumstances, refuse the free circulation (see Article 16(6) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

iii) Certificate of Origin Form A

Products originating in developing countries within the GSP are eligible, on importation into the EC, to benefit from the tariff preferences on submission of a Certificate of Origin Form A, which is to be issued by the customs authorities or by other competent governmental authorities of the beneficiary country.

For the Form A certificates to be accepted by the national authorities in the Member States, the beneficiary country must communicate to the Commission the names and addresses of the governmental authorities situated in their territory which are empowered to issue certificates of origin Form A, together
with specimen impressions of the stamps used by those authorities, and the names and addresses of the relevant governmental authorities responsible for the control of the certificates of origin Form A; and subsequently – in the framework of administrative cooperation - assist the EC by allowing the customs authorities of Member States to verify the authenticity of the document or the accuracy of the information regarding the true origin of the products in question (see Article 81(1) of Regulation No 2454/93).

The customs authorities of the Member States of importation may further require a translation of a proof of origin and may also require the import declaration to be accompanied by a statement from the importer to the effect that the products meet the conditions required for the application of the tariff preferences (see Article 84 of Regulation No 2454/93).

The Form A certificate constitutes the documentary evidence for the application of the tariff preferences. A certificate of origin Form A may be issued only where it can actually serve as the documentary evidence required for the purposes of the tariff preferences (see Article 81(2) of Regulation No 2454/93). Therefore, under the customs regulations it is the responsibility of the competent administrative authorities of the exporting country to take any steps necessary to verify the origin of the products and to check the other statements on the certificate (see Article 83 of Regulation No 2454/93).

**a. Methods of administrative cooperation**

In the framework of administrative cooperation, beneficiary countries are required to inform the Commission of the names and addresses of the governmental authorities situated in their territory which are empowered to issue certificates of origin Form A, together with specimen impressions of the stamps used by those authorities, and the names and addresses of the relevant governmental authorities responsible for the control of the certificates of origin Form A and the invoice declarations. The stamps referred to are valid as from the date of receipt by the Commission of the specimens.

Subsequently, the Commission forwards this information to the customs authorities of the Member States. When these communications are made within the framework of an amendment of previous communications, the Commission indicates the date of entry into use of those new stamps according to the instructions given by the competent governmental authorities of the beneficiary countries (see Article 93 of Regulation No 2454/93).

Subsequent verifications of certificates of origin Form A are carried out at random or whenever the customs authorities in the EC have reasonable doubts as to the authenticity of such documents, the originating status of the products concerned or the fulfilment of the other requirements (see Article 93(1) of Regulation No 2454/93).
With a view to verification of the certificates, the customs authorities in the EC return the certificate of origin Form A or a copy of the document, to the competent governmental authorities in the exporting beneficiary country giving, where appropriate, the reasons for the enquiry. Any documents and information obtained suggesting that the information given on the proof of origin is incorrect is to be forwarded in support of the request for verification (see Article 93(2) of Regulation No 2454/93).

When an application for subsequent verification has been made by the customs authorities of the Member States, such verification is to be carried out and its results communicated within a maximum of six months. The results of the verification procedure will establish whether the proof of origin in question applies to the products actually exported and whether these products can be considered as products originating in the beneficiary country or in the EC (see Article 93(3) of Regulation No 2454/93).

If in cases of reasonable doubt there is no reply within the six months or if the reply does not contain sufficient information to determine the authenticity of the document in question or the real origin of the products, a second communication is to be sent to the competent authorities. If after the second communication the results of the verification are not communicated to the requesting authorities within four months, or if these results do not allow the authenticity of the document in question or the real origin of the products to be determined, the requesting authorities will, except in exceptional circumstances, refuse entitlement to the tariff preferences (see Article 93(5) of Regulation No 2454/93).

Where the verification procedure or any other available information appears to indicate that the applicable requirements of the EC’s Custom Code are being contravened, the exporting beneficiary country is required, on its own initiative or at the request of the EC, to carry out appropriate inquiries or arrange for such inquiries to be carried out with due urgency to identify and prevent such contraventions (see Article 93(6) of Regulation No 2454/93).

For the purposes of the subsequent verification of certificates of origin Form A, copies of the certificates, as well as any export documents referring to them, are to be kept for at least three years by the competent governmental authorities of the exporting beneficiary country (see Article 93(7) of Regulation No 2454/93).

\[b)\] **Goods with a non-preferential origin**

\[i)\] **Universal Certificates of Origin**

Universal Certificates of Origin are used in relation to goods with a non-preferential origin which are imported in and exported from the EC (see below for proof of origin of goods with a preferential origin), when the origin has to be proved on importation in the country of destination by the production of a certificate of origin (see Article 47 of Regulation No 2454/93).
A universal certificate of origin certifies that a product to which it relates originates in a specific country. In order to perform this function, the certificate must fulfil certain conditions. The certificate must be drawn up in a specific form (see Article 48(2), Article 50 and Annex 12 of Regulation No 2454/93), by a reliable authority or agency duly authorized for that purpose by the country of issue and it must contain certain mandatory particulars for the purpose of identifying the product to which it relates (see Article 47 of Regulation No 2454/93).

The certificate is to measure 210 × 297 mm, although a tolerance of up to minus 5 mm or plus 8 mm in the length is allowed. The paper used is to be white, free of mechanical pulp, dressed for writing purposes and weigh at least 64 g/m² or between 25 and 30 g/m² where air-mail paper is used. It must have a printed guilloche pattern background in sepia such as to reveal any falsification by mechanical or chemical means (see Article 50(1) of Regulation No 2454/93). Certificates are to be printed in one or more of the official languages of the EC or, depending on the practice and requirements of trade, in any other language (see Article 50(2) of Regulation No 2454/93).

Each origin certificate (and copies thereof) must bear a serial number by which it can be identified (see Article 52 of Regulation No 2454/93). In addition, the competent authorities or authorized agencies of the Member States may number such documents by order of issue.

Certificates issued by the competent authorities or authorised agencies of the Member States must also comply with the conditions just discussed (see Article 48(1) of Regulation No 2454/93). These certificates certify that goods originate in the European EC, although when the exigencies of export trade so require, they may also certify that the goods originate in a particular Member State (see Article 48(3) of Regulation No 2454/93). The competent authorities or authorized agencies of the Member States which have issued certificates of origin are required to retain the applications for a minimum of two years.

ii) Certificates of origin for certain agricultural products subject to special import arrangements

Certificates of origin relating to certain agricultural products originating in third countries for which special non-preferential import arrangements have been established, are to be distinguished from universal origin certificates and must fulfil certain specific requirements in terms of their form and mandatory particulars (see Article 56(1) and Annex 13 of Regulation No 2454/93). Besides, the implementing provisions of the Customs Code prescribe methods of administrative cooperation for the verification of the authenticity of those certificates (see Articles 63 to 65 of Regulation No 2454/93).

The certificates may consist only of a single sheet identified by the word ‘original’ next to the title of the document. If additional copies are necessary, they shall bear the designation ‘copy’ next to the title of the
document. The competent authorities in the EC may only accept as valid the original of the certificate of origin (see Article 57(2) of Regulation No 2454/93).

The certificate is to measure 210 × 297 mm, although a tolerance of up to plus 8 mm or minus 5 mm in the length is allowed. The paper used is to be white, not containing mechanical pulp, and may not weigh less than 40 g/m². The face of the original is to have a printed yellow guilloche pattern background making any falsification by mechanical or chemical means apparent. Lastly, the certificate is to be printed and completed in one of the official languages of the EC (see Article 58 of Regulation No 2454/93).

Each certificate of origin is to bear a serial number, whether or not printed, by which it can be identified, and must be stamped by the issuing authority and signed by the person or persons empowered to do so, and the issuing authority must keep a copy of each certificate issued (see Article 61 of Regulation No 2454/93).

a. Methods of administrative cooperation

The use of the special non-preferential import arrangements using the certificates discussed directly above is subject to the setting up of an administrative cooperation procedure. To this end the third countries concerned must send the European Commission the names and addresses of the issuing authorities for certificates of origin together with specimens of the stamps used by the said authorities, the names and addresses of the authorities to which requests for the subsequent verification of origin certificates should be sent.

Subsequently, the Commission will transmit the information provided by the third countries to the competent authorities of the Member States. Where the third countries in question fail to send this information to the Commission, the competent authorities in the EC must refuse access entitlement to the special import arrangements (see Article 63 of Regulation No 2454/93).

The verification of certificates of origin is to be carried out at random and whenever reasonable doubt has arisen as to the authenticity of the certificate or the accuracy of the information it contains. For the purposes of verification, the competent authorities in the EC will return a certificate of origin to the governmental authority designated by the exporting country, giving, where appropriate, the reasons of form or substance for an enquiry. The authorities will also provide any information that has been obtained suggesting that the particulars given on the certificates are inaccurate or that the certificate is not authentic.

The result of verifications is to be communicated to the competent authorities in the EC as soon as possible (see Article 65(1) of Regulation No 2454/93). The results must make it possible to determine whether the origin certificates remitted for verification apply to the goods actually exported and whether
the latter may actually give rise to application of the special importation arrangements concerned. If there is no reply within a maximum time limit of six months to requests for subsequent verification, the competent authorities in the EC will definitively refuse to grant entitlement to the special import arrangements (see Article 65(2) of Regulation No 2454/93).

3) Legalisation formalities restricting the use of these Public Documents

Most of the EC instruments and free trade agreements discussed in relation to the EC’s Customs Union and the 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 that are used to certify documents used as proof of a goods’ origin or EC status. Besides, they usually provide for administrative cooperation and mutual assistance between authorities in relation to the verification of such documents.

It is submitted that only in the absence of such specific rules and procedures aimed at ensuring the authenticity of documents and allowing for the verification of the authenticity of such documents in cases where reasonable doubt exists, legalisation formalities arguably remain of practical relevance. In this regard we can further observe that the Hague 1961 Apostille Convention does not apply to administrative documents dealing directly with commercial or customs operations (see Article 1(2)(b) of the Convention), which means that documents may be subject to the conventional legalisation formalities.

a) Forged A.TR. Certificates and lack of administrative cooperation

A recent case before the Court of First Instance illustrates the practical importance of the issue of authenticity of documents used as evidence in the process of proving the (preferential) origin of goods. Case T-23/03 CAS SpA v Commission of the European Communities [2007] ECR 00000

The case was centred around the 1963 Association Agreement between Turkey and the EC and the authenticity of certificates of origin issued in Turkey.

The applicant (CAS) was a company incorporated under Italian law and a 95% subsidiary of a German company. CAS processes imported fruit juice concentrates and is also an importer of such in Italy. CAS imported juice concentrates into the EC (via Italy) using A.TR. certificates with the effect that those products would be exempted from customs duties under the Association Agreement (and its Protocol).

As per normal procedure, the Italian authorities carried out a post-clearance documentary check on the authenticity of the certificates and sent a request for verification of authenticity to the Turkish

---

53 Case T-23/03 CAS SpA v Commission of the European Communities [2007] ECR 00000
The Turkish authorities replied that 22 of the certificates were false and so OLAF began an investigation in Turkey. The number later rose to 32 considered to be false and 16 classified as invalid (i.e., although they had been issued by the Turkish authorities, the goods in question did not originate in Turkey). Because of this, none of the goods related to these 48 certificates could classify for preferential treatment and so the Italian authorities demanded the relevant customs duties.

CAS claimed that such duties should not have been entered into the accounts post-clearance of the goods and that the import duties claimed should be repaid and supported its claim through a pleading of good faith and errors on the part of the authorities involved. The Italian authorities then asked the Commission whether it was appropriate to waive the subsequent account entry or to repay the duties.

By a decision dated 18 October 2002, the Commission concluded that it was appropriate to enter in the accounts the import duties and that it was appropriate to repay import duties only with respect to those 16 invalid certificates since in that situation, CAS was considered to be in a ‘special situation’ within the meaning of the EC Customs Code since no deception or obvious negligence could be attributed to CAS (Article 239 Regulation No 2913/92). As for the 32 other certificates, the Commission did not think there was a ‘special situation’ and decided it was not appropriate to repay the import duties.

There was dispute as to the classification of one certificate in particular where it was ambiguous as to whether the Turkish authorities meant that the certificate was invalid or whether it was forged. The Court of First Instance emphasized the importance of the division of powers between the authorities of the exporting and importing countries to properly ensure the correct functioning of the system and stated, as follows, that: “the authorities of the exporting country are in the best position to verify directly the facts which determine origin.”

The Court further held that the system will only work if the importing authorities accept the legal determinations of the exporting authorities: “the recognition of such decisions (…) is necessary in order that the EC can (…) demand that the authorities of other countries with which it has concluded free-trade agreements accept the decisions taken by the customs authorities of the Member States concerning the origin of products exported from the EC to those non-member countries.” The Turkish authorities had clearly concluded that the certificate had been forged.

CAS put forth various arguments to show that the stamps and signatures applied to the certificates at issue were indeed issued and authenticated by the Turkish authorities. The Court stated that the issuing authorities have the exclusive competence to determine whether the documents they have issued are

---

54 Article 15 of Decision No 1/96 of the EC-Turkey Customs Cooperation Committee provides that in order to ensure the proper application of the provisions of the present Decision, the Member States and Turkey are to assist each other, through their respective customs administrations and within the framework of mutual assistance in checking the authenticity and accuracy of the certificates; see also Article 14(1) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee that provides for the exchange of specimen stamps and a verification procedure.
authentic. CAS also argued that because the Italian authorities compared specimen impressions of stamps it held with the certificates at issue before it accepted them, it must be concluded that they were authentic. The Court disagrees: a party cannot expect the continuing validity of certificates based on an initial acceptance by customs authorities when the role of these authorities in their initial acceptance of declarations does not preclude subsequent verifications of authenticity.

CAS then claimed that officially registration of the certificates means they were authentic. The court finds that the keeping of registers is not mandated under either the Association Agreement or the implementation provisions; rather, the only thing required is that the document number be entered into box 12 of the certificates and, besides, entry into a register does not automatically indicate authenticity.

CAS also attributed fault to the Commission. The Commission seriously failed to discharge its duty to protect importers through its failure to send to national customs authorities specimens of stamps and signatures used in Turkey. The Court also rejects this argument and notes that the only article in the implementation regulation of the EC Customs Code requiring such transmission of specimens (see Article 93 Regulation No 2913/92) was inapplicable to the case at hand because that article is concerned with EC relations with developing countries (GSP), which clearly does not affect Turkey. Furthermore, the Association Agreement itself contains no such obligation.

A recent decision of the EC-Turkey Customs Cooperation Committee (Decision No 1/2006) provides that the customs authorities of the Member States of the EC and of Turkey are now required to provide each other, through the European Commission, with specimen impressions of stamps used in their customs offices for the issue of A.TR. movement certificates and with the addresses of the customs authorities responsible for verifying those certificates (see Article 14(1) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee). Besides, the EC and Turkey are to assist each other, through the competent customs authorities, in checking the authenticity of A.TR. movement certificates and the correctness of the information given in them (see Article 14(2) of Decision No 1/2006 of the EC-Turkey Customs Cooperation Committee).

4) Intra-EC movement of goods

Goods originating in one EU Member State have the right to be exported from that state and the right to be imported into another Member State (see respectively Articles 29 and 28 EC). Quantitative restrictions on imports and exports and measures having equivalent effect to quantitative restrictions imposed by Member States are prohibited (see Articles 28 and 29 EC).

Both Articles 28 and 29 are subject to an exhaustive list of derogations (see Article 30 EC). These derogations concern matters such as public policy, public security, and health, and can be invoked by the
home or host state to justify a restriction on the free movement of goods as described consisting, for example, of a refusal to allow the import or export of particular goods.

Articles 28 and 30 EC entail *inter alia* that Member States of destination of a good cannot forbid the sale on their territories of products lawfully marketed in another Member State and which are not subject to EC harmonisation, unless the technical restrictions laid down by the Member State of destination are justified on the grounds described in Article 30 EC, or on the basis of overriding requirements of general public importance recognised by the Court of Justice's case law, and that these restriction are proportionate. If a Member State successfully invokes one of the express derogations provided for in the Treaty, it creates a barrier to inter-state trade which can be eliminated through EC harmonisation measures.

**a) Proof of the origin of EC goods**

Subject to certain exceptions, all goods in the customs territory of the EC are deemed to be EC goods, unless it is established that they do not have EC status (see Article 313(1) of Regulation No 2454/93).

In *Dassonville* the Court explained that the requirement by a member-State of a certificate of origin (or authenticity) which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another member-State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty (see Article 28 EC), since all trading rules enacted by member-States which are capable of hindering, directly or indirectly, actually or potentially, intra-EC trade are to be considered as measures having an effect equivalent to quantitative restrictions.

Formalities required by a member-State for the purpose of proving the origin of a product, which only *direct* importers of the product are really in a position to satisfy without facing serious difficulties, may constitute a means of arbitrary discrimination or a disguised restriction on trade between member-States (see Article 30 EC) even without having to examine whether or not such measures are covered by Article 28 EC.

If a member-State takes measures to prevent irregular practices (e.g. fraud in relation to the origin of goods) it is subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between member-States and should, in consequence, be accessible to all EC nationals.

**b) EC status documents**

---

55 *Case 8/74 Procureur du Roi v Benoit and Gustave Dassonville* [1974] ECR 00837 6-8
56 *Case 8/74 [in 55]* 5
Documents acceptable for proving EC status, known as “EC status documents”, include T2L or T2LF certificates, which are in fact copy 4 or 4/5 of the Single Administrative Document (SAD) that was established in 1988 on the basis of the EFTA - EEC Convention on the simplification of formalities in trade in goods; or a properly completed commercial document (invoice or transport document or shipping company’s manifest).57

\[a. \quad \textit{Administrative cooperation}\]

In the framework of the operation of the Customs Union, the customs administrations of the Member States are required to assist one another in checking the authenticity (and accuracy) of the documents and verifying that the applicable procedures concerning the proof of the EC status of goods have been correctly applied (see Article 314(a) of Regulation No 2454/93).

\[c) \quad \textit{Proof of the conformity of EC goods}\]

In \textit{Bouchara}58 the Court held that, in principle, a national provision requiring the person responsible for placing a product on the national market for the first time to verify its conformity with the rules in force on the said market regarding the health and safety of persons, fair trading and consumer protection and rendering that person liable in criminal law for breach of that requirement is compatible with EC law.

This is on condition that its application to products manufactured in another Member State is not subject to requirements going beyond what is necessary to achieve the objective pursued, having regard, on the one hand, to the public interest in question and, on the other, to the means of proof normally available to an importer.

The Court stipulated that an importer must be entitled to rely to this end on certificates issued by the authorities of the Member State of production or by a laboratory approved by the said authorities for that purpose, or, if the legislation of that Member State does not require the production of such certificates, on other attestations providing like degree of assurance.

The European Commission has proposed a number of new measures which are intended to stimulate the intra-community trade in industrial goods.59 These measures are aimed at ensuring that will make it easier for companies, especially SMEs, to trade their products in the Union.

\[57 \text{Generally speaking, proof that goods have EC status may be established solely by one of the specific documents established by the provisions implementing the EC’s Customs Code, which differ depending on the specific type of good in question and its movement (see Article 314(4) of Regulation No 2454/93), but include T2L Documents (see Article 315 of Regulation No 2454/93); TIR carnets or ATA carnets (see Article 319 of Regulation No 2454/93); Excise Duty Administrative Accompanying Documents (see Regulation No 2719/92); T2M forms (see Article 325 of Regulation No 2454/93); Form 302 labels (see Article 462 of Regulation No 2454/93); Annex 109 forms (see Article 812 of Regulation No 2454/93); and T5 Control Copies (see Article 843 of Regulation No 2454/93).}\]

\[58 \text{Case 25/88 Criminal proceedings against Esther Renée Bouchara, née Wurmser, and Norlaine SA [1989] ECR 1105 20}\]
i) Example: Car registration

Using the example of free movement of motor vehicles we will discuss the current state of and prospective framework for intra-EU free movement of goods and the role of Public Documents in this context.

EU legislation has made it easier for consumers in recent years to buy products from Member States other than their own. One example is the purchase of a motor vehicle, which has become relatively straightforward. Nonetheless, all of the Member States require the driver of a vehicle registered in another Member State to hold a certificate of registration corresponding to that vehicle, in order that it may be used on the roads in their territory. All of the Member States further require a document certifying that registration and the technical characteristics of the vehicle.

According to the Court of Justice, registration is the natural corollary of the exercise of the powers of taxation in the area of motor vehicles. It facilitates supervision both for the Member State of registration and for other Member States, since registration in one Member State constitutes proof of payment of taxes on motor vehicles in that State.60

Every individual must register his vehicle in the Member State in which he is normally resident. The competent authorities in the Member State of temporary import may demand, but must equally accept, proof of the place of normal residence of a person for the purpose of an exemption from taxes on motor vehicles in that State by any appropriate means, such as their identity card or any other valid document (see Article 7(2) of Directive 182/83/EEC).61

If the competent authorities of the Member State of importation have doubts as to the validity of a statement as to normal residence made or for the purpose of certain specific controls, they may request additional information or evidence (see Article 7(2) of the Directive).

Notwithstanding the existence of EC measures in the area, which will be introduced below, the Commission identified problems arising in practice for persons buying a motor vehicle when trying to

---


legally register that vehicle at home.\textsuperscript{62} This remains the source of many complaints, in particular due to burdensome type-approval requirements and registration procedures.

The problems appear to be the result of bureaucratic, complicated registration procedures and burdensome type-approval certificates needed. As a result, many people do not buy a car from another Member State due to the hassle and extra cost it can involve.

\textit{ii) Relevant EC measures and associated Public Documents}

\textit{a. EC certificates of conformity}

At the EC level, an EC type-approval procedure was established for each vehicle type.\textsuperscript{63} This procedure allows authorities in the Member States to check the compliance with vehicle requirements that have been harmonised at the EC level, and that each Member State can recognise checks carried out by other Member States.

The procedure enables each Member State to ascertain whether a vehicle type has been submitted to the checks laid down by the specific type approval Directive and is listed in a type-approval certificate (see Article 4 of the Directive).

The competent authorities of each Member State are obliged to send to the competent authorities of the other Member States a copy of the information document and approval certificate for each vehicle type which they approve or refuse to approve (see Article 5(1) of the Directive).

The procedure enables manufacturers to issue certificates of conformity, in their capacity as holders of a type-approval certificate, for all vehicles which conform to an approved vehicle type (see Article 5(2) of the Directive). One could argue that EC certificates of conformity are not Public Documents \textit{strictu sensu} since they are not executed by public authorities. On the other hand, they are executed on the basis of an explicitly attributed competence under EC law and Member State authorities are required to accept certificates of conformity as binding proof of type-approval.

The binding nature of EC certificates of conformity is justified as a result of the far-reaching harmonisation of technical requirements and the cooperation between the competent authorities of the Member States. Accordingly, vehicles that are accompanied by a certificate of conformity must be considered by all authorities in the Member States as meeting the technical requirements.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} Commission interpretative communication on procedures for the registration of motor vehicles originating in another Member State [2007] OJ C 68 15
\end{itemize}
\end{footnotesize}
Member States as conforming to their own laws. In other words, a Member State may not refuse to register or prohibit the sale, entry into service or use of any new vehicle on grounds relating to its construction or functioning, where that vehicle is accompanied by a certificate of conformity (see Article 7(1) of the Directive).

**b. European registration certificates for motor vehicles**

Harmonising measures have been established at the EC level establishing an EC motor vehicle registration certificate. Directive 1999/37/EC\(^{64}\) harmonises both the form and content of motor vehicle registration certificates (see Article 3 and Annexes I and II of the Directive).

The Directive prescribes overall dimensions of the registration certificate and indicates that the paper used for the registration certificate must be made secure against forgery by using a combination of certain techniques, e.g. graphics, watermark, fluorescent fibres, or fluorescent imprints (see Annexes I and II of the Directive).

The establishment of a uniform registration certificate was aimed at facilitating its comprehension and thus aid the free movement, on the roads in the territory of the other Member States, of vehicles registered in a Member State.

Furthermore, the harmonisation of the uniform certificate was thought to facilitate the re-entry into service of vehicles that have previously been registered in another Member State, thereby contributing to the proper functioning of the internal market. Finally, the use of one uniform certificate was expected to facilitate checks specifically intended to combat fraud and the illegal trade in stolen vehicles.

**c. Administrative cooperation**

The Directive provides for close cooperation between Member States, based on an effective exchange of information (see Recital 9 and article 5 of the Directive). The Directive stipulates that the registration certificate issued by a Member State must be recognised by the other Member States for the identification of the vehicle in international traffic or for its re-registration in another Member State (see Article 4 of the Directive).

**iii) Legalisation formalities restricting the use of these Public Documents**

**a. Directive 1999/37 contains no explicit exemptions from legalisation**

---

European registration certificates for motor vehicles have not been expressly exempted from legalisation formalities that apply in the Member States, which means that existing formalities continue to apply as far as they have not been simplified or abolished, notwithstanding the far-reaching harmonisation of the form and content of European registration certificates for motor vehicles type and the enhanced administrative cooperation that is required between the competent authorities in the Member States.
(ii) Unrestricted entry and residence for EU citizens and their family

1) Introduction

The introduction of citizenship of the Union "constitutes, for the citizen, the guarantee of belonging to a political community under the rule of law". This was the opinion of the European Parliament in its Resolution on the second Commission report on citizenship of the Union. In this report, the Commission states that citizenship of the Union "raised citizens’ expectations as to the rights that they expect to see conferred and protected". The conclusions of the Cardiff European Council recognised that "a sustained effort is needed by the Member States and all the institutions to bring the Union closer to people by making it more open, more understandable and more relevant to daily life".

Citizenship of the EU is recognised as the fundamental status of nationals of the individual Member States. The idea of EC citizenship and the notion of ‘People’s Europe’ precede the symbolic move from European Economic EC to European EC with the Maastricht Treaty. However, the concept of Union citizenship and the implication of this status have developed quite significantly in recent years, which is exhibited in the ECJ’s case law. In particular, there is now a directly effective right for all EU citizens to move and reside freely within the territory of the Member States.

The right to enter the territory of another Member State and to reside there for the purposes mentioned in the treaty follows from the EC treaty or, as the case may be, from the provisions adopted for its implementation (see Article 18(1) EC). This right is conferred directly on EU citizens by the Treaty and exists independently from the fulfilment of the Member States’ administrative procedures.

The Treaty further prohibits discrimination on the grounds of nationality (see Article 12 EC). This right not to be discriminated against is restricted in scope ratione personae to persons who reside lawfully on the territory of a host Member State and have the status of EU citizen. An EU citizen who lawfully resides in the territory of a host Member State can consequently rely on the protection against discrimination in all situations that come within the scope of EC law.

65 Resolution on the second report from the Commission on citizenship of the Union (COM(97) 230 C4-0291/97) [1998] OJ C 226 61
66 Second report from the Commission on citizenship of the Union COM(97) 230 final
Notwithstanding the directly applicable right of free movement as described above, EC law has not deprived the Member States of the power to maintain certain measures that enable them to have precise information of movements of population in their respective territories. The measures of Member States that are still sanctioned under EC law and the relevant Public Documents that these measures involve are discussed below.

2) Relevant EC measures and associated Public Documents

a) Directive 2004/38

The right to move and reside freely throughout the EC is subject to the limitations and conditions laid down in the Treaty and those laid down in the measures adopted to give it effect. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, is a recent restatement and development of the law in this regard. It constitutes a codification of the existing secondary legislation and case law of the Court of Justice.

b) EC instruments that were amended or repealed

The introduction to the Directive indicates a need for a single legislative act in order to remedy the existing sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right. Prior to the entry into force on 29 April 2004 of Directive 2004/38 the relevant EC legislative framework consisted of multiple instruments dealing separately with workers, self-employed persons, and students, as well as other economically inactive persons.

Directive 2004/38 amends Articles 10 and 11 of Regulation 1612/68 on freedom of movement for workers within the EC, and repealed the following acts: Directive 68/36 on the abolition of restrictions on movement and residence within the EC for workers of Member States and their families; Directive 73/148 on the abolition of restrictions on movement and residence within the EC for nationals of Member States with regard to establishment and the provision of services; Directive 90/364 on the right of residence; Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity; and Directive 93/96 on the right of residence for students.


69 Recital 4 of Directive 2004/38/EC

70 The period for transposition granted in the Directive to the Member States in order to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive ended on 30 April 2006 (see Article 40(1) of the Directive)
The Directive distinguishes three distinct free movement rights granted to three separate categories of migrants.

**c) Categories of beneficiaries**

The beneficiaries of the rights contained in the Directive are split into three categories of migrants: (1) all Union citizens who move to or reside in a Member State other than that of which they are a nationals; (2) the family members of the latter described in terms of (a) the spouse; (b) the partner\(^\text{71}\); (c) the direct descendants who are under the age of 21 or are dependants including those of the spouse or partner; and (d) the dependent direct relatives in the ascending line and those of the spouse or partner; and (3) certain other family members who do not fall within the first group of family members (see Article 2 of the Directive).

The last mentioned category includes persons who are dependants or members of the Union citizen's household, or who on serious health grounds require personal care by the Union citizen. Finally, the last category further includes partners of Union citizens whose relationship does not qualify as a registered partnership falling in category (b), but which is nonetheless of a demonstrably durable nature.

**d) Categories of rights**

The first category of rights dealt with in the Directive concerns the right of exit and entry (see Articles 4 and 5 of the Directive); the second, the right of residence for up to three months and for more than three months (see Articles 6 and 7 of the Directive); and finally, the right of permanent residence (see Articles 16 to 18). We will not discuss here in detail how the different categories of rights are attributed to the different categories of beneficiaries discussed above. Instead we will focus on the proof that may be demanded by the Member States in the process of recognising the rights of the beneficiaries under the Directive.

**i) Right to equal treatment**

Subject to specific provisions in the Treaty and secondary law, the Directive confers on Union citizens residing on the basis of this Directive in the territory of the host Member State the right to equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right is also

\(^{71}\) With a view to the differences between the Member States in the willingness to recognise certain forms of partnerships, the Directive describes the term as the “partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State” (see Article a(2)(b) of the Directive).
extended by the Directive to family members who are not nationals of a Member State and who have the right of residence or permanent residence (see Article 24(1) of the Directive).

ii) Restrictions
The Member States are allowed under the Directive to restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health as far as the measures taken on those grounds comply with the principle of proportionality and are based exclusively on the personal conduct of the individual concerned (see Article 27(1) of the Directive). The Directive clarifies that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention are not accepted (see Article 27(2) of the Directive).

a. Cooperation between competent authorities
In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or the residence card, the host Member State may, if it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries are not to be made as a matter of routine (see Article 27(3) of the Directive).

e) Supporting documents issued in another (Member) state
The Directive clarifies that the supporting documents that may be required by the Member States prior to recognising the existence of an EC right within the scope of the Directive have been comprehensively specified in the relevant provisions of the Directive in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise in practice of the right of entry and residence (see Recital 14 of the Directive).

i) Right of entry
   a. Valid passports, identity card and visa
The Directive requires the Member States to grant Union citizens leave to enter their territory with a valid identity card or passport and family members who are not nationals of a Member State leave to enter their territory with a valid passport (see Article 5(1) of the Directive).

Family members who are not nationals of a Member State may only be required to have an entry visa in accordance with Regulation 539/2001/EC or, where appropriate, with national law. The possession of a
valid residence card (see Article 10 of the Directive) further exempts such family members from any visa requirement.

b. Other means of evidence

Furthermore, the Directive provides that where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State where entry is sought is required, before turning them back, to give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence (see Article 5(4) of the Directive).

c. Requirement to report presence

The Member States are allowed to require the persons entering their territory to report their presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions (see Article 5(5) of the Directive).

ii) Right of residence for up to three months

a. Valid passports and identity cards

The right of residence for Union citizens on the territory of another Member State for a period of up to three months may not be subjected to any conditions or any formalities other than the requirement to hold a valid identity card or passport (see Article 6(1) of the Directive). The same applies for family members who are not nationals of a Member State, accompanying or joining the Union citizen. They may be required to present a valid passport (see Article 6(2) of the Directive).

iii) Right of residence for more than three months

The Directive provides that all Union citizens have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or (c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means.
as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c) above (see Article 7(1) of the Directive).

Besides, the Directive stipulates that the right of residence for more than three months also extends to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that the Union citizen satisfies the conditions referred to above in (a), (b) or (c) (see Article 7(2) of the Directive).

In relation to workers or self-employed persons, the Directive indicates that a Union citizen who is no longer a worker or self-employed person retains the status of worker or self-employed person in the following circumstances for the purpose of the Directive if he/she: (a) is temporarily unable to work as the result of an illness or accident; (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office; (c) is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. The status of worker is retained for no less than six months if the worker embarks on vocational training. Unless the worker is involuntarily unemployed, the retention of the status of worker requires the vocational training to be related to the previous employment (see Article 7(3) of the Directive).

In the situation in which a Union citizen is enrolled at a private or public establishment for the principal purpose of following a course of study (see Article 7(1)(c) of the Directive), only his or her spouse, registered partner and dependent children have a right of residence as family members of a Union citizen. In this situation, the dependent direct relatives in the ascending lines and those of their spouse or registered partner do not benefit. The Directive merely requires the Member States to facilitate their entry and residence in accordance with their national laws (see Article 7(4) in conjunction with Article 3(2) of the Directive).

a. **Registration requirement and registration certificates: Union citizens**

For periods of residence longer than three months, the host Member State may require Union citizens and their family members to register with the domestic competent authorities. The obligation to register may also potentially apply to stays for periods shorter than three months (see Article 5(5) of the Directive). The Directive requires the Member States to immediately issue registration certificates stating the name and address of the person registering and the date of the registration.
b. Valid identity cards or passports; documents proving (self)employment, the existence of a family relationship or of a registered partnership, direct descendency, dependency, sickness insurance, and sufficient resources

The Member States may insist on the production of certain documentary evidence prior to issuing the registration certificate (see Article 8(3) of the Directive). We are aware of the fact that not all of the documentary evidence referred to below involves the production necessarily of foreign (public) documents. This is the case for example in relation to proof of employment, enrolment and comprehensive sickness insurance in the host Member States which will normally be provided by means of domestic (public) documents.

Union citizens who are workers or self-employed persons (see article 7(1)(a) of the Directive) may be required to present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons (see Article 8(3) of the Directive).

Union citizens who have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State (see Article 7(1)(b) of the Directive) may be required to present a valid identity card or passport and proof of sufficient resources and comprehensive sickness insurance in the host Member State (see Article 8(3) of the Directive).

Union citizens who are enrolled at a private or public establishment for the principal purpose of following a course of study (see Article 7(1)(c) of the Directive) may be required to present a valid identity card or passport, provide proof of enrolment at an accredited establishment, and of comprehensive sickness insurance cover and the declaration or equivalent means (see Article 8(3) of the Directive).

Family members of Union citizens, who are themselves Union citizens, may be required to present a valid identity card or passport; a document attesting to the existence of a family relationship or of a registered partnership; where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining; or documents proving direct descendency from the Union citizen or dependency on the Union citizen (see Article 8(5)(a) to (d) of the Directive).

Other family members, irrespective of their nationality, who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen may need to supply a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen (see Article 8(5)(d) and (e) of the Directive).
The partner with whom a Union citizen has a durable relationship may be required to present proof of the existence of a durable relationship with the Union citizen (see Article 8(5)(f) of the Directive).

c. **Residence cards: family members who are non-EU nationals**

The Directive requires the Member States to issue residence cards – “Residence card of a family member of a Union citizen” - to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months (see Article 9(1) of the Directive). The function of the residence card is to provide proof of the right of residence of the non-EU national family members of a Union citizen (see Article 10(1) of the Directive).

The Member States may insist on the production of certain documentary evidence prior to issuing the residence card (see Article 10(2) of the Directive). As already indicated in relation to registration certificates, we are aware of the fact that not all of the documentary evidence referred to below involves the production necessarily of foreign (public) documents.

d. **Valid passports; and documents proving the existence of a family relationship or of a registered partnership, direct descendency, dependency, sickness insurance, and sufficient resources**

Family members of Union citizens, who are themselves non-EU nationals may be required to present a valid passport; a document attesting to the existence of a family relationship or of a registered partnership; where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining; or documents proving direct descendency from the Union citizen; or dependency on the Union citizen (see Article 10(2)(a) to (d) of the Directive).

Other family members, irrespective of their nationality, who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen may need a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen (see Article 10(2)(d) and (e) of the Directive).

The partner with whom a Union citizen has a durable relationship may be required to present proof of the existence of a durable relationship with the Union citizen (see Article 10(2)(f) of the Directive).

iv) **Permanent residence cards**
Union citizens who have resided legally for a continuous period of five years in the host Member State have the right of permanent residence there (see Article 16(1) of the Directive). This right also applies to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years (see Article 16(2) of the Directive).

a. Permanent residence cards

The Directive requires the Member States to issue, upon application by a person entitled to permanent residence, a document certifying permanent residence after having verified the duration of residence (see Article 19(1) of the Directive). The same applies to family members who are not nationals of a Member State, although the residence card will be renewable automatically every 10 years (see Article 20(1) of the Directive).

v) General provisions concerning residence documents

The Directive stipulates that the Member States are prohibited, under all circumstances, from making the possession of a registration certificate, a document certifying permanent residence, a certificate attesting submission of an application for a family member residence card, a residence card or a permanent residence card, a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof (see Article 25 of the Directive).

3) Legalisation formalities restricting the use of these Public Documents

a) Directive 2004/38 contains no explicit exemptions from legalisation

Directive 2004/38 does not explicitly exempt the Public Documents we discussed above from legalisation formalities that apply in the member States. This means, in principle, that the regulation and implementation of legalisation formalities aimed at verifying the authenticity of foreign Public Documents remain subject to the domestic laws of the Member States.

The Directive does, however, contain certain passages that shed some light on the question whether formalities to ensure the authenticity of the documents required in the process of recognising the rights protected by the Directive can be justified.

72 The issue was equally neglected in the instruments that the Directive amended or repealed.
Firstly, the Directive indicates in general terms that, “The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined (…)” (see Recital 7 of the Directive).

Secondly, in relation to the right of residence for a period not exceeding three months, the Directive stipulates that, “Union citizens should have the right of residence (…) without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport (…)” (emphasis added; see Recital 9 and Article 6(1) of the Directive).

Thirdly, the Directive allows the Member State authorities to verify whether a Union citizen or his/her family members satisfies the conditions provided for by the Directive (see Article 14 in conjunction with Articles 7, 12 and 13 of the Directive). However, this competence exists only in specific cases where there is reasonable doubt as to the actual fulfilment of those conditions.

The Directive proscribes a systematic verification of the applicable conditions. When a competent authority doubts the authenticity of a document produced as proof of the fulfilment of the Directive’s conditions, the authority is arguably entitled to engage in a process of verification since doubt regarding a document’s authenticity is likely to cause reasonable doubt as to the actual fulfilment of those conditions.

Lastly, to guard against abuse of rights or fraud, notably (but not exclusively) marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, the Directive allows the Member States to adopt necessary measures. These measures may imply the refusal, termination or withdrawal of rights conferred by the Directive in the case of abuse of rights or fraud (see Article 35 of the Directive). Those measures are, however, subject to requirements of proportionality and certain procedural safeguards (see Articles 30 and 31 of the Directive).
(iii) Unrestricted entry and residence for workers

1) Introduction

Freedom of movement of workers implies the obligation for the Member States to abolish discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment (see Article 39 (2) EC). The freedom of movement of workers entails the right of workers of the Member States to accept offers of employment; to move freely within the territory of member States for this purpose; to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of the State laid down by law, regulation or administrative action; and to remain in the territory of a Member State after having been employed in that State, subject to the conditions contained in implementing EC legislation (see, respectively, (a), (b), (c), and (d) of Article 39(3) EC).

Approximately 1.5% of EU-25 citizens live and work in a Member State different from their country of origin – a proportion that has hardly changed for the last 30 years.73 Every year on average, 7.2% of EU citizens change their place of residence, of which 15% refer to a change in job as the main reason for the move. This compares to 16.2% of US citizens moving home each year, 17% for occupational reasons.74

On 22 February 2007 the European Commission published its report on the 2006 Year of Worker’s Mobility which was presented to the 27 Ministers for Employment. The report gives an optimistic assessment of the initiatives taken over recent years to improve ‘skills and mobility’: a Directive on the recognition of qualifications, a European sickness insurance card, the overhaul of ‘social security’ Regulations, a European Quality Charter for Mobility, a Directive on the free movement of researchers, a new Eures portal for those seeking employment, etc.

The report also points to specific ‘challenges to be taken up’. The report mentions in particular the crucial importance of the removal of legal, administrative and cultural obstacles to mobility which is described as a “global job, which demands a doubling of efforts in order to achieve the general objective, which consists in creating a European employment market”. Current initiatives in the field of social security, the portability of pension rights or the transferability of qualifications in non-regulated professions “must be fully implemented” and, if necessary, be “supplemented so as to create an environment in which geographical and professional mobility become a normal element of a career”.

73 Source: Eurostat

a) Administrations identified as main obstacles to mobility

Existing EU law intended to facilitate the mobility of labour and the free circulation of people in Europe is not being applied by local, regional, national and even EU authorities, as reported by citizens at a forum in Brussels. This citizens’ forum was organised by the European Citizen Action Service (ECAS) on 22 November 2006 and brought EU actors together with ordinary citizens who had experienced mobility.

Citizens generally criticised the lack of proper information, the imposition of unjustified requirements and formalities, and the lack of recognition of rights or status acquired abroad. People who had migrated to another EU country said that in most cases this concerned the country of origin as well as the country of destination.

2) Relevant EC measures and associated Public Documents

A number of implementing measures have been established at the EC level aimed at developing the freedom of movement of workers (see Article 40 EC). In this regard, we will consider in particular Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Directive 2004/38 amended Regulation 1612/68/EEC on freedom of movement for workers within the EC and replaced Directive 68/360/EEC on the abolition of restrictions on movement and residence within the EC for workers of Member States and their families.

Moreover, in relation to tax matters, we will refer to Commission Recommendation 94/79/EC on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident (see Article 155 EC).

The issue of the recognition of professional qualifications of workers is discussed separately below where we consider Directive 2005/36/EC on the recognition of professional qualifications.

a) Regulation 1612/68

75 Directive 2004/38/EC [n 68]


78 94/79/EC: Commission Recommendation of 21 December 1993 on the taxation of certain items of income received by non-residents in a Member State other than that in which they are resident [1994] OJ L 39 22

Regulation 1612/68 stipulates that any national of a Member State has, irrespective of his/her place of residence, the right to take up an activity as an employed person, and to pursue such activity within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State. This right includes, in particular, the right to take up available employment in the territory of another Member State with the same priority as nationals of that State (see Article 1 of the Regulation).

Besides, the nationals of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom (see Article 2 of the Regulation).

Under the Regulation, provisions laid down by law, regulation or administrative action and administrative practices of a Member State are proscribed where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment, where they are subjected to conditions not applicable in respect of their own nationals; or where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered (see Article 3 of the Regulation).

The preamble of Directive 90/364 on the right of residence emphasizes that a person can only genuinely exercise the right of free movement if this right is also granted to members of his or her family. The right of free movement for family members of EC workers is further substantiated in Regulation 1612/68 and is, as far as relevant for the present example below, granted to both the spouse and descendants (under 21 or dependant) of a worker who is a national of one Member State and is employed in another Member State (see Article 10(1) of Regulation 1612/68).

**b) Directive 2004/38**

Directive 2004/38, as discussed above, amended Regulation 1612/68 and replaced Directive 68/360. The Directive regards Union citizenship as the fundamental status of nationals of the Member States when they exercise their right of free movement and residence, whether these persons move in the capacity of workers, self-employed persons, students or other inactive persons. As far as the Directive contains specific provisions concerning workers, these will be discussed below.

---


To a certain extent, this discussion may at times appear repetitive in the light of the previous comprehensive evaluation of the Directive in relation free movement of union citizens and their family members. Notwithstanding this overlap, for purposes of clarity, the relevant provisions specifically aimed at Union citizens who move for the purpose of employment in another Member State and their family members are discussed here independently.

The Directive maintained certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State (see Article 17 of the Directive).

These advantages constitute acquired rights, conferred by Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State and Directive 75/34 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity.

i) Right of entry

a. Valid passports, identity card and visa
The Directive requires the Member States to grant Union citizens leave to enter their territory with a valid identity card or passport and family members who are not nationals of a Member State leave to enter their territory with a valid passport (see Article 5(1) of the Directive).

Family members who are not nationals of a Member State may only be required to have an entry visa in accordance with Regulation 539/2001/EC or, where appropriate, with national law. The possession of a valid residence card (see Article 10 of the Directive) further exempts such family members from any visa requirement.

b. Other means of evidence
Furthermore, the Directive provides that where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State where entry is sought is required, before turning them back, to give such persons every reasonable opportunity to obtain the necessary documents within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence (see Article 5(4) of the Directive).

c. Requirement to report presence
The Member States are allowed to require persons entering their territory to report their presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions (see Article 5(5) of the Directive).

ii) Right of residence for up to three months

a. Valid passports and identity cards

The right of residence for Union citizens on the territory of another Member State for a period of up to three months may not be subjected to any conditions or any formalities other than the requirement to hold a valid identity card or passport (see Article 6(1) of the Directive). The same applies for family members who are not nationals of a Member State, accompanying or joining the Union citizen. They may be required to present a valid passport (see Article 6(2) of the Directive).

iii) Right of residence for more than three months

The Directive provides that all Union citizens have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c) above (see Article 7(1) of the Directive).

Furthermore, the Directive stipulates that the right of residence for more than three months also extends to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that the Union citizen satisfies the conditions referred to above in (a), (b) or (c) (see Article 7(2) of the Directive).

In relation to workers or self-employed persons, the Directive indicates that a Union citizen who is no longer a worker or self-employed person retains the status of worker or self-employed person in the following circumstances for the purpose of the Directive if he/she: (a) is temporarily unable to work as the result of an illness or accident; (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office; (c) is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. The status of worker is retained for no less than six months if the worker embarks on vocational training. Unless the worker is involuntarily unemployed, the retention of the status of worker requires the vocational training to be related to the previous employment (see Article 7(3) of the Directive).
\textbf{a. Registration requirement and registration certificates: Union citizens}

For periods of residence longer than three months, the host Member State may require Union citizens and their family members to register with the domestic competent authorities. This potential obligation exists in addition to the possible obligation to report their presence within the territory of the host Member State for periods shorter than three months (see Article 5(5) of the Directive). The Directive requires the Member States to immediately issue registration certificates stating the name and address of the person registering and the date of the registration.

\textbf{b. Valid identity cards or passports; and documents proving (self)employment, the existence of a family relationship or of a registered partnership, direct descendency, dependency, sickness insurance, and sufficient resources}

The Member States may insist on the production of certain documentary evidence prior to issuing the registration certificate (see Article 8(3) of the Directive). We are aware of the fact that not all of the documentary evidence referred to below necessarily involves the production of foreign (public) documents. This is the case, for example, in relation to proof of employment, enrolment and comprehensive sickness insurance in the host Member States which will normally be provided by means of domestic (public) documents.

Union citizens who are workers or self-employed persons (see article 7(1)(a) of the Directive) may be required to present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons (see Article 8(3) of the Directive).

Family members of Union citizens, who are themselves Union citizens may be required to present a valid identity card or passport; a document attesting to the existence of a family relationship or of a registered partnership; where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining; or documents proving direct descendency from the Union citizen; or dependency on the Union citizen (see Article 8(5)(a) to (d) of the Directive).

Other family members, irrespective of their nationality, who, in the country from which they have come are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen may need to provide a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen (see Article 8(5)(d) and (e) of the Directive).

The partner with whom a Union citizen has a durable relationship may be required to present proof of the existence of a durable relationship with the Union citizen (see Article 8(5)(f) of the Directive).
c. Residence cards: family members who are non-EU nationals

As EC law currently stands, the status of spouses who are non-Member State nationals is determined by the legal status of the EC national. Those non-Member State nationals therefore have only rights derived through their spouse; for example rights of entry and residence. The status conferred by EC law on non-Member State nationals is not, however, the result of primary law but only of secondary law. 82

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of “family member” should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage. 83

The Directive requires the Member States to issue residence cards – “Residence card of a family member of a Union citizen” - to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months (see Article 9(1) of the Directive). The function of the residence card is to provide proof of the right of residence of the non-EU national family members of a Union citizen (see Article 10(1) of the Directive).

The Member States may insist on the production of certain documentary evidence prior to issuing the residence card (see Article 10(2) of the Directive). As already indicated in relation to registration certificates, we are aware of the fact that not all of the documentary evidence referred to below involves the production necessarily of foreign (public) documents.

d. Valid passports; and documents proving the existence of a family relationship or of a registered partnership, direct descendency, dependency, sickness insurance, and sufficient resources

Family members of Union citizens, who are themselves non-EU nationals, Member States may be required to present a valid passport; a document attesting to the existence of a family relationship or of a registered partnership; where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining; or documents proving direct descendency from the Union citizen; or dependency on the Union citizen (see Article 10(2)(a) to (d) of the Directive).

Other family members, irrespective of their nationality, who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union

82 Case C-459/99 [n 7] 38
citizen: a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen (see Article 10(2)(d) and (e) of the Directive).

The partner with whom a Union citizen has a durable relationship may be required to present proof of the existence of a durable relationship with the Union citizen (see Article 10(2)(f) of the Directive).

iv) Permanent residence cards

Union citizens who have resided legally for a continuous period of five years in the host Member State have the right of permanent residence there (see Article 16(1) of the Directive). This right also applies to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years (see Article 16(2) of the Directive).

a. Permanent residence cards

The Directive requires the Member States to issue, upon application, to a person entitled to permanent residence, after having verified the duration of residence, a document certifying permanent residence (see Article 19(1) of the Directive). The same applies to family members who are not nationals of a Member State, although the residence card will be renewable automatically every 10 years (see Article 20(1) of the Directive).

v) General provisions concerning residence documents

The Directive stipulates that the Member States are prohibited, under all circumstances, from making the possession of a registration certificate, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof (see Article 25 of the Directive).

3) Legalisation formalities restricting the use of these Public Documents

a) Directive 2004/38 contains no explicit exemptions from legalisation
Directive 2004/38 does not explicitly exempt the Public Documents we discussed above from legalisation formalities that apply in the member States.\(^{84}\) This means, in principle, that the regulation and implementation of legalisation formalities aimed at verifying the authenticity of foreign Public Documents remain subject to the domestic laws of the Member States.

The Directive does, however, contain certain passages that shed some light on the question whether formalities to ensure the authenticity of the documents required in the process of recognising the rights protected by the Directive can be justified.

Firstly, the Directive indicates in general terms, that: “The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined (…)” (see Recital 7 of the Directive).

Secondly, in relation to the right of residence for a period not exceeding three months, the Directive stipulates that: “Union citizens should have the right of residence (…) without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport (…)” (emphasis added; see Recital 9 and Article 6(1) of the Directive).

Thirdly, the Directive allows Member State authorities to verify whether a Union citizen or his/her family members satisfies the conditions provided for by the Directive (see Article 14 in conjunction with Articles 7, 12 and 13 of the Directive). However, this competence exists only in specific cases where there is reasonable doubt as to the actual fulfilment of those conditions.

The Directive proscribes a systematic verification of the applicable conditions. When a competent authority doubts the authenticity of a document produced as proof of the fulfilment of the Directive’s conditions, the authority is, arguably entitled to engage in a process of verification, since doubt regarding a document’s authenticity is likely to cause reasonable doubt as to the actual fulfilment of those conditions.

Lastly, to guard against abuse of rights or fraud, notably (but not exclusively) marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, the Directive allows the Member States to adopt necessary measures. These measures may imply the refusal, termination or withdrawal of rights conferred by the Directive in the case of abuse of rights or fraud (see Article 35 of the Directive). Those measures are, however, subject to requirements of proportionality and certain procedural safeguards (see Articles 30 and 31 of the Directive).

\(^{84}\) The issue was equally neglected in the instruments that the Directive amended or repealed.
(iv) Taxation of migrant workers

The freedom of movement for persons, in particular workers, is still frustrated by the existence of a number of tax provisions in the Member States which, when applied, cause persons exercising freedom of movement for the purpose of carrying on an activity in a Member State other than the one in which they reside to be taxed in the other Member State in a less favourable manner than the residents of that other Member State.

The Commission has indicated that hundreds of thousands of people are subject to frequent discriminations in this regard, which is testified by the great number of complaints that the Commission receives, as well as by petitions addressed to the European Parliament.

i) Non-discrimination of non-resident taxpayers

With a view to the principle of non-discrimination, the Commission has attempted to provide for a solution to the problems referred to above which especially concern the following categories of persons: frontier workers; other persons in paid employment; recipients of pensions and other similar remuneration in consideration of past employment; persons exercising a professional activity or some other self-employed activity, including performing artists and sportsmen and sportswomen; persons exercising agricultural and forestry activities; and persons exercising industrial and commercial activities.

a. Non-resident regimes

In principle, these persons are taxed in the country in which they carry on their activity, and most Member States apply to them so-called “non-residents’ regimes”, which differ from those applied to residents. Under these tax arrangements, generally speaking, only income from sources within the country in which the activity is exercised is taxed, with no provision being made for tax relief on grounds of family circumstances or for the various deductions for which residents are eligible, considering that such advantages should be granted by the country of residence.

b. Tax benefits

These advantages can be grouped, as follows, in different categories, taking into account the taxpayer's contributive capacity: as regards the worker itself, there are, for instance, the basic allowance (which provides a tax exemption for low income); specific deductions for medical expenses or for exceptional expenditures; if he/she is married, this statute may offer him/her a right, depending on the Member State concerned, to a joint assessment with his/her spouse, through a 'splitting' system if relevant, or a family coefficient relief or other allowances; as regards children, there are often special deductions, grossed up in the case of handicapped children, deductions for school expenses, etc. However, the persons in
question are very often precluded from the benefit of such relief in their country of residence as well, since they have no or insufficient taxable income in that country.

c. Bi-lateral double taxation treaties

An exception to this rule is the tax treatment of the income of certain frontier workers, in that Member States have concluded bilateral agreements under which such income is taxed in the country in which those workers are resident. It is only where frontier workers are taxed exclusively in their country of residence that they are not discriminated against, being taxed in the same way as other residents.

By contrast, persons who exercise an activity in an employed or self-employed capacity, agricultural and forestry activities, or industrial and commercial activities in a Member State other than the one in which they are resident and who are taxed in their country of residence are, in most cases, subject to a higher level of taxation than persons exercising the same activities in the country in which they are resident.


With a view to correcting this situation, the Commission presented, in 1979, a proposal for a Directive concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the EC. The Commission has also initiated infringement proceedings against some Member States with regard to tax provisions which discriminate against residents. Many Member States have felt that the general problem of taxing non-resident workers may be more suitably resolved by bilateral agreements.

iii) Recommendation 94/79

In view of this situation, the Commission withdrew its 1979 proposal, and took new steps to encourage Member States to eliminate discriminatory provisions from their legislation on the taxation of non-residents and to amend their laws on the basis of common rules of conduct established in a Commission Recommendation drafted to this end. This was considered necessary due to the fact that some Member States, at their own initiative, amended their tax rules in this area.

In order to prevent the risk that very divergent new rules will be introduced in various Member States, the Commission sought to establish guidelines at EC level by adopting a Recommendation that defined principles and rules which should underlie Member States' legislation on the tax treatment of non-residents.

a. Aim of the Recommendation
The aim of this Recommendation is to ensure that individuals receiving certain types of income in a Member State in which they are not resident are taxed on a fair and non-discriminatory basis. However, the Recommendation also seeks to ensure that non-residents do not benefit from more favourable tax treatment than other taxpayers. This could happen if they were to benefit, in the Member State of residence, from the same deductions of other tax relief which they had already been granted in the Member State of activity.

b. Scope of the Recommendation

The Recommendation covers the income of all persons, whether salaried or self-employed, pensions and income from other economic activities. The allocation of the right to tax non-residents between the state of activity and the state of residence, as determined by the double-taxation agreements concluded between the Member States, is respected as regards the income of frontier workers. Consequently, they may be taxed either in the state where they work or the state in which they reside (see Article 1 of the Recommendation).

c. Non-discrimination of non-residents under the Recommendation

The Recommendation suggested precise rules to ensure non-discriminatory taxation of non-residents by the state of activity where they are in a comparable position to its own residents. A comparable situation is deemed to exist where the income received in the state of activity is at least 75 % of the non-resident's total taxable income (see Article 2(2) of the Recommendation).

Member States of residence have the option under the rules suggested by the Recommendation not to grant to a taxpayer the benefit of certain relief or deductions if these have already been accorded by the state of activity (see Article 2(4) of the Recommendation).

iv) Documents proving the income in another Member State for tax purposes

The Recommendation stipulates that a Member State may ask a non-resident to prove that he derives at least 75 % of his income on its territory. In the Commission's opinion, such proof can be provided by means of documents, such as a copy of a tax return, a written statement from an employer, a copy of a balance sheet, etc. (see Article 2(2) of the Recommendation).

The Recommendation aims at preventing non-residents from benefiting from more favourable tax treatment than other taxpayers. This could happen if they were to benefit, in the Member State of residence, from the same deductions or other tax relief which they had already been granted in the Member State of activity. Accordingly, the suggested rules of the Recommendation make it possible for the Member State of residence to refuse to grant deductions or other tax relief in such cases (see Article 3 of the Recommendation).
v) Administrative cooperation
The Commission suggested that the implementation of the mechanism established by the Recommendation would potentially require a more intensive exchange of information between the tax administration of the taxpayer's country of residence and that of his country of activity. In this regard the Commission stressed that Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation85 allows Member States to exchange any information necessary for that purpose.

2) Legalisation formalities restricting the use of these Public Documents

a) No explicit exemptions from legalisation apply
Although there are no explicit provisions exempting these Public Documents from legalisation requirements, as noted above, the Commission has suggested that the system established in the Recommendation would require a more advanced framework for administrative cooperation to allow Member States to exchange any necessary information in relation to direct taxation.

(v) Unrestricted entry and residence for self-employed persons

1) Introduction

The freedom of movement of self-employed persons for the purpose of establishment and the provision of services entails the abolition of restrictions on movement and residence within the EC for nationals of Member States wishing to establish themselves or to provide services within the territory of another Member State (see Articles 43 and 49 EC).

Notwithstanding the right of establishment, the self-employed person providing a service may, in order to do so, temporarily pursue his/her activity in the Member State where the service is provided, under the same conditions as are imposed by that Member State on its own nationals (see Article 50 EC).

2) Relevant EC measures and associated Public Documents

The precise conditions for the exercise of the freedom of movement for self-employed nationals of Member States with regard to establishment and the provision of services in other Member States, which we will evaluate in this report, are contained in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States that repealed Directive 148/73/EEC, already addressed previously.86

86 Directive 2004/38/EC [n 68]
(vi) Unrestricted establishment

1) Introduction

Restrictions on the freedom of establishment of national of a Member State in the territory of another Member State are prohibited (Article 43 EC). The right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators.87

Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular EC companies or firms, under the conditions laid down for its own nationals by the law of the country where such establishment is effected (see the second paragraph of Article 43 EC).88

The EC right of establishment concerns the establishment of EC nationals either as a primary place of business or as a secondary place of business (see, respectively, the second and first paragraphs of Article 43 EC).

Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited. The prohibition concerns, in particular, restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State (see the first paragraph of Article 43 EC).

2) Relevant EC measures and associated Public Documents

In order to make it easier for persons to establish themselves with a view to taking up and pursuing activities, the provisions laid down by law, regulation or administrative action in the Member States have been subject to coordinating measures at EC level (see Article 47(2) EC).

a) Directive 2006/123 on services in the internal market

Most relevant in this regard is the Directive 2006/123/EC on services in the internal market, which concerns requirements at the Member State level which affect the access to, or the exercise of, a service

87 Case C-411/03 SEVIC Systems AG [2005] I-10805 18
88 See the conclusion of Advocate General Tizzano for Case C-411/03 [n 87] 3
activity. The Directive entered into force on 28 December 2006 (see Article 45 of the Directive). Although the end of the transposition date for the Services Directive is 28 December 2009 at the latest (see Article 44(1) of the Directive), it is nonetheless expedient to consider the likely consequences of the Directive for the cross-border use of Public Documents in this report with a view to its impact and relevance for legalisation formalities that persist at the Member State level.

i) Aim of Directive 2006/123

The Directive’s aim is to create a legal framework to ensure the freedom of establishment and the free movement of services between the Member States. This legal framework should enable providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the free movement of services. Providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State (see Recitals 5 and 12 of the Directive).

The Directive seeks to accomplish its aim through the removal of barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States, and by guaranteeing recipients and providers the legal certainty necessary for the exercise in practice of the two mentioned freedoms guaranteed under the Treaty (see Recital 5 and 116 of the Directive).

ii) The State of the Internal Market for Services

In its report entitled "The State of the Internal Market for Services", the Commission identified a large number of barriers which are preventing or slowing down the development of services between Member States predominantly in the field of services. The report concludes that there is still a huge gap between the vision of an integrated European Union economy and the reality as experienced by European citizens and service providers.

a. Legal uncertainty, administrative burdens and lack of mutual trust between authorities

The barriers that were identified by the Commission affect a wide variety of service activities across all stages of the provider's activity and have a number of common features, including the fact that they often arise from administrative burdens, the legal uncertainty associated with cross-border activity and the lack of mutual trust between Member States (see Recital 3 of the Directive).

---

The term “barriers” is used in the Directive interchangeably with the terms such as “requirements” and “restrictions”. Requirements are defined for the purpose of the Directive as: “any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy” (see Article 4(7) of the Directive).

The Directive addresses the need to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States, and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the Treaty. The Directive states that this objective cannot be achieved solely by relying on direct application of Articles 43 and 49 of the Treaty.

In support of the harmonisation effort, the Directive indicates that addressing remaining issues on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and EC institutions, and that the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation (see Recitals 5 and 6 of the Directive).

b) Barriers to the freedom of establishment for service providers

i) Authorisation schemes

The Directive deals specifically with the freedom of establishment for service providers in Chapter III, Articles 9 to 15 (below we will consider the Directive as far as it concerns the free movement of services). As far as establishment is concerned, the Directive deals predominantly with authorisation schemes applicable in the Member States that restrict service providers’ freedom of establishment. The term “authorisation scheme” is defined, as follows, in the Directive: “any procedure under which a provider or recipient is in effect 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”.

In the first place, the Directive introduces EC requirements for the conditions and criteria that are part of the authorisation schemes applicable in the Member States. Secondly, the Directive contains specific lists of prohibited, discriminatory requirements that are part of authorisation schemes, and non-discriminatory requirements that must be evaluated for their compliance with specified EC requirements (see respectively Article 14 and 15 of the Directive).

a. EC requirements for conditions and criteria of authorisation schemes
Based on the Directive, Member States may not make access to a service activity or the exercise thereof subject to an authorisation scheme unless certain conditions are satisfied: (1) the authorisation scheme must not discriminate against the provider in question; (2) the need for an authorisation scheme is justified by an overriding reason relating to the public interest; and (3) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an *a posteriori* inspection would take place too late to be genuinely effective (see Article 9(1)(a) to (c) of the Directive).

The conditions that were just mentioned are explained in the Directive as requiring that the criteria applied as part of any authorisation scheme preclude the competent authorities from exercising their power of assessment in an arbitrary manner; in particular those criteria must be: (1) non-discriminatory; (2) justified by an overriding reason relating to the public interest; (3) proportionate to that public interest objective; (4) clear and unambiguous; (5) objective; (6) made public in advance; and (7) transparent and accessible (see Article 10(2)(a) to (g) of the Directive).

### b. Prevention of the duplication of requirements and controls

In addition, the Directive provides that the conditions for granting authorisation for a new establishment may not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State (see Article 10(3) of the Directive).

### ii) Administrative formalities

As indicated above, one of the fundamental difficulties in accessing and exercising service activities that is addressed by the Directive is the complexity, length and legal uncertainty of administrative procedures applicable in the Member States. This is a difficulty common to the exercise of the freedom of establishment and the free movement of services, but is discussed in this part for practical reasons. With a view to addressing this difficulty, the Directive establishes principles of administrative simplification. In general, the Member States are required to (self) examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined in accordance with this obligation are not sufficiently simple, Member States must undertake steps to simplify them (see Article 5(1) of the Directive).

More specifically, the measures for administrative simplification are aimed at eliminating the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the "red tape" involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. The Directive indicates that such administrative practices have particularly significant
dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States (see Recital 43 of the Directive).

a. Harmonisation of forms for Public Documents at the EC level

The Directive addresses problems related to the existence of differences in form and substance of Public Documents between the Member States that are in practice required for the exercise of the freedom of establishment for providers in Member States and the free movement of services. To this end, the Directive allows the Commission, assisted by a regulatory committee composed of the representatives of the Member States and chaired by the representative of the Commission, to establish forms harmonised at the EC level which must be accepted by the Member States as equivalent to certificates, attestations and any other documents required of a provider (see Recital 44 and Article 5(2) in conjunction with Article 40(2) of the Directive and Articles 5 to 8 of Council Decision 1999/468/EC90 laying down the procedures for the exercise of implementing powers conferred on the Commission).

b. Explication of the means of evidence to be accepted as proof of EC rights

Another measure of simplification contained in the Directive concerns the means of evidence that must be accepted by Member States as proof of the fulfilment of requirements. The Directive provides that where Member States require a service provider or recipient to supply a certificate, attestation or any other document proving that a 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 (see Recital 47 and Article 5(3) of the Directive).

c. The form in which Public Documents must be accepted

In addition, the Directive contains a prohibition against the Member States requiring that a document from another Member State be produced in its original form or as a certified copy. In other words, the Member States must accept uncertified copies of Public Document as an appropriate means of evidence for the purpose of the Directive.

This requirement is subject to two exceptions. In the first place, the Directive excludes certain specific Public Documents from the requirement (see Article 5(4) of the Directive). In particular, this exclusion concerns documents involved in the mutual recognition of professional qualifications (see Articles 7(2) and 50 of Directive 2005/36); procedures for the award of public works contracts, public supply contracts and public service contracts (see Articles 45(3), 46, 49 and 50 of Directive 2004/18); the facilitation of the

---

practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (see Article 3(2) of Directive 98/5); the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty (see Directive 68/151); and the disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (see Directive 89/666).

Secondly, the Directive provides for a general exception to the requirement where other EC instruments indicate that originals or certified copies may be required or where such a requirement is justified by an overriding reason relating to the public interest, including public order and security (see Article 5(3) of the Directive). The concept of "overriding reasons relating to the public interest" to which reference is made in certain provisions of the Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 EC and is likely to further evolve. Most relevant for the present purposes is the recognition by the Directive of "combating fraud" as a potential overriding reason relating to the public interest.

Generally, the notion covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy (see Recital 40 and Article 4(8) of the Directive).

d. The language in which Public Documents must be accepted

The Directive further prevents the Member States 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 (see Article 5(3) of the Directive). On the other hand, Member States are entitled to require non-certified translations of documents in one of their official languages (see Article 5(3) of the Directive).

In this regard the Directive points out that in accordance with the Treaty rules on the free movement of services, prohibited discrimination on grounds of the nationality could take the form of an obligation
imposed only on nationals of another Member State to supply original documents, certified copies, a certificate of nationality or official translations of documents (see Recital 94 of the Directive).

The Directive excludes certain specific Public Documents from the scope of the requirement for Member States to accept non-certified translations (see Article 5(4) of the Directive). In particular, this exclusion concerns documents concerning the mutual recognition of professional qualifications (see Articles 7(2) and 50 of Directive 2005/36); procedures for the award of public works contracts, public supply contracts and public service contracts (see Articles 45(3), 46, 49 and 50 of Directive 2004/18); the facilitation of the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (see Article 3(2) of Directive 98/5); the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty (see Directive 68/151); and the disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (see Directive 89/666).

In addition, as explained in some detail above, the Directive provides for a general exception to the requirement for Member States to accept non-certified translations where other EC instruments indicate that certified translations may be required or where such a requirement is justified by an overriding reason relating to the public interest, including public order and security (see Article 5(3) of the Directive).

e. **Proportionality of costs of justified procedures and formalities**

In relation to fees and charges in the process of fulfilling administrative formalities and procedures, the Directive stipulates that these must be reasonable and proportionate to the cost of the formality or procedure in question and may not exceed their cost (see Recital 49 and Article 13(2) of the Directive).

f. **Electronic means of fulfilling formalities**

In the reasonably near future, the Directive requires Member States to set up electronic means of completing remaining procedures and formalities. The fact that it must be possible to complete those procedures and formalities at a distance means, in particular, that Member States must ensure that they may be completed across borders (see Article 8(1) of the Directive). In this respect the Directive provides that the European Commission will adopt detailed rules for the implementation of this requirement by the Member States with a view to facilitating the interoperability of information systems and use of procedures by electronic means between Member States, taking into account common standards developed at EC level (see Article 8(3) of the Directive).
The obligation as to results does not cover procedures or formalities which by their very nature are impossible to complete at a distance. Furthermore, this does not interfere with Member States' legislation on the use of languages (see Recital 52 of the Directive).

g. Administrative cooperation between Member States

The Directive stresses the importance of efficient administrative cooperation between Member States. It requires that Member States give each other mutual assistance, and put in place measures for effective cooperation with one another, in order to ensure the supervision of providers and the services they offer (see Article 28 of the Directive). As far as relevant here, the Directive requires the Commission to establish, in cooperation with the Member States, an electronic system for the exchange of information between Member States, taking into account existing information systems (see Recital 112 and Article 34 of the Directive).

c) Relevant Public Documents for the purpose of establishment

Relevant Public Documents for the purpose of the Directive in relation to establishment can be any document, irrespective of the form in which it is produced, proving the fulfilment of a requirement imposed by a Member State, or any document which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied (see Article 5(3) of the Directive).

The Directive does not affect Directive 2005/36 on the recognition of professional qualifications (see Recital 41 and Article 3(1)(d) of the Directive). It deals with questions other than those relating to professional qualifications. Consequently, relevant Public Documents concerning the proof of professional qualifications for the purpose of establishment and the provision of services are considered separately below (make reference).

In addition the Directive does not affect Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the EC. Accordingly, relevant Public Documents whose production is required in the process of ensuring that persons moving within the EC and their dependants and survivors retain the social security rights and advantages acquired and in course of being acquired are also considered separately (make reference).

Lastly, the Directive does not affect Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities and Directive 96/71 concerning the posting of workers in the framework of the

---

provision of services\textsuperscript{92}. These Directives will not be considered separately in this report for practical reasons.

It is nonetheless worth mentioning here that the Public Documents relevant in relation to Directive 96/71 may concern documents issued by the competent authorities in the Member State that allow an undertaking established in a Member State that, in the framework of the transnational provision of services, posts workers to the territory of another Member State, to prove that the minimum terms and conditions of employment, as referred to in the Directive, have effectively been guaranteed (see Article 1(1) and 3 of the Directive). The Directive lays down detailed rules on the cooperation between the competent authorities of the Member States to ensure that the fulfilment of the minimum terms and conditions can be verified in individual cases through sharing of information and mutual assistance (see Article 4 of the Directive).

\begin{itemize}
  \item[i)] \textbf{Public documents in a harmonised EC form}
  \end{itemize}

As indicated above, the Directive provides the necessary basis for the establishment at the EC level of harmonised forms for documents which must be accepted by the Member States as equivalent to certificates, attestations and any other documents required of a provider for the purpose of exercising the freedom of establishment or the freedom of services.

\textbf{3) Legalisation formalities restricting the use of these Public Documents}

\begin{itemize}
  \item[a)] \textit{Directive 2006/123 contains no explicit exemptions from legalisation}
  \end{itemize}

Directive 2006/123 does not explicitly abolish legalisation formalities between the Member States. However, it is important to note that the formulation of the Directive in principle renders the preservation of legalisation formalities impossible between the Member States. The Directive contains an explicit prohibition for the Member States to require that a document originating in another Member State is produced in its original form or as a certified copy (see Article 5(3) of the Directive). Consequently, the Member States must in principle accept copies of Public Documents. As a general rule, copies of Public Documents cannot be legalised. For example, uncertified copies of Public Documents cannot be certified by means of an Apostille under the Hague 1961 Convention, since it applies only to originals and certified copies of Public Documents.\textsuperscript{93}

\begin{footnotes}
\footnote{93} See Conclusions and recommendations adopted by the Special Commission on the practical operation of the Apostille, Service and Evidence Conventions of 28 October to 4 November 2004 at point 11, available online at: http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf
\end{footnotes}
On the other hand, this conclusion is mitigated by the fact that in relation to certain document types, e.g. documents proving professional qualifications, the obligation of Member States to accept copies does not apply (see Article 5(4) of the Directive), and further by the fact that a general exception to the obligation to accept copies applies 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 (see Article 5(3) of the Directive).

i) Legalisation as a measure for the prevention of fraud

The Directive acknowledges that the combating of fraud can be considered as an overriding reason relating to the public interest (see Recital 40 and Article 4(8) of the Directive) that may justify the application of authorisation schemes and other measures that restrict free movement, as far as these measures do not discriminate on grounds of nationality and further respect the principles of necessity and proportionality (see Recital 56 and Article 15(3)(a), (b) and (c) of the Directive).

Legalisation formalities are generally associated with measures concerned with the prevention of fraud in relation to the cross-border use of Public Documents: legalisation identifies a Public Document’s origin and may assist in the process of establishing its authenticity. In those circumstances, the practical implications of the Directive could be that the domestic authorities of the Member States are inclined to continue to insist on the fulfilment of legalisation formalities. In addition, the persistence of legalisation formalities could potentially be justified under the proviso that they do not discriminate on grounds of nationality; can be considered suitable for securing the attainment of the objective they pursue; do not go beyond what is necessary to attain that objective; and cannot be replaced with other, less restrictive measures which attain the same result.

(vii) Refund of VAT to not established taxable persons

1) Introduction

The aim of the Eighth Directive\(^4\) on the harmonisation of the laws of the Member States relating to turnover taxes is to establish detailed rules for reimbursement of VAT paid in a Member State by taxable persons established in another Member State and thus to harmonise the right to refund arising under the

---

Sixth Directive\textsuperscript{96} on the harmonisation of the laws of the Member States relating to turnover taxes (see Article 17(3) of the Directive).\textsuperscript{96}

The main aim of that directive is to avoid a taxable person established in a Member State being subjected to double taxation by reason of his having to bear the definitive burden of a tax invoiced to him in another Member State (see the second recital of the Directive).

The right of a taxable person established in a Member State to obtain refund of VAT paid in another Member State, in the manner governed by the Eighth Directive, is the counterpart of such a person’s right established by the Sixth Directive to deduct input VAT in his own Member State.

Another general objective of the Eighth Directive is to combat certain forms of tax evasion or avoidance (see the sixth recital of the Directive).\textsuperscript{97}

\textit{a) Relevant Public Documents for the purpose of VAT refund}

\textbf{i) Certificate concerning the capacity as a taxable person liable to VAT}

In order to meet the double objective mentioned above, the Eighth Directive gives the taxable person a right to reimbursement of the input VAT paid in a Member State in which he has neither his business, nor a fixed establishment, nor his permanent address or usual place of residence, and where he has not supplied any goods or services, subject to the production to the tax authority of the Member State in which that reimbursement is applied for (‘the reimbursing Member State’), of a certificate provided by the tax authority of the issuing Member State concerning the capacity of the operator seeking that reimbursement as a taxable person liable to VAT.\textsuperscript{98}

The Directive provides explicitly that Member States may not impose on the taxable persons any obligation other than the obligation to provide the information necessary to determine whether the application for refund is justified, i.e. the VAT certificate (see Article 6 of the Directive).

\textbf{ii) Administrative cooperation and mutual trust between authorities}

With regard to the effect of a VAT certificate, the system of reimbursement established by the Eighth Directive necessarily rests on a mechanism of cooperation and mutual trust between the tax authorities of the Member States.

\textsuperscript{97} See Case C-361/96 Grandes sources d’eaux minérales françaises [1998] ECR I-3495 28
\textsuperscript{99} Case C-429/07 Commission v France [2001] ECR I-637 28
In that context, in order to ensure the harmonious functioning of that mechanism, the Eighth Directive provides that the certificate must comply with a specimen annexed to the Directive (see Article 9(2) and Annex B of the Directive).

According to that specimen, the certificate must indicate, in particular, the VAT registration number and the ‘address of the establishment’ of the person concerned. In addition, the certificate is to be issued by the authority of the State in which the taxable person is established (see Article 3(b) of the Directive).

a. **Tax authorities are in principle bound in fact and in law by the VAT Certificate**

Based on the provision for administrative cooperation and mutual trust between authorities, the certificate drawn up in accordance with the specimen of the Eighth Directive permits the assumption that the person concerned is not only liable to VAT in the issuing Member State but is also established there in one way or another, whether by having his business there or a fixed establishment from which operations are carried out.99

Besides, the tax authorities of the refunding Member State are in principle bound in fact and in law by the information contained in the certificate.100

However, given the differences which exist, as regards conditions for refund, between the system established by the Eighth Directive for taxable persons established in a Member State other than the refunding State and the system established by the Thirteenth Directive101 for taxable persons not established in EC territory, the issuing of a certificate in accordance with the Eighth Directive cannot prevent the tax authorities of the refunding Member State from seeking assurance as to the economic reality of the establishment whose address is mentioned in such a certificate.

Where, however, the tax authorities of the refunding Member State have doubts, as in the case of suspected tax evasion, for example, as to the economic reality of the establishment referred to in that certificate, they cannot, given the presumption which attaches to that certificate, refuse the taxable person a refund without any further prior verification.

In such a case, those authorities have the possibility to require the taxable person to supply it with the necessary information in order to assess whether the application for refund is well founded (see Article 6 of the Eighth Directive), such as information enabling them in principle to assess the economic reality of the establishment referred to in the certificate of status as a taxable person.

---

99 Case C-73/06 Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern [2007] ECR I-00000 40
100 Id at 41
The authorities also 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.102

The preamble of Regulation No 1798/2003 indicates that cooperation between the authorities of the Member States is also not intensive enough, in that, apart from the VAT information exchange system (VIES), there are not enough automatic or spontaneous exchanges of information between Member States. Exchanges of information between the respective administrations as well as between administrations and the Commission should be made more intensive and swifter in order to combat fraud more effectively.

If the information obtained shows that the address given in the certificate of status as a taxable person does not correspond either to the place of business of the person concerned, or to a fixed establishment from which he carries out his operations, the tax authorities of the refunding Member State are entitled to refuse the refund applied for by that person, without prejudice to any possible legal action by the latter.103

---


103 Case C-32/03 Fini H [2005] ECR I-1599 33-34; and, in the context of Article 43 EC, see Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-7895 55
(viii) **Unrestricted provision of services**

1) **Introduction**

Restrictions on the freedom to provide services within the EC are prohibited in respect of nationals of Member States who are established in a State of the EC other than that of the person for whom the services are intended (see Article 49 EC).

Services within the meaning of the Treaty are those that are normally provided for remuneration, insofar as they are not governed by the freedoms concerning goods, capital and persons (see Article 50 EC). Services include, in particular, activities of an industrial character; of a commercial character; of craftsmen; or of professions (see Article 50 (a), (b), (c), and (d) EC respectively).

Measures have been taken at the EC level in order to achieve the liberalisation of specific services (see Article 52(1) EC). On the other hand, as long as restrictions on freedom to provide services have not been abolished, the Member States are required to apply those restrictions without distinction on grounds of nationality or residence to all persons providing services (see Article 54 EC).

2) ** Relevant EC measures and associated Public Documents**

In order to make it easier for persons to provide cross-border services, the provisions laid down by law, regulation or administrative action in the Member States have been subject to coordinating measures at EC level (see Article 47(2) in conjunction with Article 55 EC). In this regard, we considered in detail Directive 2006/123 on services in the internal market which was already addressed in some detail above.

a) **Barriers to the free movement of services**

i) **Service providers**

Chapter IV of the Directive deals specifically with the freedom to provide services and related derogations (see Articles 16 to 20 of the Directive). The Directive repeats that the Member States must respect the right of providers to provide services in a Member State other than that in which they are established (see Article 16(1) of the Directive).

Besides, the Directive stipulates that a Member State in which a service is provided by a person established in another Member State, must ensure free access to and free exercise of this service activity within its territory (see also Article 16(1) of the Directive).
a. **Prohibited restrictions**

The Directive contains a general prohibition for the Member States to make access to a service activity or exercise of a service activity in their territory subject to compliance with any requirements. In addition, the Directive contains a list of specific prohibited restrictions consisting of requirements, for example, to have an establishment in their territory or to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of EC law (see Article 16(2)(a) to (g) of the Directive).

b. **Justification of restrictions**

Member States to which a provider moves are not prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment (see Article 16(2) of the Directive).

Such requirements, however, that restrict the access to or exercise of a service activity must respect the following principles: (a) non-discrimination: requirements may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established; (b) necessity: requirements must be justified for reasons of public policy, public security, public health or the protection of the environment; and (c) proportionality: requirements must be suitable for attaining the objective they pursue, and must not go beyond what is necessary to attain that objective (see Article 16(1)(a), (b) and (c) of the Directive).

The Directive further provides for certain specific derogations from the freedom to provide services, which mainly concern services of general economic interest which are provided in another Member State (see Article 17 of the Directive), and for case-by-case derogations in exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures related to the safety of services (see Article 18 of the Directive).

ii) **Recipients of services**

a. **Prohibited restrictions**

In relation to the rights of recipients of services, the Directive prohibits Member States to impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements: (a) an obligation to obtain authorisation from or to make a declaration to their competent authorities; and (b) discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided (see Article 19 of the Directive).
In addition, the Directive requires Member States to ensure that the recipient of a service is not made subject to discriminatory requirements based on his nationality or place of residence, and that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient.

b. Justification of restrictions
The Directive does not contain detailed provisions on the justification of restrictions to the rights of recipients of services. It merely provides, in relation to prohibited discriminatory measures, that these prohibitions apply without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria (see Article 20(2) of the Directive).

c. Assistance for recipients of services
Aside from prohibiting restrictions of the rights of recipients of services, the Directive requires the Member States to provide them with assistance in order to ensure that recipients can obtain, in their Member State of residence, inter alia, the information on the requirements applicable in other Member States relating to access to, and exercise of, service activities (see Article 21(1)(a) of the Directive). Where appropriate, advice from the competent authorities may include a simple step-by-step guide. In any event, the Directive requires that any information and assistance is provided in a clear and unambiguous manner, is easily accessible at a distance, including by electronic means, and is kept up to date (see Article 21(1)(a) of the Directive).
(ix) Recognition of professional qualifications

1) Introduction

The mutual recognition by the Member States of professional qualifications is of importance for the effective free movement of workers, the freedom of establishment and the freedom to provide services alike. For nationals of the Member States, these freedoms include, in particular, the right to pursue a profession, in a self-employed or employed capacity, in a Member State other than the one in which they have obtained their professional qualifications.

In order to make it easier for persons to take up and pursue activities, the Member States’ laws have been harmonised at the EC level to establish the mutual recognition between the Member States of diplomas, certificates and other evidence of formal qualifications (see Article 40, 47(1) and (2), and 55 EC).

2) Professional qualifications

The terms “formal qualification” or “professional qualifications” as used here refer not only to diplomas, but also to, for example, professional experience. Directive 2005/36 defines “professional qualifications” as follows: “qualifications attested by evidence of formal qualifications, an attestation of competence (…) and/or professional experience”.

When considering the recognition of professional qualifications between the Member States, we must distinguish between recognition of diplomas for academic purposes (recognition in order to continue studies) and recognition of diplomas for professional purposes (recognition in order to work in a certain profession). In contrast with the recognition of qualifications for academic purposes, the recognition of qualifications between the Member States for professional purposes has been subject to harmonisation measures at the EC level.

3) Recognition of professional qualifications for academic activities

a) Member State autonomy

As regards recognition of an academic title or a period of study abroad in order to continue studying in the country of origin, each Member State remains responsible under the EC Treaty for its own educational content and organisation (see Article 149(1) EC). Universities, which are autonomous institutions, remain entirely responsible for the content of their curricula and for awarding diplomas and certificates to
students. Accordingly, there are no EC provisions that currently provide explicitly for the mutual recognition between the Member States of professional qualifications for academic purposes.

Nonetheless, the importance of mutual recognition of qualifications for academic purposes was stressed at the occasion of the Ministerial Conference on higher education held in Prague on 19 May 2001: "Ministers strongly encouraged universities and other higher education institutions to take full advantage of existing national legislation and European tools aimed at facilitating academic and professional recognition of course units, degrees and other awards, so that citizens can effectively use their qualifications, competencies and skills throughout the European Higher Education Area".  

The Communiqué of the Conference of European Ministers responsible for higher education held in Bergen on 19-20 May 2005 indicates that the EC will build on the Bologna Process by establishing a European Higher Education Area which involves an overarching framework for qualifications, the agreed set of European standards and guidelines for quality assurance and, most relevant for the purposes of this report, the recognition of degrees and periods of study.

b) National information centres for the recognition of diplomas

Notwithstanding the lack of express rules, the European Commission has encouraged mutual recognition (for academic purposes) between the various education systems in Europe through such EC programmes as Erasmus. Participation in Erasmus is entirely voluntary. Nonetheless, it has contributed to an understanding and recognition of education systems that are often very different.

The network of National Recognition Information Centres for diplomas (NARIC, established in 1984) is a more tangible result under the Erasmus programme to encourage the recognition of academic qualifications. NARIC provides information on national academic recognition procedures. The Union’s NARIC Network cooperates closely with the European Network of Information Centres (ENIC, established in 1994). ENIC was established as a joint Council of Europe/UNESCO Network of national information centres on academic mobility and recognition.

c) Convention on the Recognition of Qualifications concerning Higher Education in the European Region

The mutual recognition between the Member States of qualifications for academic purposes is facilitated by the fact that twenty one Member States (including Bulgaria and Romania - excluding Belgium, 

---


i) The aim of the Convention

The Convention was developed to address, “the need to find common solutions to practical recognition problems in the European region”. In this regard, the Preamble of the Convention stresses that the recognition of studies, certificates, diplomas and degrees obtained in another country of the European region represents an important measure for promoting academic mobility and that a fair recognition of qualifications is a key element of the right to education and a responsibility of society.

The Convention’s Explanatory Report indicates that the Convention reflects the evolution in practices concerning the recognition of qualifications which have developed considerably over the past decades. In the past, the assessment of foreign qualifications often entailed a detailed comparison of curricula and lists of material studied ("equivalence"), while the emphasis has now shifted to a broader comparison of the qualifications earned ("recognition").

The Explanatory Report further highlights a tendency for formal international regulations to emphasize the procedures and criteria applicable to the process of recognition of foreign qualifications rather than to list or define degrees and diplomas that shall be recognized under the regulation.

ii) Recognition of qualifications under the Convention

Recognition under the Convention is defined as follows: “A formal acknowledgement by a competent authority of the value of a foreign educational qualification with a view to access to educational and/or employment activities.” In this sense, recognition can be described as a type of assessment of individual qualifications.

However, while an assessment may be any kind of statement on the value of a foreign qualification, recognition refers to a formal statement by a competent recognition authority acknowledging the value of the qualification in question and indicating the consequences of this recognition for the holder of the qualification for which recognition is sought. For example, a qualification may be recognised for the

---


107 See the Preamble of the Lisbon Convention [n 106]

108 Explanatory Report to the Lisbon Convention [n 106]
purpose of further study at a given level (such as doctoral studies), for the use of a title or for the exercise of gainful employment (see Article 4 of the Convention).

The Explanatory Report further clarifies that the definition of recognition for employment purposes aims at recognition for the purpose of gainful employment activities in general and is not specifically directed towards recognition for the purpose of admission to regulated professions.

iii) Assessment of qualifications under the Convention

Assessment of qualifications with a view to recognition is subject to basic principles under the Convention (see Article 3 of the Convention). The Convention generally prohibits discrimination and requires the Contracting States to make appropriate arrangements for the assessment of an application for recognition of qualifications solely on the basis of the knowledge and skills achieved (see Article 3(1) of the Convention).

The Convention further requires the procedures and criteria used in the process of assessment and recognition of qualifications to be transparent, coherent and reliable (see Article 3(2) of the Convention). Lastly, the Convention stipulates that decisions on recognition are to be made on the basis of appropriate information on the qualifications for which recognition is sought and that the responsibility for providing adequate information rests with the applicant, who is to supply all information in good faith.

Notwithstanding this arguably quite burdensome responsibility of the applicant, the Convention indicates that institutions which issued the qualifications in question have a duty to provide, upon request of the applicant and within reasonable limits, relevant information to the holder of the qualification, to the institution, or to the competent authorities of the country in which recognition is sought (see Article 3(3) of the Convention).

iv) The Diploma Supplement

The Lisbon Recognition Convention provides for the establishment of a so-called “Diploma Supplement” and requires the Contracting States to promote its use (see Article 9(3) of the Convention). The Diploma Supplement was produced by national institutions according to a template developed by a Joint European Commission - Council of Europe - UNESCO working party that tested and refined it.109

The supplement is a document that is to be attached to a higher education diploma and which aims at improving international transparency and at facilitating the academic (and professional) recognition of

qualifications, including diplomas, degrees, certificates etc. It was designed to provide a description of the nature, level, context, content and status of the studies that were successfully completed by the individual named on the original qualification to which this supplement is appended.

It was further intended to be free from any value-judgements, equivalence statements or suggestions about recognition. It is a flexible non-prescriptive tool which is designed to save time, money and workload. It is capable of adaptation to local needs. A description of the national higher education system within which the individual named on the original qualification graduated has to be attached to the supplement. This description is provided by the National Academic Recognition Information Centres (NARICs)

The Diploma Supplement is composed of eight sections: (1) information identifying the holder of the qualification; (2) information identifying the qualification; (3) information on the level of the qualification; (4) information on the contents and results gained; (5) information on the function of the qualification; (6) additional information; (7) certification of the Supplement; and (8) information on the national higher education system. If a diploma supplement is used, the information in all eight sections is required. Where information is not provided, an explanation should be provided.

In the Communiqué of the Conference of Ministers responsible for higher education in Berlin on 19 September 2003 the objective was adopted to ensure that every student graduating as from 2005 should receive the Diploma Supplement automatically and free of charge, and that it should be issued in a widely spoken European language.¹¹⁰

v) Issues of ratification and recognition

As indicated above, currently six Member States have not ratified the Convention. Problems inherent to diversity and fragmentation of legal regimes at the international level are likely results. The importance of ratification of the Convention by the remaining Member States with a view to establishing the European Higher Education Area and was confirmed by the European Ministers of Education in May 2005.

Within the framework of the Convention, the Conference identified problems in the process of inter-state recognition of qualifications and therefore called upon all countries: “to address recognition problems identified by the ENIC/NARIC networks [and to] draw up national action plans to improve the quality of the process associated with the recognition of foreign qualifications.”¹¹¹


¹¹¹ See the Communiqué.
4) Recognition of professional qualifications for professional activities

a) Regulated professions

When considering the recognition of professional qualifications for professional purposes, we must further distinguish between professions that are regulated from the standpoint of qualifications and non-regulated professions.

For the purpose of EC law, the term “regulated profession” can be defined as follows: “a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit” (see Article 3(1)(a) of Directive 2005/36, which we will discuss in detail below).

In other words, when a profession is regulated, the lack of the necessary national professional qualifications constitutes a legal obstacle to access to that profession.

If a profession is not “regulated” in the sense described above, the access to this profession is not generally dependent on the proof of professional qualifications, but is subject to the rules of the labour market and the behaviour of that market. The system of mutual recognition established at the EC level does not apply in relation to this type of professions.

b) Regulated professions not harmonised at the EC level

In the absence of harmonization of the conditions of access to a particular profession, the Member States are entitled to lay down the knowledge and qualifications needed in order to pursue it and to require the production of documents certifying that the holder has the relevant knowledge and qualifications.112

Nonetheless, the Member States are required to act in accordance with the general Treaty provisions on free movement (see in particular Articles 39, 43 and 49 EC). Consequently, the authorities of a Member State must take into consideration the professional qualification of a person by making a comparison between the qualifications certified by his/her diplomas, certificates and other formal qualifications and by

his/her relevant professional experience and the professional qualifications required by the national rules for the exercise of the profession in question.\textsuperscript{113}

The competent authorities of the Member States have an EC obligation to examine to what extent, the knowledge certified by the diploma granted in another Member State and the qualifications or professional experience obtained there, together with the experience obtained in the Member State in which the candidate seeks enrolment, must be regarded as satisfying, even partially, the conditions required for access to the activity concerned.

That examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. Such assessment must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess having regard to that diploma, as well as the nature and duration of the studies and practical training to which the diploma relates.

If that comparative examination of diplomas results in a finding that the knowledge and qualifications certified by the foreign diploma correspond to those required by the national provisions, the Member State must recognise that diploma as fulfilling the requirements laid down by its national provisions. If, on the other hand, the comparison reveals that the knowledge and qualifications certified by the foreign diploma and those required by the national provisions correspond only partially, the host Member State is entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking.\textsuperscript{114}

\section*{5) Relevant EC measures and associated Public Documents}

\textit{a) Directive 2005/36}


\footnotesize

\textsuperscript{113} Case C-313/01 \textit{Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova} [2003] ECR I-13467 57

\textsuperscript{114} Case C-313/01 [n 113] 67-70


b) The aim of the Directive

The aim of Directive 2005/36/EC is to establish rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory conditional upon possession of specific professional qualifications will recognise professional qualifications obtained in one or more other Member States and which allow the holder of these qualifications access to and pursuit of the same profession there (see article 1 of the Directive).

The Directive simplifies and develops the EC’s legal framework for the mutual recognition of professional qualifications between Member States by standardising the principles applicable in the existing Directives in the area and by consolidating a majority of them in one single instrument (see Recital 9 of the Directive).

c) Recognition of professional qualifications

Both for establishment and the free movement of services, the Directive provides that the recognition of professional qualifications by a Member State allows a person to gain access in that Member State to the same profession as that for which he/she is qualified in his home Member State and to pursue it in the host Member State under the same conditions as its nationals (see Article 4(1) of the Directive).

For the purposes of the Directive, a profession which an applicant wishes to pursue in the host Member State is the same as that for which he is qualified in his home Member State, if the activities covered by the professional qualifications in question are comparable (see Article 4(2) of the Directive).

d) Provision of services

The Directive contains specific provisions as regards freedom to provide services, where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis (see Article 5(2) of the Directive).

i) Service providers legally established in another Member State

The Directive prohibits the Member States to restrict, for any reason relating to professional qualifications, the free provision of services in another Member State if the service provider is legally established in a Member State for the purpose of pursuing the same profession there (see Article 5(1)(b) of the Directive).
The same prohibition applies where the service provider moves to another Member State on a temporary and occasional basis, if he has pursued that profession in the Member State of establishment for at least two years during the 10 years preceding the provision of services when the profession is not regulated in that Member State. The condition requiring two years' pursuit does not apply when either the profession or the education and training leading to the profession is regulated (see Articles 5(1)(b) and 5(2) of the Directive).

ii) Prohibition of prior authorisation or registration requirements
Host Member States are required under the Directive to exempt service providers established in another Member State from the requirements which it places on professionals established in its territory relating to authorisation by, registration with or membership of a professional organisation or body (see Article 6(a) of the Directive). Member States are also prohibited from requiring service providers to register with a public social security body for the purpose of settling accounts with an insurer relating to activities pursued for the benefit of insured persons (see Article 6(b) of the Directive).

iii) Prior declaration requirements for the service provider
A host Member States may demand a written declaration to be sent to its competent authorities prior to a person moving for the first time with a view to provide services in the Member State in question (see Article 7(1) of the Directive).

iv) Administrative cooperation
The competent authorities of the host Member State may ask the competent authorities of the Member State of establishment, for each provision of services, to provide any information relevant to the legality of the service provider's establishment and his good conduct, as well as the absence of any disciplinary or criminal sanctions of a professional nature (see Article 8 of the Directive).

The Directive indicates that the need for prior declaration requirements will be reviewed periodically in the light of the progress made in establishing an EC framework for administrative cooperation between the Member States (see Recital 7 of the Directive).

v) Relevant Public Document for the purpose of the free provision of services
a. Documents proving a person’s nationality, legal establishment, professional qualifications, the professional experience, and a clean criminal record
The host Member States may further require that the declaration is accompanied by the following documents: (1) proof of the nationality of the service provider; (2) an attestation certifying that the holder
is legally established in a Member State for the purpose of pursuing the activities concerned and that he is not prohibited from practising, even temporarily, at the moment of delivering the attestation; (3) evidence of professional qualifications; (4) for unregulated professions any means of proof that the service provider has pursued the activity concerned for at least two years during the previous ten years; and (5) for professions in the security sector, where the Member State so requires for its own nationals, evidence of no criminal convictions.

vi) Evidence of formal qualifications

The Directive provides the following definition of the term “evidence of formal qualifications”: “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” (see Article 3(1)(c) of the Directive). This definition is part of the general provisions in the Directive and its application is therefore not limited to situations in which evidence of formal qualification is required in the process of free movement of services; it is also relevant in relation to freedom of establishment, dealt separately with below.

a. Evidence of formal qualifications issued by a third country

It is interesting to note that Member States are compelled under the Directive to regard evidence of formal qualifications issued by a third country as evidence of formal qualifications for the purpose of the Directive if the holder has three years' professional experience in the profession concerned on the territory of the Member State which recognised that evidence of formal qualifications in accordance with the minimum training conditions laid down in the Directive, certified by that Member State (see Articles 3(1)(c) and 3(3) of the Directive).

e) Establishment

In relation to the freedom of establishment, the Directive deals with the recognition of professional qualification in three chapters (see Title III of the Directive): The first chapter features a general system for the recognition of evidence of professional training (see Articles 10 to 16 of the Directive); the second chapter deals with the recognition of professional experience (Articles 16 to 20 of the Directive); and the third chapter concerns the automatic recognition of professional qualification on the basis of coordination of minimum training conditions in relation to seven regulated professions (Articles 21 to 55 of the Directive).

i) General system of recognition of evidence of professional training
The general system of the Directive reflects the system for the mutual recognition of professional qualifications already established by Directive 89/48/EEC and supplemented by Directive 92/51/EEC. Since Directive 1999/42/EC entered into force, crafts and commercial professions and certain other services were also partially covered by the general system.

The general system is designed primarily for those persons who are qualified to practice a profession in one Member State and wish to have their qualifications recognised in another, in order to practice the same profession there. It applies when a Member State requires a qualification in order to practise a profession on its territory, with the exception of the professions already covered by a sectoral directive.

The sectoral directives cover seven professions and provided for the harmonisation of minimum training requirements and the automatic recognition of professional qualifications: (1) doctor; (2) general nurse; (3) midwife; (4) veterinary surgeon; (5) dental surgeon; (6) pharmacist; and (7) architect.

**a. Different levels of qualification**

The different levels of qualification for the purpose of recognition under the Directive are generally grouped, as follows: (1) attestations of competence issued by a competent authority; (2) certificates attesting to the successful completion of a secondary course; (3) diplomas certifying successful completion of training at post-secondary level; (4) diplomas certifying successful completion of training at post-secondary level at a university; and (5) diplomas certifying that the holder has successfully completed a post-secondary course of at least four years' duration at a university (see Article 11 of the Directive).

**b. Equal treatment of qualifications**

The Directive stipulates that the Member States must treat equally, as evidence of professional qualifications in the terms of the Directive, any evidence of formal qualifications or set of evidence of formal qualifications issued by a competent authority in a Member State, certifying the successful completion of training in the EC which is recognised by that Member State as being of an equivalent level and which confers on the holder the same rights of access to or pursuit of a profession or prepares for the pursuit of that profession. The equal treatment extends to the different levels of qualification as described above (see Article 12(1) of the Directive).

**c. Conditions for recognition**

116 The Directive provides for a more detailed grouping of levels of qualifications than described here. Please refer, if necessary directly to Article 11 of the Directive.
The Directive indicates that if the access to or pursuit of a regulated profession in a host Member State is dependent upon possession of specific professional qualifications, the competent authority of that Member State must permit access to and pursuit of that profession, under the same conditions applicable to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access to and pursue that profession on its territory (see Article 13 of the Directive).

The attestations of competence or evidence of formal qualifications must satisfy certain conditions which will not be discussed in detail here. Generally the conditions require that the attestations must be issued by a competent authority in a Member State and that the attestations prove a certain minimum level of professional qualification in terms of training or experience (see in more detail Article 13(1) and (2) of the Directive). Under certain conditions, the Member States may impose a compensation measure in the form of an adaptation period or an aptitude test in order to address situations in which professional qualifications are clearly not equivalent due to, for example, differences in duration or substance of training (see Article 14 of the Directive).

ii) Recognition of professional experience for access to certain industrial, commercial and craft activities

The Directive simplifies the rules allowing access to a number of industrial, commercial and craft activities, in Member States where those professions are regulated, insofar as those activities have been pursued for a reasonable and sufficiently recent period of time in another Member State, while maintaining for those activities a system of automatic recognition based on professional experience.

Where access to or pursuit of one of certain activities is dependent upon possession of general, commercial or professional knowledge and aptitudes, the Directive requires that Member State to recognise, subject to certain minimum conditions relating to the length of the experience (see Articles 17, 18 and 19 of the Directive), previous pursuit of the activity in another Member State as sufficient proof of such knowledge and aptitudes (see Article 16 of the Directive). Many different professional activities are distinguished and listed in an Annex to the Directive (see lists I to III of Annex IV of the Directive).

iii) Recognition of professional qualifications on the basis of coordinated minimum training conditions for doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects

a. Principle of automatic recognition
In relation to the free movement of doctors (see Article 24 of the Directive), nurses responsible for general care (see Article 31 of the Directive), dental practitioners (see Article 34 of the Directive), veterinary surgeons (see Article 38 of the Directive), midwives (see Article 40 of the Directive), pharmacists (see Article 44 of the Directive) and architects (see Article 46 of the Directive), the Directive contains a requirement for the Member States to automatically recognise the evidence of formal qualifications with a view to the fact that the minimum conditions for training have been coordinated at the EC level (see Article 21 of the Directive).

iv) Relevant Public Documents for the purpose of establishment

a. Documents proving a person’s nationality, professional competence, formal qualifications, professional experience, a person’s good character, repute, solvency, and clean professional and criminal record
The Directive contains common provisions on establishment in relation to documentation and formalities (see Article 50 of the Directive). The Directive states that the competent authorities of the host Member State deciding on an application for authorisation to pursue a regulated profession may demand certain documents and certificates (see Article 50(1) in conjunction with Annex VII of the Directive).

Accordingly, the following documents may be required: (1) proof of the nationality of the person concerned; (2) copies of the attestations of professional competence or of the evidence of formal qualifications giving access to the profession in question, and an attestation of the professional experience of the person concerned where applicable; (3) in relation to the recognition of professional experience - certificates concerning the nature and duration of the activity issued by the competent authority or body in the home Member State or the Member State from which the foreign national comes; (4) where the competent authority of a host Member State requires of persons wishing to take up a regulated profession - proof that they are of good character or repute or that they have not been declared bankrupt, or suspends or prohibits the pursuit of that profession in the event of serious professional misconduct or a criminal offence, i.e. sufficient evidence consists of documents issued by competent authorities in the home Member State or the Member State from which the foreign national comes, showing that those requirements are met (see Annex VII paragraph 1(a) to (f) of the Directive).

b. Documents proving a person’s mental health
Where a host Member State requires of its own nationals wishing to take up a regulated profession, a document relating to the physical or mental health of the applicant, that Member State must accept as
sufficient evidence thereof the presentation of the document required for this purpose in the home Member State. If the home Member State does not issue such documents, the host Member State is required to accept a certificate issued for this purpose issued by a competent authority in that State (see Annex VII paragraph 1(d) of the Directive).

c. **Documents proving a person’s financial standing and insurance against the financial risks arising from their professional liability**

Where a host Member State requires its own nationals wishing to take up a regulated profession to furnish proof of the applicant's financial standing or proof that the applicant is insured against the financial risks arising from their professional liability in accordance with the laws and regulations in force in the host Member State regarding the terms and extent of cover, the Directive requires that Member States accept as sufficient evidence an attestation to that effect issued by the banks and insurance undertakings of another Member State (see Annex VII paragraph 1(e) of the Directive).

d. **Certificates proving that the evidence of professional qualifications concerning coordinated minimum training conditions for doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects is that covered by Directive 2005/36**

Regarding the facilitation of the recognition of the documentary evidence of professional qualifications concerning coordinated minimum training conditions for doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects covered by the Directive, the Directive allows the Member States to require, in addition to the documentary evidence of the required formal qualifications, a certificate from the competent authorities of the Member State of origin certifying that the documentary evidence of formal qualifications that is produced is actually that covered by the Directive (see Annex VII paragraph 2 of the Directive).

e. **Documentary evidence may be substituted by certified declarations on oath or solemn declarations**

In the event that the competent authorities of the host Member State or of the Member State from which the foreign national comes do not issue the documents that may be required, the Directive provides that those documents can be replaced by a declaration on oath or, in States where there is no provision for declaration on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority or, where appropriate, a notary or qualified professional body of the home Member State or the Member State from which the person comes; such authority or notary shall issue a certificate attesting the authenticity of the declaration on oath or solemn declaration (see Annex VII under 1(d) of the Directive).

6) **Legalisation formalities restricting the use of these Public Documents**
a) Directive 2005/36 does not contain an explicit exemption from legalisation formalities

Directive 2005/36 does not contain a provision that explicitly exempts Public Documents within its scope from legalisation formalities. On the other hand, the Directive contains multiple provisions concerning administrative cooperation (see in particular Article 56 of the Directive).

i) Administrative cooperation in case of justified doubts about the authenticity or adequacy of Public Documents required for the purpose of establishment

The most relevant form of administrative cooperation provided for in the Directive that may have a bearing on the legitimacy of legalisation requirements concerns the cooperation that is required under the Directive in case of justified doubts about the authenticity (or adequacy) of Public Documents required as proof of professional qualifications for the purpose of establishment (see Article 50 of the Directive).

In the event of justified doubts, a host Member State may, for example, require from the competent authorities of a Member State of origin documentary evidence confirming the authenticity of the attestations and evidence of formal qualifications, as well as, concerning doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives, pharmacists and architects, confirmation of the fact that the beneficiary fulfils the minimum training conditions (see Article 50(2) of the Directive).
(x) Social security

1) Introduction

When it comes to the free movement of workers, it is important to be aware of the tensions and interplay between certain economic and social aspects. On one side, there is the image of the ‘EC worker’ as a mobile unit of production, contributing to the creation of a single market and to the economic prosperity of Europe. On the other side, there is the image of the worker as a human being who at some point may become reliant upon benefits that he or she is entitled to under the laws of a particular Member State. In order to facilitate the free movement of workers whilst ensuring that the social aspects of free movement are not disregarded, the Member States’ national security schemes have been coordinated at the European level.

EC measures in the field of social security are necessary to provide for effective free movement of workers (see Article 42 EC). These measures should secure for migrant workers and their dependants (1) aggregation, for the purpose of acquiring and retaining the right to benefit and calculating the amount of benefit, of all periods taken into account under the laws of several countries; and (2) payment of benefits to persons resident in the territories of Member States (see Article 42(a) and (b) EC respectively).

The legal basis for EC measures in the field of social security is limited to the coordination of the application of national social security schemes as regards persons resident in the territory of a Member State who are or have been subject to the social security legislation of one or more other Member States. The system established is based on the principle of equal treatment and exportability of acquired social security benefits of persons who move within the EC and who are therefore subjected to multiple national social security schemes. One of the measures taken in the process of coordination was to address the issue of legalisation as regards statements, documents and certificates by the Member State where they are to be produced as far as their production is required for the effective coordination of the national social security schemes.

a) Relevant EC measures and associated Public Documents

In relation to social security we focus on Regulation 883/2004/EC on the coordination of social security systems\(^\text{118}\) that entered into force on 20 May 2005 (see Article 91 of the regulation) and Regulation 574/72/EEC\(^\text{119}\) fixing the procedure for implementing Regulation 1408/71/EEC on the application of social

---


\(119\) Regulation 574/72/EEC on the coordination of social security systems
security schemes to employed persons and their families moving within the EC, which was repealed by

i) Cooperation between competent authorities

The Regulation provides for an extensive degree of cooperation between the competent authorities
involved in the coordination of the Member States social security systems. The institutions and persons
covered by the Regulation have a duty of mutual information and cooperation with a view to ensuring the
Regulation’s correct implementation (see Article 76(4) of the Regulation).

In the framework of this cooperation, the Regulation allows the authorities to communicate directly with
one another and with the persons exercising their rights under the Regulation (see article 76(3) of the
Regulation). In accordance with the principle of good administration, the authorities are required to
respond to all queries within a reasonable period of time and must provide the persons exercising free
movement rights with any information required for exercising the rights conferred on them by the
Regulation (see article 76(4) of the Regulation).

In the event of any difficulties in the interpretation or the application of the Regulation which could
jeopardise the rights of a person covered by it, the authorities of the competent Member State or of the
Member State of residence of the person concerned are further required to contact each other in order to
find a solution (see Article 76(6) of the Regulation).

ii) E-Certificates

Regulation 1408/71 provided for the establishment of an Administrative Commission on Social Security
for Migrant Workers (see Article 80(1) of the Regulation). Under the Regulation it is the task of this
Administrative Commission to deal with all administrative matters arising from Regulation (EEC) No
1408/71 and subsequent regulations (see Article 81(a) of the Regulation).

On the basis of Regulation 574/72 it is the duty of the Administrative Commission to draw up models of
documents necessary for the application of Regulations 1408/71 and 574/72 (see Article 2(1) of the
Regulation). The so-called E-form certificates are - like the substantive rules in the social security
Regulations – aimed at facilitating freedom of movement for workers and freedom to provide services.120

iii) Example: the E101 Certificate

1408/71 on the application of social security schemes to employed persons and their families moving within the EC [1972] OJ L 74 1

120 Case C-202/97 Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen [2000] ECR I-00883
48; see also Case C-2/05 Rijksdienst voor Sociale Zekerheid v Herbosch Kiere NV [2006] ECR I-01079 20
Their significance can be illustrated by means of an example derived from a recent case before the Court of Justice in which the significance and effects of E-forms was considered. The case concerned an E101 certificate in which the competent authority of the Member State in which an undertaking providing temporary personnel was established had declared that its own social security system remained applicable to certain posted workers for the duration of their posting. The Court considered that by virtue of the principle that workers must be covered by only one social security system, the certificate thus necessarily implied that the other Member State’s social security system could not apply.\textsuperscript{121}

a. Principle of cooperation in good faith

The principle of cooperation in good faith, laid down in Article 10 EC, requires the issuing institution to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable in the matter of social security and, consequently, to guarantee the correctness of the information contained in an E101 certificate.\textsuperscript{122}

On the other hand, the Court considered that, in relation to the competent authorities of the Member State to which workers are posted, it is clear from the obligations to cooperate arising from Article 10 EC that those obligations would not be fulfilled – and the substantive aims of Regulations 1408/71 and 574/72 would be thwarted – if the institutions of that Member State were to consider that they were not bound by the certificate and also made those workers subject to their own social security system.\textsuperscript{123}

b. E-Certificates establish a presumption and are binding on authorities

Consequently, the Court held that, in so far as an E101 certificate establishes a presumption that posted workers are properly affiliated to the social security system of the Member State in which the undertaking which posted those workers is established, such a certificate is binding on the competent institution of the Member State to which those workers are posted.\textsuperscript{124} The Court considered that the opposite result would undermine the principle that workers are to be covered by only one social security system, would make it difficult to know which system is applicable and would consequently impair legal certainty. In cases in which it was difficult to determine the system applicable, each of the competent institutions of the two Member States concerned would be inclined to take the view, to the detriment of the workers concerned, that their own social security system was applicable to them.\textsuperscript{125}

\textsuperscript{121} Case C-202/97[n 120] 51
\textsuperscript{122} Case C-202/97[n 120] 51
\textsuperscript{123} Case C-2/05 [n 120] 23; see also Case C-202/97 [n 120] 52
\textsuperscript{124} Case C-2/05 [n 120] 24; see also Case C-202/97 [n 120] 53
\textsuperscript{125} Case C-2/05 [n 120] 25; see also Case C-202/97 [n 120] 54
c. **E-Certificates are binding until withdrawn or declared invalid by the authority that executed them**

Accordingly, the Court held that as long as an E101 certificate is not withdrawn or declared invalid, the competent institution of a Member State to which workers are posted must take account of the fact that those workers are already subject to the social security legislation of the State in which the undertaking employing them is established and that the authority in the Member State of posting cannot make the workers in question subject to its own social security system.\(^{126}\)

d. **Member State courts have no authority to declare E-forms invalid**

The Court further held that the competent authorities in the Member States are not allowed to bring proceedings before a court in order to have an E101 certificate declared invalid. This could potentially undermine the system based on the duty of cooperation in good faith between the competent authorities of the Member States. The Court concluded, therefore, that as long as it has not been withdrawn or declared invalid, an E101 certificate takes effect in the internal legal order of the Member State in which the workers concerned are posted and, therefore, binds its institutions, and that a court of the host Member State is not entitled to scrutinise the validity of an E101 certificate as regards the certification of the matters on the basis of which such a certificate was issued, in particular the existence of a direct relationship between the undertaking which posted the worker and the posted worker himself.\(^{127}\)

e. **Hungarian E101 Certificates not accepted in Germany**

The Hungarian report acknowledged a problem relating to the non-acceptance of Hungarian E101 certificates by German social security authorities. The relevant cases are still pending. However, it appears that generally the courts have admitted that the documents should have been accepted.

iv) **E-forms concerning general information and requests, posting of workers, sickness benefits, pensions, unemployment, family benefits and non-contributory benefits**

The Administrative Commission has established several series of E-forms in relation to general information and requests transferred between the competent authorities in the Member States, the posting of workers, sickness benefits, pensions, unemployment, family benefits, and non-contributory benefits.\(^{128}\)

---

\(^{126}\) Case C-2/05 [n 120] 26; see also Case C-202/97 [n 120] 55

\(^{127}\) Case C-2/05 [n 120] 30-32

\(^{128}\) The relevant E-forms are as follows: information and requests (E001); posting of workers (E101, E101a, E102), sickness benefits (E103, E104, E106, E107, E108, E109, E112, E115, E116, E117, E118, E119, E120, E121, E123, E124, E125, E126, E127); pensions (E201, E202, E203, E204, E205 – country
We will not discuss the form and contents of E-forms in detail. As indicated, the E-forms generally concern models of documents necessary for the coordination of the Member States’ social security schemes and their application to employed persons and their families moving within the EC.

v) The language in which documents must be accepted
Administrative cooperation between the authorities of the Member States is a pivotal requirement in the system of the Regulation (see Article 76 of the Regulation). In this light, the Regulation prohibits the authorities, institutions and tribunals of one Member State to reject 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 (see Article 76(7) of the Regulation). In case of language problems, the competent authorities are able to contact directly the authorities in the other Member States.

vi) Public documents in electronic form
The Regulation provides that electronic documents sent or issued by an institution in conformity with this Regulation and the Implementing Regulation may not be rejected by any authority or institution of another Member State on the grounds that it was received by electronic means, once the receiving institution has declared that it can receive electronic documents (see Recital 40 and Article 78(3) of the Regulation). Member State authorities must regard electronic documents transferred to them as valid if the computer system on which the document is recorded contains the safeguards necessary in order to prevent any alteration, disclosure or unauthorised access to the recording (see Article 78(4) of the Regulation).

Reproductions and recordings of electronic Public Documents must further be presumed to be correct and accurate reproductions of the original document or representations of the information they relate to, unless there is proof to the contrary (see Article 78(3) of the Regulation).

vii) Administrative fees
The Regulation provides that the Member States are required to apply in a non-discriminatory manner all exemptions from or reduction of taxes, stamp duty, notarial or registration fees provided for under their legislation in respect of certificates or documents required to be produced in application of the legislation specific, E207, E207, E210, E211, E213, E215, E501, E502, E503, E505, E551); unemployment (E301, E302, E303); family benefits (E401, E402, E403, E404, E405, E406, E407, E411); and non-contributory benefits (E601, E602).
of that Member State also to similar certificates or documents required to be produced in application of the legislation of another Member State or of this Regulation (see Article 80(1) of the Regulation).

2) Legalisation formalities restricting the use of these Public Documents

a) Regulation 883/2004 contains an explicit exemption from legalisation formalities

In the same terms as Regulation 1408/71, Regulation 883/2004 is clear when it comes to applicable legalisation formalities re documents required to be produced abroad for the implementation of the Regulation: “all statements, documents and certificates of any kind whatsoever required to be produced in application of this Regulation shall be exempt from authentication by diplomatic or consular authorities” (see Article 80(2) of the Regulation).

i) Different language versions

In this regard it is interesting to compare two language versions of Article 80(2) of the Regulation because the English language version does not refer explicitly to legalisation. The English language version of the Article, titled “Exemption from authentication”, states, as follows, that: “All statements, documents and certificates of any kind whatsoever required to be produced for the purposes of this Regulation shall be exempt from authentication by diplomatic or consular authorities”. Conversely, the German language version, titled “Befreiung von der Legalisierung” makes an explicit reference to legalisation formalities and states, as follows, that: “Urkunden, Dokumente und Schriftstücke jeglicher Art, die im Rahmen der Anwendung dieser Verordnung vorzulegen sind, brauchen nicht durch diplomatische oder konsularische Stellen legalisiert zu werden“.

b) Validity and binding effect of Public Documents

Another interesting point to be raised here is the fact that the original Commission proposal for Regulation 883/2004 (see COM(2006)16 final) dealt explicitly with the legal value of foreign documents and supporting documents issued in other Member States that appears to be derived from the case law of Court of Justice in relation to the significance and effect of E-form certificates under Regulation 1408/71 (see article 5(1) of the Proposal). Literally, the proposal provided, as follows, that: “Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of Regulation (EC) No. 883/2004 and of this Regulation, and supporting documents issued by the authorities of another Member State, including the taxation authorities, shall be accepted by the institutions of the other Member States so long as they have not been withdrawn or declared to be invalid by the competent authority or institution of the Member State in which they were issue.”
In addition, the Commission’s proposal stipulated that, in the event of doubts about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the authority of the Member State that receives the document would be required to contact the issuing institution to ask it for the necessary clarification and, where appropriate, the withdrawal of the document (see Article 5(2) of the proposal). Ultimately, the Article was not retained in the final text of the Regulation. This leaves the question of the effect of Public Documents required in the context of Regulation 883/2004 unanswered.

2.04 EC civil justice cases

(a) Introduction

The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the EC is to adopt, among others, the measures relating to judicial cooperation in civil matters having cross-border implications and needed for the proper functioning of the internal market.

Civil justice is an EC policy area formally connected to free movement of persons (see Title IV of the Treaty and in particular Article 65 EC). For the purpose of this report, EC civil justice cases are considered independently, despite this relationship, with a view to their particular nature and self-standing subject matter, i.e. effective access to justice in the EU as opposed to freedom of movement. An independent analysis is further warranted with a view to the growing number of detailed implementing measures in the area of civil justice.

The EC area of civil justice is in a state of constant and progressive development. Public documents and their effective use are of vital importance for the proper functioning of the EC’s civil justice area, both in terms of access to justice and effective justice.

(b) Associated rights of civil justice

(i) Access to justice

1) Introduction

Within the European context, a person’s access to justice can be hampered both by a lack of resources for a litigant, whether acting as claimant or as defendant, or by difficulties flowing from a dispute's cross-border dimension.
The expression "right to a fair trial" is often used by the European Court of Human Rights to include all the safeguards offered to persons coming before the courts under Article 6 of the European Convention on Human Rights (ECHR). The term covers all the procedural safeguards to enable persons to exercise the rights provided for in the ECHR.

One of the safeguards laid down in Article 6 is legal assistance which states party to the ECHR have to provide to everyone within their jurisdiction in order to guarantee access to justice, if the persons concerned lack sufficient means and if the interest of justice so requires. The right to access to justice is restated in the EU Charter of Fundamental Rights\textsuperscript{129} (see Article 47).

2) Relevant EC measures and associated Public Documents

EC measures in the process of maintaining and developing the EC's civil justice area include measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States (see Article 65(c) EC).

In accordance with the conclusions of the Tampere European Council on 15 and 16 October 1999, such measures include measures establishing minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the EU.

For the purpose of the study, we focus on Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.\textsuperscript{130} The Directive promotes the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice.

In implementing the Directive, the Member States must grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State (see Article 4 of the Directive).

The main purpose of this Directive is to guarantee an adequate level of legal aid in cross-border disputes by laying down certain minimum common standards relating to legal aid in such disputes (see Article 1 of the Directive).

\textsuperscript{129} Charter of fundamental rights of the European Union [2000] OJ C 364 1

The preamble of the Directive confirms that persons involved in a civil or commercial dispute ought to be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings.

Legal aid is regarded as appropriate under the Directive when it allows the recipient effective access to justice (see Article 3(2) of the Directive). The aid guaranteed under the Directive covers the entire proceeding, including expenses incurred in having a judgment enforced, and if an appeal is brought either against or by the recipient (see Articles 7 to 11 of the Directive). Legal aid under the Directive also covers the enforcement of authentic instruments in another Member State (see Article 11 of the Directive).

Under the Directive, the Member States are required to designate authorities competent to send (transmitting authorities) and receive (receiving authorities) legal aid applications (see Article 14 of the Directive).

\[a) \text{ EC legal aid application forms} \]

The Directive established a standard form for legal aid applications and for the transmission of legal aid applications in the event of cross-border litigation. The aim of establishing one form is to facilitate the transmission of forms and to make the relevant application and granting procedures easier and faster (see Recital 28 and Article 16(1) of the Directive).\(^{131}\)

EC legal aid application forms, as well as national application forms, are available on a European level through the information system of the European Judicial Network\(^ {132}\) (see Recital 29 of the Directive). The notification and transmission mechanisms provided for by the Directive are based on those of the European Agreement on the transmission of applications for legal aid signed in Strasbourg on 27 January 1977\(^ {133}\) (see Recital 26 of the Directive).


\(^{133}\) European Agreement on the Transmission of Applications for Legal Aid (signed in Strasbourg on 27 January 1977, entry into force on 28 February 1977) ETS No 092; On 15 April 2007 21 Member States were party to the Convention, excluding Cyprus, Hungary, Malta, Slovak Republic, and Slovenia
3) Legalisation formalities restricting the use of these Public Documents

Under the 1977 European Agreement on the transmission of applications for legal aid, all documents transmitted in pursuance of the Agreement were exempt from legalisation formalities (see Article 4 of the Agreement). The Explanatory Report states: “In the light of the current trend of practice (...) the documents transmitted need not be legalised which constitutes a simplification compared with the Hague Convention (...). The term "an equivalent formality" covers, inter alia, those used in the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.”

The Explanatory Report justified the abolition of existing legalisation formalities in relation to legal aid application forms, with reference to the emerging practice of European countries in progressively exempting documents from other European countries from legalisation. In addition, the drafters of the Agreement stated that the possibility of recourse to the service of the transmitting and receiving authorities appeared to provide a sufficient guarantee of authenticity of the documents produced in the pursuance of the Agreement.  

Directive 2003/8 builds on the Convention and also exempts legal aid request forms and their supporting documents from all legalisation formalities as applicable between the Member States (see Article 13(5) of the Directive).

(ii) Effective justice

1) Relevant EC measures and associated Public Documents

For the purpose of this report, we shall refer where relevant to the following EC instruments and Public Documents in their scope of application: (1) Regulation 1896/2006/EC creating a European order for payment procedure; (2) Regulation 805/2004/EC creating a European Enforcement Order for uncontested claims; (3) Regulation 2201/2003/EC concerning jurisdiction and the recognition and

---

134 Explanatory Report to the European Agreement on the Transmission of Applications for Legal Aid [n 70] 4
enforcement of judgments in matrimonial matters and the matters of parental responsibility\textsuperscript{137}; (4) Regulation 1206/2001/EC on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters\textsuperscript{138}; (5) Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters\textsuperscript{139}; (6) Regulation 1348/2000/EC on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters\textsuperscript{140}; and (7) Regulation 1346/2000/EC on insolvency proceedings\textsuperscript{141}.

In addition, we give attention to recent proposals of the Commission in the area of civil justice: (1) the (amended) proposal for a Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters\textsuperscript{142}; (2) the proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations\textsuperscript{143}; and (3) the proposal for a Regulation establishing a European Small Claims Procedure\textsuperscript{144}.

\textbf{a) Decisions and their accompanying EC certificates}


\textsuperscript{138} Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters \[2001\] OJ L 174 1


\textsuperscript{140} Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters \[2000\] OJ L 160 37

\textsuperscript{141} Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings \[2000\] OJ L 160 1

\textsuperscript{142} Amended proposal for a Regulation of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ("Service of documents") COM(2006) 751 final

\textsuperscript{143} Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations COM(2005) 649 final

\textsuperscript{144} Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure COM(2005) 87 final
i) Commission proposal: European Small Claim Procedure Judgments and their accompanying certificates

This Commission Proposal establishing a European Small Claims Procedure is intended to simplify and speed up litigation concerning small claims, and to reduce costs. The small claims procedure is designed to be available to litigants as an alternative to the procedures existing under the laws of the Member States. The proposed Regulation is intended to eliminate the intermediate measures necessary to enable recognition and enforcement, in other Member States, of judgments, with the exception of judgments on uncontested claims, given in one Member State in a small claims procedure (see Article 1 of the Proposal).

With a view to the enforcement of a small claims procedure judgment in another Member State, the claimant must provide the competent enforcement authorities of that Member State with: (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity (see Article 18(a) of the Proposal); and (2) the certificate which the court that rendered the judgment must draw up using a standard form (see Article 18 and Annex III of the Proposal).

a. “shall be established in the language of the judgment”

The proposed Regulation establishing the European small claims procedure does not contain an explicit reference to (certified) translation requirements in relation to the documents that a claimant must produce when enforcement of the small claims judgment is sought in another Member State. In relation to the certificate that is to be used by courts to certify their judgment, the proposal merely provides that it will be drawn up in the language of the judgment (see Article 18 of the Proposal).

b. COM (2005) 87 final contains no explicit exemption from legalisation

COM (2005) 87 final does not explicitly exempt copies of judgments which satisfy the conditions necessary to establish authenticity and the certificate which is to accompany the judgments in a European Small Claims Procedure from legalisation formalities (see Article 18 of the Proposal). The text of the proposal is silent as regards legalisation or equivalent formalities.

ii) Commission proposal: Decisions, authentic instruments and party agreements in matters relating to maintenance obligations

The Commission proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations aims at bringing together in a single instrument all the measures necessary to the recovery of maintenance

---

146 Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations COM(2005) 649 final
obligations within the EC (see recital 8 of the Regulation). The Regulation therefore contains provisions on jurisdiction, conflict of laws, enforceability and enforcement of foreign decisions and cooperation.

A party applying in a Member State for the recognition or enforcement of a decision given in matters relating to maintenance obligations by a court of a Member State is required to produce: (1) a copy of the decision which satisfies the conditions necessary to establish its authenticity; and (2) an extract established by the competent authority drawn up using a standard form (see Article 28 and Annex I of the Proposal).

For the purpose of the proposed Regulation, authentic instruments and agreements between parties which are enforceable in a Member State are to be treated as equivalent to decisions (see Recital 20 of the Proposal). The term "authentic instrument" is defined, as follows, for the purpose of the Regulation: “a document which has been formally drawn up or registered as an authentic instrument in matters related to maintenance obligations, and the authenticity of which: i) relates to the signature and the content of the instrument; and ii) has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates, or b) an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them” (see Article 2(4) of the proposal).

a. “no translation shall be required”

The Commission’s proposal in relation to decisions in matters relating to maintenance obligations is quite clear in relation to the need to provide the authorities in other Member States with (certified) translations of judgments or their accompanying certificates: No such translation may be required by the competent authorities of the Member State of enforcement (see Article 28 of the Proposal).

b. COM (2005) 649 final contains an explicit exemption from legalisation

COM (2005) 649 final exempts decisions relating to maintenance obligations from legalisation formalities (see Article 31 in conjunction with Article 28 of the Proposal).

iii) European order for payment certificates

Regulation 1896/2006 established a European order for payment procedure.  

147 The Regulation entered into force on 30 December 2006 and will apply from 12 December 2008, with the exception of Articles 28, 29, 30 and 31 which shall apply from 12 June 2008 (see Article 33 of the Regulation).

The purpose of the Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement (see Recital 9 of the regulation).

For enforcement in another Member State, the claimant must provide the competent enforcement authorities of that Member State with a copy of the European order for payment, as declared enforceable by the court of origin, which satisfies the conditions necessary to establish its authenticity (see Article 21(2)(a) of the Regulation).

The court that executes the order must use a standard form (see Article 12(1) and Annex V of the regulation). The regulation indicates that the use of standard forms facilitates the administration of the order for payment and enables automatic data processing (see Recital 11).

a. “where necessary”

For enforcement in another Member State of a European order for payment under Regulation 1896/2006 the claimant must provide the competent enforcement authorities of that Member State, if necessary, with a translation of the European order for payment into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court proceedings of the place where enforcement is sought, in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept, certified by a person qualified to do so in one of the Member States (see Article 21(2)(b) of the Regulation).

b. Regulation 1896/2006 contains no explicit exemption from legalisation

Regulation 1896/2006 does not explicitly exempt copies of European orders for payment from legalisation formalities.

iv) European enforcement order certificates

---

Regulation 805/2004 established a European enforcement order for uncontested claims (EEO).\textsuperscript{149} The Regulation entered into force on 21 January 2004 and is applicable since 21 October 2005, with the exception of Articles 30, 31 and 32, which are applicable since 21 January 2005 (see article 33 of the regulation).

The purpose for creating an EEO is to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings brought in the Member State of enforcement prior to recognition and enforcement (see Article 1 of the regulation).

The Regulation applies to judgments, court settlements and authentic instruments on uncontested claims and to decisions delivered following challenges to judgments, court settlements and authentic instruments as far as these documents are certified as European Enforcement Orders (see Recital 7 of the regulation).

The term "uncontested claims" covers all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained either a court decision against that debtor or an enforceable document that requires the debtor's express consent, be it a court settlement or an authentic instrument (see Recital 5 of the regulation).

The advantage of the EEO as compared with the exequatur procedure provided for in Regulation 44/2001 is that there is no need for approval by the judiciary in a second Member State with the delays and expenses that this entails (see Recital 9 of the Regulation).

The assessment by the court of only one Member State that all conditions for certification as a European Enforcement Order are fulfilled was considered justified as a result of the mutual trust in the administration of justice that exists between the Member States. This allows a judgment to be enforced in all other Member States without judicial review of the proper application of the minimum procedural standards in the Member State where the judgment is to be enforced (see Recital 18 and Article 5 of the Regulation).

Under the Regulation, a creditor seeking the enforcement of a judgment, court settlement or authentic instrument that is certified as an EEO is required to provide the competent enforcement authorities of the Member State of enforcement with the following documents (see Article 20(2)(a) and (b) of the regulation): (1) a copy of the judgment which satisfies the conditions necessary to establish its

authenticity; and (2) a copy of the European Enforcement Order certificate which satisfies the conditions necessary to establish its authenticity (see Article 27 in conjunction with Annexes I (Article 9 - judgments), II (Article 24 – court settlements) and III (Article 25 – authentic instruments) of the Regulation). The use of uniform certificates is expected to warrant the necessary mutual trust between the courts and competent authorities of the Member States (see Recital 18 of the Regulation).

**a. European enforcement order certificates for judgments**

A judgment on an uncontested claim delivered in a Member State can, upon application at any time to the court of origin, be certified as an EEO (see Article 6 of the Regulation). The Regulation stipulates the use of a standard EEO certificate by the court competent to scrutinise full compliance with the minimum procedural standards provided for in the Regulation (see Article 9(1) and Annex I of the Regulation).

**b. European enforcement order certificates for court settlements**

A court settlement on an uncontested claim delivered in a Member State can, upon application at any time to the court which approved it or before which it was concluded, be certified as an EEO (see Article 24(1) of the Regulation). The Regulation stipulates the use of a standard EEO certificate (see Article 24(1) Annex II of the Regulation).

**c. European enforcement order certificates for authentic instruments**

An authentic instrument on an uncontested claim executed in a Member State can, upon application at any time to the competent authority in the Member State of origin, be certified as an EEO (see Article 24(1) of the Regulation). The Regulation stipulates the use of a standard EEO certificate (see Article 25(1) Annex III of the Regulation).

**d. Certificates of lack or limitation of enforceability**

The Regulation further provides that where a judgment that was previously certified as an EEO has ceased to be enforceable or its enforceability has been suspended or limited, the competent court of origin of the EEO can be requested to execute a certificate indicating the lack or limitation of enforceability. This certificate must be drawn up in accordance with a standard form annexed to the Regulation (see Article 6(2) and Annex IV of the Regulation).

**e. European enforcement order replacement certificates following a challenge**

Where a decision has been delivered following a challenge to a judgment certified as an EEO, a replacement certificate can, upon application at any time, be issued (see Article 6(3) of the Regulation). This replacement certificate must be drawn up in accordance with a standard form annexed to the Regulation (see Article 6(3) and Annex V of the Regulation).
f. **“where necessary”**

For enforcement in another Member State of an EEO under Regulation 805/2004 the claimant must, if deemed necessary, provide the competent enforcement authorities of that Member State with a translation of the European order for payment into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court proceedings of the place where enforcement is sought, in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept, certified by a person qualified to do so in one of the Member States (see Article 20(1)(c) of the Regulation).

g. **Regulation 805/2004 does not contain an explicit exemption from legalisation**

Regulation 805/2004 does not explicitly exempt judgments, court settlements or authentic instruments on uncontested claims which fulfil the requirements of Regulation 44/2001 or their accompanying certificates from legalisation formalities.

The Regulation does stipulate that: “Mutual trust in the administration of justice in the Member States justifies the assessment by the court of one Member State that all conditions for certification as a European Enforcement Order are fulfilled to enable a judgment to be enforced in all other Member States without judicial review of the proper application of the minimum procedural standards in the Member State where the judgment is to be enforced” (see Recital 18 of the Regulation).

The Regulation further stipulates that a judgment certified as a European Enforcement Order shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement (see Article 20(1) of the Regulation).

v) **Judgments, authentic instruments and party agreements in matrimonial matters and the matters of parental responsibility and their accompanying certificates**

Regulation 2201/2003 facilitates the recognition and enforcement between member States of judgments, authentic instruments and agreements between parties in matrimonial matters and matters of parental responsibility.150 A person seeking or contesting the recognition of a judgment, authentic instrument or party agreement, or who is applying for a declaration of enforceability must produce the following documents: (1) a copy of the judgment, authentic instrument or party agreement in question which

satisfies the conditions necessary to establish its authenticity (see respectively Articles 37(1)(a), 45(1)(a) and 46 of the Regulation); and (2) the appropriate certificate drawn up in accordance with the Annexes to the Regulation.

   a. **Certificates concerning judgments, authentic instruments or party agreements in matrimonial matters**

   Judgments, authentic instruments or party agreements in matrimonial matters must be certified, at the request of any interested party, by the competent court or authority of a Member State of origin using a relevant standard form (see article 39 and Annex I of the Regulation).

   b. **Certificates concerning judgments, authentic instruments or party agreements on parental responsibility**

   Judgments, authentic instruments or party agreements on parental responsibility must be certified, at the request of any interested party, by the competent court or authority of a Member State of origin using a relevant standard form (see article 39 and Annex II of the Regulation).

   c. **Certificates concerning judgments on rights of access**

   Judgments on rights of access must be certified, at the request of any interested party, by the competent court or authority of a Member State of origin using a relevant standard form (see article 41(1) and Annex III of the Regulation).

   d. **Certificates concerning judgments on the return of children**

   Judgments on rights of access must be certified, at the request of any interested party, by the competent court or authority of a Member State of origin using a relevant standard form (see article 42(1) and Annex IV of the Regulation).

   e. **Certificates or documents proving the institution of proceedings or the acceptance of the defendant**

   The regulation provides that, in situations where a judgment concerning matrimonial matters or parental responsibility is given in default, the party seeking recognition or applying for a declaration of enforceability must produce - in addition to the documents indicated above - the following documents (see Article 37(2): (a) The original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document; or (b) any document indicating that the defendant has accepted the judgment unequivocally.

   f. **Equivalent documents that may be accepted**
If a person does not, or is unable to provide a certificate required under Article 38 of the Regulation or, in the case of default judgments, the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings, the court in the Member State of enforcement may accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production (see Article 38(1) of the Regulation).

g. “if the court so requires”

In procedures concerning applications for a declaration of enforceability governed by Regulation 2003/2201, the production of translations of both judgments and certificates certified by a person qualified to do so in one of the Member States may be required (see Article 38(2) of the Regulation; the Article apparently applies to all documents referred to in its Section).

There is also a requirement of a certified translation for equivalent documents which are produced as replacements of Annex I or II certificates or of documents proving the service of the document that instituted proceedings (see Article 38(2) of the Regulation).

h. “shall be accompanied by a translation”

In contrast with the above, Regulation 2003/2201 does not require the production of certified translations of judgments concerning rights of access and of judgments which require the return of the child. Generally, both judgments and their accompanying certificates may be drawn up in the language of the Member State in which they were executed and a certified translation may not be required prior to declaring the judgments enforceable (see Article 41(2) of the Regulation).

The only translation requirement that persists in this part of the Regulation relates to certain important elements of the EC certificates that need to accompany the judgments when an application for a declaration of enforceability is made (See Article 45(2) of the Regulation). These parts relate to the precise arrangements for exercising right of access or the arrangements for implementing the measures taken to ensure the child’s return (see respectively points 12 and 14 of the relevant certificates in Annexes III and IV of the Regulation).

i. Regulation 2201/2003 contains an explicit exemption from legalisation

Regulation 2201/2003 exempts judgments in matrimonial matters or in matters concerning parental responsibility from legalisation formalities (see Article 52 of the Regulation).

Certificates drawn up in the standard forms required for certifying the authenticity of judgments, authentic instruments and agreements between parties are also exempt from legalisation formalities by the
Regulation (see Article 52 in conjunction with respectively Annex I (Article 39); II (Article 39); III (Article 41); and IV (Article 42) of the Regulation).

In addition, documents which have been formally drawn up or registered as authentic instruments and are enforceable in the Member State in which they were concluded are to be recognised and declared enforceable under the same conditions as judgments in matrimonial matters or matters concerning parental responsibility. As a result, these documents are equally to be exempt from legalisation formalities (see Article 46 in conjunction with Article 52 of the Regulation).

Lastly, agreements between parties that are enforceable in the Member State in which they were concluded are to be recognised and declared enforceable under the same conditions as judgments in matrimonial matters or matters concerning parental responsibility. As a result, these documents are equally to be exempt from legalisation formalities (see Article 46 in conjunction with Article 52 of the Regulation).
vi) Judgments, authentic instruments and court settlements in civil and commercial matters and their accompanying certificates

Regulation 44/2001 facilitates the recognition and enforcement of judgments, authentic instruments and court settlements in civil and commercial matters on jurisdiction and of judgments in civil and commercial matters. 151 A person seeking recognition or applying for a declaration of enforceability must produce the following documents: (1) a copy of the judgment, authentic instrument or court settlement which satisfies the conditions necessary to establish its authenticity (see Article 53(1) of the regulation); and (2) the appropriate certificate drawn up in accordance with the Annexes to the Regulation:

a. Certificates concerning judgments and court settlements

Judgments or court settlements must be certified, at the request of any interested party, by the competent court or authority of the Member State of origin using a relevant standard form (see article 54 and 58, and Annex V of the Regulation).

b. Certificates concerning authentic instruments

Authentic instruments must be certified, at the request of any interested party, by the competent authority of the Member of origin using a relevant standard form (see article 57(4) and Annex VI of the Regulation).

c. Equivalent documents that may be accepted

If a person does not produce a certificate required under Article 54 of the Regulation, the court or competent authority in the Member State of enforcement may accept equivalent documents or, if it considers that it has sufficient information before it, dispense with its production (see Article 55(1) of the Regulation).

d. “if the court so requires”

In procedures concerning applications for a declaration of enforceability governed by Regulation 44/2001, the production of translations of both judgments and certificates certified by a person qualified to do so in one of the Member States may be required by the court in the Member State of enforcement (see Article 55(2) of the Regulation; the Article apparently applies to all documents referred to in its Section).

---

There is also a requirement of a certified translation for equivalent documents which are produced as replacements of Annex I or II certificates or of documents proving the service of the document that instituted proceedings (see Article 55(1) of the Regulation).

e. Regulation 44/2001 contains an explicit exemption from legalisation

Regulation 44/2001 exempts judgments in civil and commercial matters which satisfy the conditions necessary to establish their authenticity from legalisation formalities (see Article 56 of the Regulation).

It also exempts certificates which are required for certifying the authenticity of judgments, court settlements and authentic instruments from legalisation formalities (see Article 56 of the Regulation in conjunction with Annex V of the Regulation).

Lastly, the Regulation exempts documents which have been formally drawn up or registered as an authentic instrument, which are enforceable in the Member State of origin, and which satisfy the conditions necessary to establish their authenticity from legalisation formalities (see Article 57(4) in conjunction with Article 56 of the Regulation).

Accordingly, the documents used for their certification are also exempt from Member State’s national legalisation requirements (see Article 57(4) and (5), and Annex VI in conjunction with Article 56 of the Regulation).

The same applies to settlements which have been approved by a court in the course of proceedings and are enforceable in the Member State in which they were concluded (see Article 58 and Annex V in conjunction with Articles 57(4) and 56 of the Regulation).
vii) Judgments and decisions in insolvency proceedings

Regulation 1346/2000 facilitates the cross-border operation of insolvency proceedings. It provides for the mutual recognition of judgments and decisions in cross-border insolvency proceedings. The Regulation does not provide for standard forms to facilitate the cross-border use of judgments within the scope of the Regulation, although the Commission website contains certain model forms to which no reference can be found in the Regulation.

The Regulation merely provides that those judgments are to be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (see Article 25 of the Regulation).

a. Judgments opening insolvency proceedings

A party seeking recognition or applying for enforcement of a judgment opening insolvency proceedings must produce the following documents (see Article 46 of the Brussels Convention in conjunction with Article 25 of Regulation 1346/2000): (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (2) in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document.

A party applying for enforcement must further produce the following (see article 47 of the Brussels Convention): (3) documents which establish that, according to the law of the Member State of origin, the judgment is enforceable and has been served; and (4) where appropriate, a document showing that the applicant is in receipt of legal aid in the State of origin.

b. Equivalent documents that may be accepted

If no certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or document showing that the applicant is in receipt of legal aid in the State of origin is produced, a Member State court may accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production (see Article 48 of the Convention).

c. Decisions appointing a liquidator

---


The Regulation stipulates that the liquidator’s appointment must be evidenced by a certified copy of the original decision appointing him/her or by any other certificate issued by the court which has jurisdiction (see Article 19 of the Regulation).

d. **Judgments concerning the course and closure of insolvency proceedings**

A party seeking recognition or applying for enforcement of a judgment concerning the course and closure of insolvency proceedings must produce the following documents (see Article 46 of the Brussels Convention in conjunction with Article 25 of Regulation 1346/2000): (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (2) in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document.

A party applying for enforcement must further produce the following (see article 47 of the Brussels Convention): (3) documents which establish that, according to the law of the Member State of origin, the judgment is enforceable and has been served; and (4) where appropriate, a document showing that the applicant is in receipt of legal aid in the State of origin.

e. **Equivalent documents that may be accepted**

If no certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or document showing that the applicant is in receipt of legal aid in the State of origin are produced, the court may accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production (see Article 48 of the Convention).

f. **Judgments deriving directly from or closely linked to insolvency proceedings**

A party seeking recognition or applying for enforcement of a judgment deriving directly from or closely linked to insolvency proceedings must produce the following documents (see Article 46 of the Brussels Convention in conjunction with Article 25 of Regulation 1346/2000): (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (2) in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document.

A party applying for enforcement must further produce the following (see article 47 of the Brussels Convention): (3) documents which establish that, according to the law of the Member State of origin, the judgment is enforceable and has been served; and (4) where appropriate, a document showing that the applicant is in receipt of legal aid in the State of origin.

g. **Equivalent documents that may be accepted**
If no certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or document showing that the applicant is in receipt of legal aid in the State of origin are produced, the court may accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production (see Article 48 of the Convention).

**h. “if the court so requires”**

The party seeking the enforcement of a judgment concerning insolvency proceedings rendered in accordance with Regulation 1346/2000 must, if the court so requires, produce a translation of the documents involved in the enforcement procedure which is certified by a person qualified to do so in one of the Contracting States (see Article 48 of the Brussels Convention in conjunction with Article 25 of Regulation 1346/2000).

**i. “A translation (…) may be required”**

Regulation 1346/2000\(^{154}\) indicates that a Member State, in which a liquidator intends to act, may require the translation of the (certified copy of the) original decision appointing the liquidator, into its official language or one of its official languages (see Article 19 of the Regulation).

**j. Regulation 1346/2000 contains an explicit provision from legalisation**

Regulation 1346/2000 exempts documents by which a liquidator is appointed in a Member state and translations of such documents from legalisation formalities (see Article 19 of the Regulation).

In addition, the Brussels Convention exempts judgments opening insolvency proceedings, judgments concerning the course and closure of insolvency proceedings, judgments deriving directly from or closely linked to insolvency proceedings or equivalent documents are exempt from legalisation (see Article 49 of the Brussels Convention).

**b) Procedural documents and their accompanying EC certificates**

**i) Judicial documents and extrajudicial Public Documents intended to be served in civil or commercial matters**

For the purpose of the study, our focus is on Public Documents that are transmitted between Member States for the purpose of being served using the procedure set out in Regulation 1348/2000\(^{155}\) and the


accompanying EC certificates that are involved in this procedure. The system of the Regulation is based on the direct transmission of all documents involved in the procedure between the competent authorities in the Member States (see Article 4 of the Regulation).

For the purpose of implementing the transmission and service requirements under the Regulation, the Member States are required to designate the following competent authorities: (1) transmitting agencies competent for the transmission of judicial or extrajudicial documents to be served in another Member State (see Article 2(1) of the Regulation); (2) receiving agencies competent for the receipt of judicial or extrajudicial documents from another Member State (see Article 2(2) of the Regulation); and (3) central bodies responsible for supplying information to transmitting agencies; seeking solutions to any difficulties which may arise during transmission of documents for service; and forwarding, in exceptional cases, at the request of a transmitting agency, a request for service to the competent receiving agency (see Article 3 of the Regulation).

a. Judicial and extrajudicial documents intended to be served

The Regulation provides for the possibility of the serving between member States of both judicial documents and extrajudicial documents (see Article 1(1) of the Regulation). Judicial documents must be transmitted in accordance with the Regulation (see Article 4(1) of the Regulation). Extrajudicial documents may be transmitted for service in another Member State in accordance with the provisions of the Regulation (see Article 16 of the Regulation).
ii) **EC certificates used for the implementation of the cross-border service procedure for judicial and extrajudicial documents in civil and commercial matters**

The Regulation prescribes the use of several EC certificates for the purpose of facilitating the communication between the competent authorities in the member States.

**a. EC requests for the service of judicial and extrajudicial documents**

Under the Regulation, the documents that are to be transmitted to and subsequently served in other Member States must be accompanied by an official request drawn up to this end by the transmitting agency using a standard form (Article 4(3) and the Annex of the Regulation).

**b. Certificates of service or non-service of documents**

When the formalities concerning the service of a judicial or extrajudicial document have been completed, a certificate of completion of those formalities must be drawn up by the receiving agency using the standard form provided for by the Regulation (see Article 10(1) and the Annex of the Regulation).

If the requested service of the documents cannot be effected within one month of receipt by the receiving agency, the receiving agency must inform the transmitting agency by means of a certificate of non-service using the standard form provided for by the Regulation (see Article 7(2) and the Annex of the Regulation).

Where the receiving agency is informed that the addressee refused to accept a document in accordance with the Regulation (see Article 7(1) of the Regulation), the agency must inform the transmitting agency by means of a certificate drawn up using the standard form provided for by the Regulation (see Article 8(2) and the Annex of the Regulation).

**c. Other certificates common in the service procedure**

In addition to the certificates mentioned above, the Regulation provides for the following supplementary certificates to facilitate the communication between the competent authorities in the Member States: (1) certificates for the acknowledgment of receipt of requests for the service of documents (see Article 6(1) and the Annex of the Regulation); (2) certificates for giving notice of the return of the request and the documents to be served in case of formal deficiencies or if the request is outside of the scope of the Regulation (see Article 6(3) and the Annex of the Regulation); and (3) certificates for giving notice of the retransmission of the request and the documents to be served due to territorial competence issues and certificates for the notice of receipt by the territorially competent authority (see Article 6(4) and the Annex of the Regulation).

**d. “shall be completed in the official language of the Member State addressed”**
Under Regulation 1348/2001, request forms that accompany the documents that are transmitted between the competent authorities of the Member states for the purpose of being served must be completed in the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or in another language which that Member State has indicated it can accept (see Article 4(3) of the Regulation).

Certificates of service must be completed in the official language or one of the official languages of the Member State of origin or in another language which the Member State of origin has indicated that it can accept (see Article 10(2) of the Regulation).

e. **Regulation 1348/2000 contains an explicit provision for legalisation**

Regulation (EC) No 1348/2000 exempts all documents, requests, confirmations, receipts, certificates and any other papers used in the process of the service of judicial and extrajudicial documents in civil and commercial matters from legalisation formalities (see Article 4(4) of the Regulation).

The (amended) proposal for a Regulation of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters exempts documents and all papers that are transmitted under the Regulation from legalisation formalities (see Article 4(4) of the proposed Regulation).
iii) Evidence taken in civil or commercial matters

For the purpose of the study, our focus is on Public Documents that are transmitted between Member States for the purpose of the cross-border taking of evidence by the courts in the Member States using the procedure set out in Regulation 1206/2001 and the accompanying EC certificates that are involved in this procedure. The system of the Regulation is based on the direct transmission and execution of requests for the taking of evidence between the competent courts in the Member States (see Article 2 of the Regulation).

Under the Regulation, the Member States are required to draw up a list of the courts competent to receive requests for the taking of evidence (see Article 2(2) of the Regulation). The Member States are also required to designate a central body responsible for (a) supplying information to the courts; (b) seeking solutions to any difficulties which may arise in respect of a request; and (c) forwarding, in exceptional cases, at the request of a requesting court, a request to the competent court (see Article 3 of the regulation).

iv) EC certificates used for the implementation of the cross-border taking of evidence procedure

The Regulation prescribes the use of several EC certificates for the purpose of facilitating the communication between the competent authorities in the member States.

a. EC requests for the taking of evidence

Under the Regulation, a court of a Member State may make a request for the taking of evidence to the court competent to take evidence in another Member State (see Article 1(1)(a) of the Regulation). These requests must be transmitted to the competent court in the other Member State using a standard form provided for under the Regulation (see Article 4(1) and Form A of the Annex of the Regulation).

b. EC requests for the direct taking of evidence

Alternatively, the courts of a Member State may make a request to take evidence directly in another Member State (see Article 1(1)(b) of the regulation). Requests to this end must be transmitted to the central body or competent authority in the other Member State (see Article 3(3) of the Regulation) using a standard form provided for under the Regulation (see Article 17(1) and Form I of the Annex of the Regulation).

---

c. **EC certificates for the notification of the refusal of requests for the taking of evidence**

Under certain circumstances the request for the (direct) taking of evidence can be refused (see Article 14(1), 14(2) and Article 17(5) of the Regulation). The refusal must be communicated to the requesting court using a standard form provided for under the Regulation (see Article 14(4) and Form I of the Annex of the Regulation; and Article 17(4) and Form J of the Annex of the Regulation).

d. **Evidence taken in accordance with a request and the accompanying EC confirmation certificate**

If the request for the taking of evidence is accepted and executed, the requested court must send the requesting court the documents establishing its execution (see Article 16 of the Regulation). Additionally, the document containing the evidence must be accompanied by a certificate confirming its execution using a standard form provided for under the Regulation (see Article 16 and Form H of the Annex of the Regulation).

e. **Other certificates common in the procedure**

Besides the certificates mentioned above, the Regulation provides for the following certificates to be used for the communication between the competent courts in the Member States: (1) certificates for the notification of the forwarding of requests made under the Regulation (see Article 7(2) and Form A of the Annex of the regulation); (2) certificates for the acknowledgment of the receipt of requests made under the Regulation (see Article 7(1) and Form B of the Annex of the regulation); (3) certificates for requests for additional information for the taking of evidence (see Article 8 and Form C of the Annex of the Regulation); (4) certificates for the acknowledgment of the receipt of deposits or advances required under the Regulation (see Article 8(2) and Form D of the Annex of the regulation); (5) certificates for the notification of requests for special procedures and/or for the use of communications technologies for the taking of evidence (see Article 10(3), 10(4) and the Form E of the Annex of the regulation); (6) certificates for the notification of the date, time, place of performance of the taking of evidence and the conditions for participation in the taking of evidence (see Articles 11(4) and 12(5), and Form F of the Annex of the Regulation); (7) certificates for the notification of delays in the taking of evidence (see Article 15 and Form G of the Annex of the Regulation); and (8) certificates for the transmission of information from the central body/competent authority (see Article 17 and Form J of the Annex of the Regulation).

f. **“(…) shall be drawn up in the official language of the requested Member State (…)”**

Requests and communication certificates pursuant to Regulation 1206/2001 must be drawn up in the official language of the requested Member State or, if there are several official languages in that Member State, in the official language or one of the official languages of the place where the requested taking of
evidence is to be performed, or in another language which the requested Member State has indicated it can accept (see article 5 of the Regulation).

Documents which the requesting court deems necessary to enclose for the execution of the request must be accompanied by a translation into the language in which the request for the taking of evidence was written (see Article 4(3) of the Regulation).

**g. Regulation 1206/2001 contains an explicit exemption from legalisation**

Regulation 1206/2001 exempts requests for taking evidence in other Member States and all accompanying documents from legalisation formalities (see Article 4(2) of the regulation). Literally, the Regulation indicates that the request and all documents accompanying the request are to be exempted from “authentication or any equivalent formality”.
v) Documents appointing a representative ad litem for the purpose of the enforcement of judgments in matrimonial matters and the matters of parental responsibility

The procedure for making an application for a declaration of enforceability of judgments in the scope of Regulation 2201/2003 is governed by the law of the Member State of enforcement (see Article 30(1) of the Regulation). In the framework of making an application for a declaration of enforceability, the applicant must give an address for service within the area of jurisdiction of the court applied to (see Article 30(2) of the Regulation). However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the Regulation requires the applicant to appoint a representative ad litem in that Member State (see Article 30(2) of the Regulation).

a. Regulation 2201/2003 contains an explicit exemption from legalisation

Regulation 2201/2003 exempts documents appointing a representative ad litem in matrimonial matters or in matters concerning parental responsibility from legalisation formalities (see Article 52 of the regulation).

vi) Documents appointing a representative ad litem for the purpose of the enforcement of judgments in civil and commercial matters

A judgment given in a Member State and enforceable in that State can be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there (see Article 38(1) of the Regulation). The procedure for making the application is governed by the law of the Member State in which enforcement is sought (see Article 40(1) of the Regulation). In the framework of making an application for a declaration of enforceability, the applicant must give an address for service within the area of jurisdiction of the court applied to (see Article 40(2) of the Regulation). However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the Regulation requires the applicant to appoint a representative ad litem in that Member State (see Article 40(2) of the Regulation).

a. Regulation 44/2001 contains an explicit provision from legalisation

Regulation 44/2001 exempts documents appointing a representative ad litem in civil and commercial matters which satisfy the conditions necessary to establish their authenticity from legalisation formalities (see Article 56 of the Regulation).
(iii) Enforcement of decisions EC Institutions in the Member States

1) Introduction

The EC Treaty stipulates that decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States are enforceable (see Article 256 EC). According to that Treaty article, Commission decisions entailing a financial obligation on a person other than a Member State shall 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. Also enforceable are judgments of the European Court of Justice and the Court of First Instance (see Article 244 in conjunction with Article 256 EC).

2) The authentication of Commission decisions

a) Procedural rules of the Commission

The procedure for the authentication of decisions adopted by the European Commission is laid down in its rules of procedure. These procedural rules require that the instruments adopted by the Commission are authenticated 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 (see Article 18 of the Commission Rules of Procedure).

b) Enforcement through the Member States’ Permanent Representations

The procedure currently followed by the Commission, which is institutional in nature, is as follows: in the absence of voluntary payment, the permanent representation of the Member State concerned is asked to serve the enforcement order via the appropriate national authority. The decision, together with the enforcement order, is then forwarded to the Commission by the same route.

3) Legalisation formalities restricting the use of these Public Documents

a) Article 256 EC contains no explicit exemption from legalisation

---

The only formalities that Member States may impose in relation to a decision of the Commission - or any other decisions and judgments covered by Article 256 EC - are those concerning the verification of its authenticity (see Article 256 EC).

Article 256 EC does not make reference to legalisation formalities. In other words, the Treaty contains no guidance on which formalities may, or may not, be imposed by the Member States for the purpose of verifying the authenticity of a decision or judgment in practice.

b) The practice of the Member States resembles legalisation

On the other hand, the current practice of the Commission resembles the fulfilment of a legalisation formality: it involves the permanent representations of the Member States which are asked to serve the enforcement order via the appropriate national authority.

i) Complicated and time-consuming

The Commission has indicated that this procedure is complicated and time-consuming as it takes six months on average, while some dossiers can take years. During this period, the recovery of the sum owed cannot be enforced, and in the best of cases will be delayed, to the detriment of the Communities’ financial interests. Notwithstanding these practical issues, the Commission has expressed its intention to extend the number of situations in which decisions will be enforced using the Article 256 EC procedure in the future.

ii) Measures for simplification

With a view to simplifying the procedure, the Commission has suggested setting up direct links between its services and the relevant national service to ensure that the great majority of problems can be dealt with upstream. An effective enforcement procedure prevents that the Commission needs to initiate proceedings against Member States for failures to act. The Commission further suggested that the Member States supply the contact details of the national service responsible for serving execution orders.
PART III. THE ACCEPTANCE, RECOGNITION AND EFFECT OF PUBLIC DOCUMENTS FOR EVIDENTIARY PURPOSES IN THE MEMBER STATES

3.01 Introduction

(a) Public documents

In general terms, documents can be divided into two groups: those bearing the signatures or seals of private citizens or concerns, such as contractual agreements drawn up and signed by private parties, and those emanating from an official source, such as birth certificates drawn up and signed by a public official, who exercises an attributed public task to provide evidence of the registration of the birth of a person.

In its broadest sense, the term ‘Public Document’ covers all documents other than documents signed by persons in their private capacity. In fact we are concerned with documents that have been executed by a public official on the basis of an attributed or delegated authority to do so.

Public documents can be distinguished on the basis of their source, i.e. courts officials, administrative officials and notaries. The first category relates to judicial documents, which includes all documents executed by competent authorities and officials, who are functionally connected with the courts or tribunals of a State.

The second category relates to all possible administrative documents, which are executed by competent officials in the exercise of public powers.

The third category relates to notarial acts. This category includes all documents executed by notaries in the exercise of attributed public powers, which cannot be classified as judicial documents, administrative documents, or official certificates (see below).

Besides Public Documents that contain acts of public authority, we can identify Public Documents that officially certify documents signed in a private capacity. This category includes documents executed by either a competent official in the exercise of public powers, or a notary, who officially certifies the registration of a document or the fact that it was in existence on a certain date, or the authenticity of signatures.
(b) Distinction between Public Documents and acts of public authority

Documents record information, usually in writing. Public documents record the acts of public authorities in the process of exercising attributed public tasks. It is important to understand that the term ‘Public Document’ is quite ambiguous to the extent that it can be taken to refer to the act of the public authority directly, or to the document in which the act of public authority is contained.  

It is important to distinguish the document from the act that is contained in it, to avoid confusion and misunderstanding. For the purpose of this report, the term Public Document refers to the document that incorporates the act of public authority.

In practice, the type of act incorporated in a Public Document determines how the document is referenced. For example, a Public Document containing a court decision is generally referred to as a judgment. The use of specific terms clarifies what particular type of act a Public Document relates to.

The range of acts of public authorities that may be contained in Public Documents is as broad as the mandate of a public authority may be in a particular state. In the EC context, this range can be very broad indeed.

The fact that the study therefore necessarily covers many different types of Public Document does not constitute a major concern for the purpose of this report, since the scope of the report is restricted to an evaluation of the function that the entire group of Public Documents has in common: the function of providing proof of acts of public authority.

In addition, the degree of EC harmonisation and the question whether or not a system of mutual recognition of those acts has been established between the Member States depends on the type of act that is involved in a specific case.

1) An example: distinguishing marriage certificates from marriages

We will illustrate the importance of distinguishing between the Public Document and the public act that the Public Document incorporates by means of an example deriving from the Hague Convention on Private International Law (9th Session 1960) tome II Legalisation; Loussouarn confirms this ambivalence where he states that: “(...) the word actes is ambivalent to the extent that it covers both the negotium and the instrumentum. However, there is no doubt that as we are dealing with a Convention of legalisation only the second meaning can apply.”
celebration and recognition of the validity of marriages\textsuperscript{159} and concerning the distinction between marriage certificates and marriages.

The Hague 1978 Convention concerns - as far as relevant for the purpose of the example - the following matters: 1) the law applicable to international marriages; 2) the recognition of the validity of those marriages across national borders; and 3) the means through which a marriage can be proved across national borders.

The first two aspects (applicable law and recognition of validity) concern the public act of marriage. The third aspect concerns the Public Document (i.e. the marriage certificate) by means of which the public act of marriage can be proved across national borders.

\textbf{a) The relevant public act: the marriage}

i) Validity of the marriage

The first part of the Convention stipulates that the law of the place of celebration (the \textit{lex loci celebrationis}) applies to the formal requirements (e.g. formalities, witnesses, etc.) and to the substantive requirements of a marriage (see Article 2 of the Convention).

This conflicts solution contained in the Convention was thought to have several advantages: 1) it enables local authorities to apply the requirements of their own law in respect of consent of the parties or age and degree of prohibited relationship (e.g. uncle and niece); 2) it allows for the non-appliance of requirements of the law of the domicile, nationality or community of foreign marriage candidates; 3) it avoids characterisation problems (e.g. the problem of determining whether a parent’s consent is a matter of form or of substance, because the applicable laws will coincide); and 4) it allows unusual or oppressive requirements of a foreign law (e.g. any requirements based on race or colour) to be ignored.

ii) Recognition of the marriage

The second part of the Convention contains the basic rule that the Contracting States are bound, subject to a limited number of exceptions and subject of course to the mandates of their public policy, to recognise the validity of the marriage if valid according to the law of the state of celebration (see Article 9 and Articles 11 to 14 of the Convention).

\textsuperscript{159} Hague Convention on Celebration and Recognition of the Validity of Marriages (concluded 14 March 1978, entered into force 1 May 1991); The Convention is in force in two Member States: Luxembourg and The Netherlands
This approach prevents the re-evaluation of the applicable law under the conflict of law rules of the recognizing state and thus the re-evaluation of the validity of the marriage validly entered into under the law of the place of celebration.

**b) The relevant Public Document: the marriage certificate**

Within the framework of the Convention, proof of the public act of marriage may be provided by a specific type of Public Document: a marriage certificate (see Article 10 of the Convention).

The Convention indicates that where a competent authority of the state where the marriage was celebrated has issued a marriage certificate, the marriage is to be presumed to be valid in the state of recognition until the contrary is established.

**i) Legal diversity as to admissibility and evidential value of documentary evidence**

The Convention’s preparatory report indicates that there are substantial differences among different legal jurisdictions as to the weight given to documentary evidence of marriage, such as certificates of marriage, and to their admissibility in evidence.160

These differences reflect diverse systems of registration, and the effect of the differences in some cases may be to require resort to oral testimony as to the facts and expert testimony as to foreign law. Several approaches for addressing difficulties that arise out of these differences were evaluated in the process of drafting the Convention.

One approach looked at the law in accordance with which a legal act has been executed - under the principle of preconstituted evidence; and another took the matter of evidence as a procedural question governed by the *lex fori*.

Reference is also made in the report to other Conventions that facilitate the cross-border proof of marriage, for example, the Convention on the issue of certain extracts from civil status records for use abroad established by the Commission internationale de l’état civil (CIEC)161.

This Convention established a standard form for extracts of marriage registers (see Articles 1 to 4 and the annexed form A of the Convention), and stipulated that an extract issued in this standard form is to be

---

161 CIEC Convention No 1 on the issue of certain extracts from civil status records for use abroad (signed Paris 27 September 1956, entered into force 15 March 1956)
given the same evidential value as extracts issued in accordance with the rules of domestic law in force in the state from which the document in question emanates (see Article 5 of the Convention).

ii) The need to facilitate the cross-border proof of the public act of marriage

In the process of preparation of the Convention, it was deemed necessary to supplement the general rule for recognition of the validity of marriage by a supporting rule that facilitated the proof of marriage through a marriage certificate.

a. The marriage certificate establishes a presumption of validity of the act of marriage

Consequently, the Convention stipulates that, on the basis of a foreign marriage certificate issued by a competent authority, a marriage is to be presumed valid until the contrary is established. The requirement for the presumption to take effect is the production of a certificate of marriage that was executed in the state of celebration.

The Convention is based on the idea that when a marriage certificate has been executed by a competent authority, it is self-evident that this means that the authority regards the marriage as valid according to the law of the state to which the authority belongs, including its rules on private international law.

b. Establishing the contrary of the presumption of validity

The Convention's explanatory report indicates that there was some discussion concerning the question as to how the contrary of the presumption of validity established by a marriage certificate could be established. For example, the United Kingdom indicated that sometimes unreliable marriage certificates were presented to administrative authorities, for example, for immigration or social security purposes.

In situations where there is available not only the certificate but also substantial evidence that a marriage is invalid, the question was whether a public authority is required to go to a court, or whether within the formulation “until the contrary is established” it would be possible for a public authority to establish the contrary themselves.

As far as the Convention is concerned, it was held by the Special Commission that Article 10, as it is formulated, does not require the rebuttal of the established presumption through a judicial decision, provided that the contrary is established by the public authority with reasonable security. It was made clear, however, that substantial evidence to the contrary would be required.

c. Marriage certificate: any Public Document executed for the purpose of proving a marriage
The Convention does not speak of an extract of the marriage act but simply refers to a “certificate”. The term was intended to encompass any document executed by a competent authority for the purpose of proving the marriage, even if it is not an extract from the act of marriage in the technical sense. This approach is understandable with a view to the significant differences of public administration and registration techniques between countries.

**d. The authority competent to execute a marriage certificate**

Nonetheless, the Convention clearly indicates that the certificate must be executed by a competent authority. The Convention does not require that the certificate emanate from the authority before which the celebration of the marriage took place. Neither does it require that the certificate be executed by a given authority, for example, the marriage official in the locality where the spouses have their habitual residence.

For the purpose of the Convention, it is sufficient that the executing authority was generally authorised to perform such acts under the law of the state of celebration. Whether this requirement is fulfilled must be answered by the authorities of the state of recognition in accordance with their general rules of proof.

**e. Authenticity and formal validity of the certificate and competence of the executing authority**

The success of the system established by the Convention to facilitate the cross-border proof of marriage depends on knowledge of whether a certificate executed by a competent authority in a particular state, is authentic and formally valid.

The Convention requires all the Contracting States to provide information on the authorities which under its law are competent to execute marriage certificates and, subsequently, of any changes relating to such authorities (see Article 23 of the Convention).

This requirement, which does not involve mandatory administrative cooperation between the authorities of Contracting States, merely addresses issues related to unfamiliarity of authorities in a recognising state with the authorities in other states competent to execute marriage certificates.

In practice, it is left to the law of the recognising state to determine whether and under which conditions it will accept a foreign marriage certificate in terms of its authenticity and formal validity, and the competence of the executing authority.
In a fairly recent judgment concerning the Hague 1978 Convention, the Dutch Supreme Court reached the same conclusion.\textsuperscript{162} The case concerned a request that was made to the Dutch civil status registration authority for the correction of the birth certificate of a child born in the Netherlands by adding the name of the child’s father.

In the process of evaluating this request, the court had to substantiate the validity of the marriage between the mother and the alleged father, which took place in Ghana. The applicants produced a “Form of Register of Customary Marriages” stamped by the “Registrar of Marriages” in Kumasi (Ghana) as proof of their marriage.

The Dutch registrar, as well as the courts in first and second instance, refused to accept the alleged marriage certificate in question as proof of the marriage under the Hague 1978 Convention, due to the fact that the document had not been legalised.

Before the Supreme Court, the applicants claimed that this requirement could not be imposed owing to Article 10 of the Hague 1978 Convention, which provides that where a marriage certificate has been issued by a competent authority, the marriage is to be presumed to be valid until the contrary is established.

With reference to the Convention’s Explanatory Report\textsuperscript{163}, the Supreme Court, however, clarified that Article 10 of the Convention merely concerns the question of how the existence of a public act of marriage can be proved (i.e. by means of a marriage certificate), but not to the question whether and how a foreign document that purports to be a marriage certificate is to be recognised as authentic, formally valid and executed by a competent authority.

The Court confirmed that these two questions must be distinguished: The first question (how can the marriage be proved?) is answered directly by the Convention; the second question (is the document that purports to be a marriage certificate really authentic, formally valid and executed by a competent authority?) is to be answered in accordance with the law of the country where the proof of the foreign marriage is sought.

\textsuperscript{162} Case NL No 6 Dutch Supreme Court of 5 September 2003; Although the Hague 1978 Convention were not directly applicable in the case (Ghana is not a party), the Dutch conflict of law rules nonetheless deem the rules of the Hague Convention applicable.

\textsuperscript{163} Å Malmström Explanatory Report on the 1978 Hague Marriage Convention in Acts and Documents (13th Session 1976) tome III Marriage 138; Malmström confirms the importance of this distinction: ‘For the purposes of article 8 [Article 10 of the Convention] it is sufficient that the authority which has issued the certificate was generally authorised to perform such acts under the law of the State of celebration. A question of whether this requirement is fulfilled is to be answered by the authorities in the State of recognition according to their general rules of proof.’
(c) The function of Public Documents

In the light of the distinction made above, a Public Document can be described as a document drawn up in the requisite form by a public official on the basis of an attributed or delegated public task or authority to execute evidence in document form of (an) act(s) of public authority. Accordingly, the function of a Public Document can be described as the provision of proof of the act(s) of public authority it incorporates.

(d) The administration of Public Documents

(i) Differences between judicial and administrative administration

Non-contentious judicial proceedings aside, judicial and administrative situations are different in that judicial situations generally involve a court deciding a dispute between two or more parties on the basis of evidence that may be produced in the form of Public Documents, while administrative situations often involve a public authority that decides on an application of one or more persons seeking to assert rights guaranteed under public law. Accordingly, a number of legal and practical differences in the administration of Public Documents between judicial and administrative situations will be identified below that are worth mentioning.

1) Judicial situations

A court that is asked to rely on a foreign Public Document is generally in a good position to evaluate, on a case by case basis, whether the document in question can be accepted and recognised/admitted as evidence.

In addition to legal expertise that allows, if deemed necessary, for the assessment of a Public Document’s formal validity and the competence of the public authority that executed a document, courts generally employ numerous effective procedural instruments enabling them to scrutinise a document’s authenticity (e.g. examination under oath, hearing of forensic experts, burdens of proof etc.).

If doubts arise as regards the authenticity of a document, a court can ultimately impose a further Burden of Proof on the person producing a document in a given case or on the person that challenges a document’s authenticity.

Notwithstanding these general observations, three further aspects can be pointed out that may explain why courts may handle Public Documents differently, depending on the procedural system in which they
operate (adversarial or inquisitorial), the legal nature of the dispute with which they are concerned (civil or administrative), or the type of proceedings involved (contentious or non-contentious).

**a) Contentious and non-contentious proceedings**

The practice of courts in administering foreign Public Documents may differ subject to the nature of the proceedings involved. In contentious proceedings, the level of scrutiny of a court in relation to a document is generally lower in comparison to non-contentious proceedings.

This reduced level of examination in contentious proceedings is explained by the fact that the party that is confronted with the production of a foreign Public Document as a means of evidence can be expected to object if there are any doubts concerning the document’s authenticity, formal validity, or if the competence of the foreign authority that executed the document is questionable.

Conversely, when in accordance with the applicable national legislation, a court is performing a non-judicial function (e.g. ruling on an application for confirmation of a company’s articles of association with a view to its registration), which, in other Member States, is entrusted to administrative authorities, it is exercising administrative authority without being at the same time called upon to settle any dispute.

With a view to the significance of an accurate exercise of authority and the absence of a party to the proceedings that is likely contest the document in his interest in case of doubts, the level of scrutiny by the court of the foreign document is expected to be higher. For example, in Germany, courts can try to find the relevant information in relation to a foreign document *sua sponte* in non-contentious proceedings.\(^{164}\)

**b) Adversarial and inquisitorial systems**

Systemic differences between systems of civil procedure may further impact the way in which courts administer foreign Public Documents. In an inquisitorial system, courts are actively involved in determining the facts of the case, as opposed to an adversarial system where the role of the court is solely that of an impartial referee between parties. This functional difference may partly determine the extent in which a foreign document is subject to *ex officio* examination by a court prior to its acceptance.

For example, Irish courts frequently admit foreign Public Documents into evidence in adversarial proceedings without requiring separate proof of their authenticity. In most civil cases, foreign documents are admitted into evidence and little emphasis is placed on the fact that the relevant document was not

---

\(^{164}\) § 12 FGG
issued in Ireland. In the Irish adversarial system, it is generally considered to be a matter for the defendant to object to the admission of the document.

The defendant will not usually object unless there is some real basis for doubt as to the authenticity or due execution of the document. Accordingly, Irish courts will usually only put a party on proof if the other party insists on such proof – and as a matter of practice this rarely happens.

Furthermore, under the rules of court, a party who unreasonably puts another party on proof of documents is liable for the costs of such proof.165 As a result, a party will only put the other party on proof where there is a real dispute as to the authenticity of the document.

c) Administrative and civil court proceedings

Another distinction that may be relevant for some countries concerns the practices of civil courts on the one hand and administrative courts on the other. In administrative courts, at litigation, the proceedings can be more inquisitorial (i.e. the court is actively involved in determining the facts of the case, as opposed to an adversarial system where the role of the court is solely that of an impartial referee between parties).

Furthermore, in administrative cases, most of the procedure is usually conducted in writing; the plaintiff writes to the court, which requests explanations from the concerned administration or public service; the court may then ask further detail from the plaintiff, etc. When the file is sufficiently complete, the proceedings open in court, although the parties are usually not required to attend the court proceedings.

For example, in German administrative court proceedings it is – unlike in civil proceedings - the task of the court to find out all the facts. The court has to come to a conclusion on the authenticity of the document, one way or the other.166 To this end, German administrative courts can try to find evidence on its own without a specific application by a party. If it does not come up with conclusive proof, the general rules on the distribution of the Burden of Proof apply.

2) Administrative situations

On a daily basis, public officials generally administer a much higher number of Public Documents than courts. Furthermore, the cases involved are usually standard administrative procedures involving, as far as relevant here, the proof of certain fact by means of Public Document.

---

165 O 32 r 2 RSC
166 Case DE Bundesverwaltungsgericht NJW 1987 1159
Besides, public officials are typically not trained lawyers. Consequently, they cannot be expected to consider a (foreign) Public Document's formal validity or the competence of the authority that executed the document from a legal point of view, taking into account all relevant (foreign) rules and regulations.

As will be pointed out in more detail below, administrative authorities tend to subject Public Documents to a different level of scrutiny (arguably more superficial from a legal perspective). On the other hand, those same authorities commonly apply formalities and requirements that are in place more rigidly and will inspect documents quite closely to satisfy themselves of the fact that those formalities and requirements have been adequately fulfilled.

In addition, administrative authorities have at their disposal different means for establishing and verifying whether a document satisfies all applicable formalities or for clarifying doubts that may arise, for example, in relation to a document’s authenticity. Instead of procedural and legal instruments, these more often involve administrative cooperation and the assistance of expert investigation authorities (e.g. fraud investigation departments etc.).

Lastly, the role of foreign law in the determination of the effect of foreign Public Documents is generally more restricted in administrative than in judicial situations. This can be explained with reference to remarks made above about the more limited legal knowledge of public officials, in particular concerning issues of private international law and foreign law.

Nonetheless, in some Member States, this distinction also applies in relation to domestic Public Documents. In a number of Member States, domestic Public Documents produce legal presumptions in administrative proceedings as regards the occurrence of facts and (validity of) legal relationships that were requisite for the execution of those documents. In contrast, courts will normally determine independently the occurrence of facts and the validity of legal relationships.

\textbf{a) Superficial scrutiny}

Due to the sheer volume of Public Documents processed on a daily basis by administrative authorities, the methods used for the authentication of those documents are more basic and often limited to checking very basic indications of a document’s authenticity, such as certification. Nonetheless, if doubts arise about a document’s authenticity, administrative authorities may have extensive procedures for the (forensic) examination of the questioned document.

For example, in the UK, administrative authorities may administer Public Documents in different ways: 1) the person making an application or otherwise wishing to rely on a document is asked to swear an affidavit or make a statutory or other declaration which imposes harsh penalties for giving false
information; 2) a person of standing in the community is asked to “guarantee” the information provided by the applicant; 3) original documents are accepted at their face-value unless manifestly forgeries. If the information in a document were to raise any questions, rather than ask for authentication of the document in question, a UK authority would be much more likely to ask for further corroborating documents.

\[b) \text{ Rigid application of formalities}\]

An evaluation of the practice of administrative authorities indicates that formalities that apply in relation to the acceptance of foreign Public Documents are generally quite rigidly applied, without much scope for lenience in cases where a formality has not been complied with.

In this regard, we can refer to legalisation of foreign Public Documents as an example. While courts usually consider legalisation as only one of several ways of proving a foreign Public Document’s authenticity, administrative officials quite often receive strict ministerial instructions stipulating the minimum conditions that a foreign Public Document must meet in order to be acceptable.

These conditions normally do not leave much discretion to the authority in question. Consequently, if the conditions involve the requirement of legalisation, the lack of legalisation will typically force the official to refuse to accept the document.

\[c) \text{ Administrative cooperation}\]

Notwithstanding a less thorough knowledge of the legal framework concerning Public Documents, administrative authorities have alternative means to verify, for example, a Public Document’s authenticity in cases of doubt. Administrative cooperation is one of the most common means in this regard. In case doubts exist in relation to a (domestic) document that purports to be a Public Document, the official that administers the document will contact the alleged author of the document directly to confirm the document’s authenticity (Austria\(^{167}\), Estonia\(^{168}\), Germany, Greece, Ireland, Lithuania\(^{169}\), Poland, Slovak Republic, Slovenia\(^{170}\), and Spain).

\[d) \text{ Application of domestic law}\]

This point relates closely to the fact that administrative officials often are not trained lawyers and do not have ready access to information on foreign laws and procedures concerning Public Documents. Administrative officials will usually refer to domestic law when administering a foreign Public Document.

---

\(^{167}\) § 310 Zivilprozessordnung
\(^{168}\) § 276 Code of Civil Procedure
\(^{169}\) Article 203 Code of Civil Procedure
\(^{170}\) Article 224 ZPP
For example, in Hungary, a distinction is made between judicial and administrative situations in that in civil court proceedings a document goes through a process of characterisation to determine whether it qualifies as a Public Document. In principle, this characterisation is based on domestic law, although foreign law may be considered additionally. In administrative situations, the domestic law applies without exception and no reference is made to foreign law.171

e) Assumptions as regards facts and legal relationships that were requisite for the execution of documents

In a number of Member States, (domestic) Public Documents produce legal presumptions in administrative proceedings as regards the occurrence of facts and (validity of) legal relationships that were requisite for the execution of those documents. In contrast, courts will normally determine independently the occurrence of facts and the validity of legal relationships in accordance with the applicable law. This difference can also be explained with reference to the fact that administrative officials are not usually trained lawyers and do not have access to or command of domestic or foreign law.

(ii) Point for reflection in EC context: more lenient application (US)

Evidentiary standards appear to be more lenient in the administrative law context. State agencies abide by their own rules of evidence as supplemented by the state’s evidence rules. While most administrative evidence rules often refer to the “technical” rules of evidence (i.e. state law rules) they may also include a clause allowing for a more lenient application of those rules.

For example, California rules provide that “[a]ny relevant evidence shall be admitted” under certain circumstances and “regardless of the existence of any common law or statutory rule which might make improper the admission (…)”.172 Similarly, in New York the rules provide that “agencies need not observe the rules of evidence observed by courts”.173

---

171 Tvr Decree No. 13 of 1979 on Private International Law, Art 3 (characterization), Art 63 (on the application of Hungarian law on procedural issues)
172 California Government Code § 11513(c)
173 New York Administrative Procedures Act, Article 3 § 306
3.02 The acceptance of Public Documents for the purpose of being admitted into evidence in judicial and administrative situations

(a) Introduction

It is essential for the effective cross-border use of a Public Document that the document in question meets the conditions applicable in judicial and administrative situations to its acceptance for the purpose of being admitted into evidence.

Above we have discussed legalisation and its role in the process of establishing a foreign Public Document’s authenticity. Below we will evaluate in more detail the question to which extent proof of authenticity is required in relation to both domestic and foreign Public Documents prior to their acceptance.

In addition, we will discuss ancillary requirements that have been identified in relation to the acceptance of Public Documents. These ancillary requirements concern the form (i.e. original, certified copy, copy etc.) and language in which Public Documents must be produced prior to their acceptance. Intrinsically, both types of requirement are linked to a document’s authenticity in that they provide an authority with a further element of scrutiny over the document.

(b) The proof of the authenticity of Public Documents

(i) Introduction

To a large extent, the conditions that apply prior to the acceptance of a Public Document in judicial and administrative situations are related to the issue of authenticity. In a majority of the Member States, Public Documents are accepted in both judicial and administrative proceedings if they are deemed authentic (Austria\textsuperscript{174}, Belgium, Czech Republic\textsuperscript{175}, Estonia, Germany, Greece, Italy\textsuperscript{176}, Latvia\textsuperscript{177}, Lithuania, Luxembourg\textsuperscript{178}, Malta\textsuperscript{179}, Portugal\textsuperscript{180}, Slovak Republic\textsuperscript{181}, and Spain\textsuperscript{182}).

\begin{footnotesize}
\textsuperscript{174} §310 Zivilprozessordnung
\textsuperscript{175} §134 Code of Civil Procedure; §53 Code of Administrative Procedure; §52 Private International Law Act
\textsuperscript{176} Article 68 of national law n. 218 of 1995
\textsuperscript{177} §152 Administrative Procedure Law
\textsuperscript{178} Article 1319 Luxembourg Civil Code
\end{footnotesize}
The authenticity of a (public) document may be said to concern two elements: firstly, the origin of the document (i.e. was the document truly executed by the alleged signatory?) and secondly the integrity of the document (i.e. was the document truly executed in its current form and substance by its signatory?). Any person who is confronted with a document that purports to be a document executed by a (foreign) public authority will be concerned with these two elements.

1) Facilitation of the proof of authenticity of domestic Public Documents

We will see in more detail below, that as regards domestic Public Documents, it is generally provided by statute in most countries that, based on trust between authorities and for reasons of convenience, they be admitted without any process of proof of their authenticity, subject only to the possibility of the verification or challenge of their authenticity through separate procedures.

Both common and civil law states provide for this facilitation of the proof of authenticity of domestic Public Documents. When documents of domestic origin are permitted for presentation in court or to administrative authorities, the law of the state in question usually permits the court to take judicial notice of any signature and/or seal they bear, and it is the practice of administrative authorities to assess on sight the authenticity of the documents. In both cases, no additional proof will be necessary before the judicial or administrative authority will accept the documents in question as prima facie authentic.

This liberal approach which is taken towards domestic Public Documents is not generally reflected in the legal systems of the Member States as regards foreign documents. Two main reasons can be highlighted for this inequality of treatment:

The first reason relates to the lack of trust in foreign public authorities and judicial and administrative systems that often results more from subjective lack of familiarity with foreign legal systems and institutions.

The second reason is the belief that the courts and other bodies to whom foreign Public Documents are presented would be subject to an unduly onerous burden if they were required to consider, evaluate and decide, on sight, the authenticity of such foreign documents bearing unfamiliar signatures, seals and stamps.

2) Authenticity and accuracy

179 Article 628 Code of Organisation and Civil Procedure
180 Article 515 Civil Procedure Code
181 SK No. 1 District Court Presov of 19 April 2006
182 Article 287 of Ley 1/2000 de 7 de enero, de Enjuiciamiento Civil
The authenticity of a Public Document and the accuracy of its contents are connected concepts in that the presumption of accuracy of a document follows only after the establishment of its authenticity. However, the presumption of accuracy of a document’s contents is more closely connected to the fact that the signatory of the document is considered to be a reliable source of information; a public authority.

A key feature of a Public Document is that its contents can generally be presumed to be faithfully recorded under the authority of a public official and can therefore, as far as necessary, be relied upon by administrative and judicial authorities in the course of executing their public tasks.

Naturally, not every public authority is regarded with the same degree of trust as regards the accuracy of the contents of the documents it executes; for example, courts generally enjoy a higher degree of trust than administrative officials of small local authorities.

In addition, the degree of trust may vary from one country to another. The public authorities of a developed country with a stable system of public administration enjoy a higher degree of trust than the authorities of a developing country with an unstable system of public administration that is inherently more vulnerable to inaccuracies, corruption and fraud.

The importance of trust in the competence and reliability of a public authority can hardly be overstated, in particular in cross-border situations. The lack of confidence in a document’s authenticity or the accuracy of its contents will affect its acceptance for the purpose for which it is produced in the first place.

3) Signs of authenticity

In all Member States, Public Documents have particular physical and formal characteristics that give trained or experienced public officials a level of assurance about a document’s authenticity. These characteristics include for example the public authority’s signature, which is used in all Member States, a stamp or seal, date, and numbering.

The format of Public Documents is not fully uniform at the national level in most countries, and even less so at the international level. The fragmentation of relevant sources of international law that aim at facilitating the cross-border acceptance of Public Documents has led to a further multiplication of (model) forms for Public Documents. Language differences further complicate the appreciation of comparable formats of Public Documents even in cases where those exist.

a) Signature, stamps and/or seals
In an area of diversity and legal uncertainty as described above, signatures (seals and stamps) constitute elements of uniformity that tolerate even problems caused by language differences due to their independence thereof. Markings such as signatures are therefore commonly used in the process of establishing the authenticity of documents. International instruments concerned with the cross-border acceptance of Public Documents, for example the Hague 1961 Convention, often employ a system that is at least partly based on the use of these signs of authenticity.

From an objective point of view, the widespread use of and reliance on signatures, seals and stamps in the process of establishing the authenticity of documents is surprising and perhaps misplaced: signatures, seals and stamps can be forged and their thorough verification inevitably requires the support of forensic experts.

More effective and efficient means of certification and authentication can easily be imagined. However, as far as the cross-border use of documents is concerned, alternative means for certification and authentication require global adherence and uniform application. The only instrument that appears to come relatively close to achieving this is the Hague 1961 Convention by means of the introduction of the system of Apostille certification. The practical deficiencies of this system are identified and discussed elsewhere within this report. Subject to their resolution, the Apostille certification system provides a veritable means of authenticating foreign Public Documents.

4) Authenticity of documents in the EC Court system

The European Court system is an excellent practical example of the important role of signatures in the process of ensuring the acceptance of documents. The European Court of First Instance has held in a recent judgment concerning its Rules of Procedure on the admissibility of actions\(^{183}\), that 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, documents require a handwritten signature.\(^{184}\)

\(a\) The certification of procedural documents directed at the Courts

The Court indicated that, as the law relating to procedures before the EC courts stands at present, the signature, appended by a lawyer in his own hand, on the original application initiating proceedings constitutes the sole means whereby the Court assures itself that responsibility for the execution and


\(^{184}\) Case T-223/06 Parliament v Eistrup [not yet published] 51 [[what are these P's?]]
content of that procedural document is assumed by a person entitled to represent the applicant before the EC courts.\(^{185}\)

Accordingly, the Court further held that the requirement of a signature must be regarded as an essential procedural rule and be applied strictly, so that failure to comply with it leads to the inadmissibility of an action.\(^{186}\)

In the same case, the Civil Service Tribunal had considered that a declaration of the inadmissibility of the action, for failure to comply with the procedural formality of the signing of documents without any substantial effect on the administration of justice, would disproportionately infringe the fundamental right of access to a court or tribunal.\(^{187}\)

However, the Court of First Instance concluded that the Civil Service Tribunal reached an incorrect conclusion and stipulated instead that the requirement of a handwritten signature constitutes an essential procedural rule which necessarily leads to the inadmissibility of an action\(^{188}\), without there being any need to consider the effects of such a breach or, in particular, to establish whether the absence of a handwritten signature on the application resulted in harm to the other party\(^{189}\).

5) **Authenticity of Public Documents containing decisions of EC Institutions in the Member States**

The EC Treaty insists that decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States are enforceable (see Article 256 EC). According to this Treaty provision, Commission decisions entailing a financial obligation on a person other than a Member State shall 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. Also enforceable are judgments of the European Court of Justice and the Court of First Instance (see Article 244 in conjunction with Article 256 EC).

a) **The certification of Commission decisions**

The procedure for the certification of decisions adopted by the European Commission is laid down in its rules of procedure.\(^{190}\) These procedural rules require that the instruments adopted by the Commission are certified by the signatures of the President and the Secretary-General on the last page of the

---

\(^{185}\) Case T-223/06 P [n 184] 50; see also Case T-37/98 *FTA and Others v Council* [2000] ECR II-373 25-26

\(^{186}\) Case T-223/06 P [n 184] 51


\(^{188}\) Case T-223/06 P [n 184] 59; see also Case T-101/92 *Stagakis v Parliament* [1993] ECR II-63 8

\(^{189}\) Case T-223/06 P [n 184] 59; see also Case C-286/95 *P Commission v ICI* [2000] ECR I-2341 42 and 52

summary note to which it is to be attached in a way in which it can not be separated (see Article 18 of the Commission Rules of Procedure).

The procedure currently followed by the Commission for the enforcement of its decisions, which is institutional in nature, is as follows: in the absence of voluntary payment, the permanent representation of the Member State concerned is asked to serve the enforcement order via the appropriate national authority. The decision, together with the enforcement order, is then forwarded to the Commission by the same route.

The only formalities that Member States may impose in relation to a decision of the Commission - or any other decisions and judgments covered by Article 256 EC - are those concerning the verification of their authenticity (see Article 256 EC). 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: It involves the permanent representation of the Member State to the EC which is asked to serve the enforcement order via the appropriate national authority.

(ii) The proof of authenticity of domestic Public Documents

1) Presumption of authenticity of documents that purport to be Public Documents

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 (Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, and UK).

Some Member States provide for a statutory presumption of authenticity of domestic documents that appear on their face to be authentic (Austria
\[^{191}\] , Cyprus
\[^{192}\] , Germany
\[^{193}\] , Italy
\[^{194}\] , Malta
\[^{195}\] , Netherlands
\[^{196}\] , Portugal
\[^{197}\] , and UK
\[^{198}\] ). In other Member States, the presumption of authenticity from which domestic

\[^{191}\] § 310(1) Zivilprozessordnung
\[^{192}\] Section 35(1) of the Cap. 9
\[^{193}\] § 437(1) ZPO
\[^{194}\] Article 2700 Civil Code
\[^{195}\] Article 627 Code of Organisation and Civil Procedure
\[^{196}\] Article 159 of the Dutch Code of Civil Procedure
\[^{197}\] Article 365(1) Civil Code
\[^{198}\] Section 9 Civil Evidence Act 1995
documents benefit is based on case law or legal practice (Denmark, Estonia, Finland, France, Greece\textsuperscript{199}, Ireland, Hungary, Latvia, Lithuania, Luxembourg, Poland, Slovak Republic, Slovenia, and Spain).

In most Member States, the authenticity of domestic Public Documents is only subject to marginal scrutiny, which usually involves an on site 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 (Austria, Estonia\textsuperscript{200}, Germany, Greece, Italy\textsuperscript{201}, Latvia, Lithuania, Malta, Netherlands\textsuperscript{202}, Poland, Portugal\textsuperscript{203}, and Spain).

2) Administrative cooperation by domestic authorities in cases of doubts over the authenticity of a domestic Public Document

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 (Austria\textsuperscript{204}, Estonia\textsuperscript{205}, Germany, Greece, Ireland, Lithuania\textsuperscript{206}, Poland, Slovak Republic, Slovenia\textsuperscript{207}, and Spain).

Other ways to resolve doubts include a comparison of the document to samples of Public Documents that are uniform (Estonia, Ireland, Lithuania), full examination of a document’s formal validity (Finland, France), examination under oath (Cyprus), hearing of expert evidence (Cyprus, Estonia\textsuperscript{208}, Finland\textsuperscript{209}, Ireland, UK), a further Burden of Proof which can be met by means of corroborating documents or other evidence (Cyprus, Ireland, UK).

(iii) The proof of authenticity of foreign Public Documents

In almost all of the Member States (except Portugal where signed foreign Public Documents benefit from the same presumption of authenticity as domestic documents) 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.

\textsuperscript{199} Case Thessaloniki Court of Appeals 211/1969
\textsuperscript{200} § 277 Code of Civil Procedure
\textsuperscript{201} The Italian rapporteur indicates that Italian judicial authorities evaluate the authenticity of a document on sight, while administrative authorities collect evidence ex officio of the authenticity of the signature on a document.
\textsuperscript{202} Article 159 of the Dutch Code of Civil Procedure
\textsuperscript{203} Article 370(1) Civil Code
\textsuperscript{204} § 310 Zivilprozessordnung
\textsuperscript{205} § 276 Code of Civil Procedure
\textsuperscript{206} Article 203 Code of Civil Procedure
\textsuperscript{207} Article 224 ZPP
\textsuperscript{208} § 277 of the Code of Civil Procedure
\textsuperscript{209} § 277 of the Code of Civil Procedure
This difference in treatment of foreign as contrasted with domestic documents was justified in one of the national reports (Germany) by the following arguments which were not considered to necessarily apply to foreign countries: firstly, the usual recipient of a domestic Public Document will normally be able to discover himself if a document is carrying the seal of the wrong authority; secondly, domestic public seals are rarely stolen and are difficult to forge; and lastly, domestic public authorities abide by the law and therefore usually do not issue documents outside of the scope of their authority.

Some Member States accept any appropriate means of evidence to prove a foreign document’s authenticity, including legalisation (Austria\textsuperscript{210}, Germany\textsuperscript{211}, Greece\textsuperscript{212}, Hungary, Poland, Netherlands\textsuperscript{213}, and Sweden\textsuperscript{214}).

For other Member States (only) legalisation was indicated as an appropriate means of evidence to prove a foreign Public Document’s authenticity (Czech Republic\textsuperscript{215}, Denmark, Estonia\textsuperscript{216}, Italy, Latvia\textsuperscript{217}, Lithuania, Malta\textsuperscript{218}, Poland, Slovak Republic\textsuperscript{219}, Slovenia\textsuperscript{220}, and Spain\textsuperscript{221}).

There are also Member States where the authorities have full 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, for example, an explicit confirmation by the embassy abroad (Cyprus, Finland\textsuperscript{222}, Lithuania\textsuperscript{223}, Sweden\textsuperscript{224}).

The general rule at common law is that registers or certified extracts kept outside England and Wales are accepted as authentic when it sufficiently appears that they have been kept under the sanction of a public authority and are recognised by the tribunals of their own country as authentic records.\textsuperscript{225}

The effect of this rule is that expert evidence may be required to determine whether certificates, etc., emanating from a particular register meet these criteria, although the availability of an Apostille certificate may assist in the process of establishing authenticity.

\textsuperscript{210} § 311(1) Zivilprozessordnung
\textsuperscript{211} GER No 9 Court of Appeal in Labour Issues of 19 January 1989
\textsuperscript{212} Piraeus Court of First Instance 80/1972
\textsuperscript{213} Article 152 Civil Procedure Code
\textsuperscript{214} Chapter 35 Section 1(1) Code of Judicial Procedure
\textsuperscript{215} Section 52 Private International Law Act; Section 53 Code of Administrative Procedure
\textsuperscript{216} § 24 Administrative Procedure; § 28 Consular Act; § 272 Code of Civil Procedure
\textsuperscript{217} Article 10 Draft Document Legalisation Law; Article 11 Draft Document Legalisation Law
\textsuperscript{218} Article 630 Code of Organisation and Civil Procedure
\textsuperscript{219} Section 134 Civil Procedure Code
\textsuperscript{220} Article 225 ZPP; Article 177 ZUP
\textsuperscript{221} Article 323.2.I of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil; Case ES No 3 Supreme Court of 13 September 2005
\textsuperscript{222} The National Rapporteur indicates that in specific situations, such as public registration, legalisation of a foreign document is generally considered to be adequate proof of the document’s authenticity, see Section 10 of the Population Information Act (507/1993).
\textsuperscript{223} Article 203 Code of Civil Procedure
\textsuperscript{224} Chapter 35 Section 1(1) Code of Judicial Procedure
\textsuperscript{225} Section 7(2) Civil Evidence Act 1995; Phipson on Evidence 32-67
1) By way of example: German legal practice

It is interesting to illustrate the treatment of the issue of authenticity of foreign Public Documents by reference to the practice of the judicial authorities in Germany (in certain ways the practice of administrative authorities differs or is less predictable.

As indicated above, in Germany foreign Public Documents do not benefit from the same presumption of authenticity as applies to domestic Public Documents. It is left to the free (unless European law requires otherwise) appreciation of the judicial or administrative authority whether to accept the foreign (non legalised) document as authentic without further proof or not. All evidence to establish the authenticity of the document is admissible, including request for verification by embassy abroad.226

In practice, German courts accept the authenticity of foreign Public Documents that have not been legalised as required. For example, the Landgericht in Berlin (reference) considered in relation to the authenticity of an English certificate issued by a Companies Registrar that authenticity can, but does not have to, be proven by an Apostille. It therefore reversed a judgment of the Amtsgericht of Berlin that refused to accept the (original) document issued by the English Company Registrar as proof and insisted on the production of a declaration of a notary public certified by an Apostille. The Landsgericht further held that if an English document constitutes full proof of the existence of a limited company in England under English law it also suffices as proof to this end in Germany.227

Notwithstanding the apparent margin of appreciation, German public authorities are not fully free in their discretion to accept a foreign document’s authenticity: if a foreign Public Document’s authenticity was adequately certified by a foreign competent authority, the requirement of an Apostille to establish the document’s authenticity has been proscribed as an erroneous use of discretion.228

Additionally, German Constitutional law does not require German judicial or administrative authorities to request the embassy abroad to verify a document’s authenticity if the authority in question considers itself capable of making this assessment itself.229

2) Another example: common law

At common law, the admissibility into evidence of a Public Document generally depends on two conditions: first, on proof of its authenticity, and secondly, on the purpose for which it is offered into evidence. In order to establish a foreign Public Document’s authenticity, public authorities will usually

---

226 GER No 9 Court of Appeal in Labour Issues of 19 January 1989
227 § 438 ZPO
228 GER No 7 Bayrisches Oberstes Landesgericht of 19 November 1992
229 GER No 3 German Constitutional Court of 7 March 2003
require certain proof that they have been kept under the sanction of a public authority and further that they are recognised by the tribunals of their own country as authentic records.

In the UK (England & Wales), the effect of these conditions may be that expert evidence is required to determine whether documents emanating from a particular register meet the criteria for admissibility under the law of the country of their origin. On the other hand, the English report indicates that the certification of a foreign Public Document by means of an Apostille may assist in the process of proving the authenticity of a foreign Public Document by certifying the origin of the document in question.

The Irish rapporteur indicates that Irish law has generally not concerned itself with legalisation as such in relation to proof of foreign Public Documents’ authenticity. Nonetheless, the law governing admissibility of evidence in court proceedings (see further Part (…)) has demonstrated some of the same concerns as those underpinning legalisation rules in other jurisdictions.

Where there is a real dispute as to the authenticity or due execution of a foreign Public Document, the party seeking to admit the document may decide to put the document through a process of legalisation in the state of origin. However, the procedure that is in place to this end falls short of full legalisation: Irish courts accept the verification of an Irish consular representative, or if there is none, the verification of a notary public in the state of origin, or if it is a commonwealth state, the verification of any court officer or commissioner of oaths. If the Irish consular officer was not familiar with the seal or signature on the document, he might ask that it first be verified by a notary and a full process of legalisation might occur.

This procedure remains subject to the Irish Constitution which means that a court would not take judicial notice of a document verified in accordance with this procedure if a reason remains for suspecting the authenticity of the document or the stamp or seal it bears. In such a case, a full process of legalisation might be required.230

In Ireland there is one situation in which legalisation of foreign Public Documents is always required: when foreign companies establish a place of business in Ireland.231 In this situation, Irish law provides that the requirement of authentication by an Irish consular officer does not need to be fulfilled if the foreign company in question is based in a Hague Convention state and the relevant company document bears an Apostille.

3) A point for reflection in the EC context: self-authentication (US)

230 Order 40 7 Rules of the Superior Courts (Jurisdiction, Recognition, Enforcement and Service of Proceedings) 2005
231 Companies (Forms) Order 1964 (as amended)
In the federal context, the term “domestic” refers not only to intra-state documents, but also to all documents originating from any of the states. Certain types of documents are automatically considered authentic and are therefore admissible in court without the need for extrinsic evidence to prove authenticity.

The applicable Federal Rule of Evidence specifically refers to domestic Public Documents: 1) documents either a) bearing a seal of the U.S. or any state, district, Commonwealth, or territory thereof or b) bearing the signature of an officer or employee of any such entity in his or her official capacity; 2) certified copies of public records; and 3) acknowledged documents (i.e. documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer).\(^\text{232}\)

If a document is not self-authenticating, a document’s authenticity must be proved by extrinsic evidence such as the testimony of an eye witness to the execution of the document or someone able to identify the handwriting if that be the case.

\(a\)  \textit{Third state Public Documents}

The Federal Rules also refer to the self-authentication of foreign Public Documents executed or attested to in an official capacity by a person authorised by the laws of a foreign country to make the execution or attestation as long as such document is accompanied by a final certification as to the genuineness of the signature and official position of the executing or attesting person. Presumably this works in conjunction with the Apostille Convention.\(^\text{233}\)

\(c\) The Burden of Proof if the authenticity of a Public Document is challenged

\(i\) \textit{Domestic Public Documents}

In all Member States, the authenticity of a domestic document can be challenged. Some countries provide for special procedures (Belgium\(^\text{234}\), France, Italy\(^\text{235}\)). The question of who carries the Burden of Proof in such a situation is, however, not answered uniformly throughout the Member States.

In a large number of Member States, the party or public authority challenging the authenticity of a domestic Public Document will have the burden of disproving the document’s authenticity (Czech

\(232\) FRE 902
\(233\) FRE 902(3)
\(234\) Articles 895-914 Civil Code
\(235\) Article 2700 Civil Code and Articles 221 ff. Italian Code of Civil Procedure
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 (Austria, Ireland, Malta, Slovak Republic, Spain).

The Austrian rapporteur indicated that there are special rules regarding the establishment of authenticity of domestic Public Documents: If there are any doubts regarding authenticity, the authority must first try to remove them by making an official inquiry with the authority that (presumably) issued the document. If the court cannot reassure itself of the authenticity of the document in this way, it is up to the person wishing to rely on the document to prove its authenticity.251

In other Member States (France, Netherlands), the type of Public Document will be decisive for the question who has the Burden of Proof when the document’s authenticity is challenged. For example, the French rapporteur indicates that in relation to ‘actes authentiques’ the authority or person challenging the document’s authenticity has the Burden of Proof, but that for other types of documents, the burden of the proof is generally on the user of the document. The Dutch rapporteur stated that as regards domestic “authentic documents”, if their authenticity is challenged, the party making the challenge has the Burden of Proof.252 In relation to other documents, the party seeking to use the document has the burden to establish the authenticity of the signature of the document.253

(ii) Foreign Public Documents

The question concerning the Burden of Proof in situations where the authenticity of a foreign document that purports to be a Public Document is challenged, must be answered taking into account the question regarding proof of a foreign document’s authenticity.

236Section 134 Code of Civil Procedure; Section 53 Code of Administrative Procedure
237§ 344 Danish Procedural Law
238§ 276 Code of Civil Procedure
239Section 1 Chapter 17 Code of Judicial Procedure; Section 33 of the Administrative Judicial Procedure Act
240437(1) ZPO
241Article 164 and 195(6) Civil Procedure Act
242Article 2700 Civil Code and Articles 221 ff. Italian Code of Civil Procedure
243Article 178 Code of Civil Procedure
244Article 232 CPC and Article 6 Civil Code; Articles 7, 77 and 78 APA
245Article 516 Civil Procedure Code
246Article 171 ZUP
247§ 310 Zivilprozessordnung
248Article 159(1) Dutch Code of Civil Procedure
249Article 159(2) Dutch Code of Civil Procedure
250Article 160(2) Dutch Code of Civil Procedure
We considered above that in almost all of the Member States, foreign Public Documents do not generally benefit from the same presumption of authenticity as domestic Public Documents. This means that proof of authenticity will normally be required.

We further concluded that legalisation is generally considered to be an appropriate means of evidence to prove a foreign Public Document’s authenticity.

As far as the Burden of Proof of a foreign Public Document’s authenticity is concerned, the starting point, must therefore be that the party that produces a foreign Public Document generally has the burden of proving its authenticity.\(^{254}\)

In a majority of Member States, legalisation generally 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 (Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovak Republic, Slovenia, and Spain).

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 (Austria\(^ {255}\), Czech Republic\(^ {256}\), Denmark\(^ {257}\), Estonia\(^ {258}\), Finland\(^ {259}\), Germany\(^ {260}\), Greece, Hungary\(^ {261}\), Italy\(^ {262}\), Lithuania\(^ {263}\), Malta\(^ {264}\), Poland\(^ {265}\), Netherlands\(^ {266}\), Slovak republic, Slovenia\(^ {267}\)).

(iii) The Burden of Proof under international agreements

The burden of proving a foreign Public Document’s authenticity can create problems for a party relying on its use. We have seen above that Member States generally accept legalisation as an appropriate means

\(^{254}\) See for example GER No 6 Bundesverwaltungsgericht of 20 April 1994

\(^{255}\) § 311(2) Zivilprozessordnung

\(^{256}\) Section 52 Private International Law Act; Section 134 Code of Civil Procedure; Section 53 Code of Administrative Procedure

\(^{257}\) § 344 Danish Procedural Law

\(^{258}\) § 276 Code of Civil Procedure

\(^{259}\) Section 1 Chapter 17 Code of Judicial Procedure; Section 33 of the Administrative Judicial Procedure Act

\(^{260}\) Art 437(1) ZPO

\(^{261}\) Article 164 and 195(6) Civil Procedure Act

\(^{262}\) Article 2700 Civil Code and Articles 221 ff. Italian Code of Civil Procedure

\(^{263}\) Article 178 Code of Civil Procedure

\(^{264}\) Article 630 Code of Organisation and Civil Procedure in conjunction with Article 562 Code of Organisation and Civil Procedure

\(^{265}\) Article 232 CPC and Article 6 Civil Code; Articles 7, 77 and 78 APA

\(^{266}\) Article 152 Civil Procedure Code

\(^{267}\) Article 171 ZUP
of evidence to prove authenticity. In that case, legalisation usually has the effect of shifting the Burden of Proof to the party that seeks to challenge the foreign document's authenticity.

In this light, we must consider the possible inconvenient practical effects of international agreements that abolish legalisation between the Member States: by proscribing legalisation, these Conventions deprive users of Public Documents of an appropriate means of evidence which is generally accepted abroad to prove the authenticity of Public Documents.

The lack of adequate means of verifying a foreign Public Document's authenticity prevents an authority from resolving doubts it may have as regards the document's authenticity. Consequently, the authority may refuse to accept the document and the party seeking its use may have no adequate means to resolve the authority's doubts.

This potentially adverse effect was one of the reasons for substituting legalisation with an alternative and simplified formality under the Hague 1961 Convention without exempting documents from all formalities. Notwithstanding its burdensome and complex character, legalisation was recognised as fulfilling a useful legal function as regards proof, which could not be dispensed with without depriving the person producing the document of valuable assistance in establishing the authenticity of the document.

With a view to these potential effects, Conventions that completely abolish legalisation usually provide for alternative means for verification of a foreign Public Document's authenticity in cases of doubt: administrative cooperation. 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.

None of the Conventions that abolish legalisation clarify who carries the Burden of Proof in situations where an authority doubts the authenticity of a document: the party seeking the document's use or the authority challenging the document's authenticity. For the reasons mentioned above, this could have negative implications for the party that produces the document, since under the laws of most Member States foreign Public Documents do not benefit from a presumption of authenticity similar to domestic documents.

This problem is artificial if the references to administrative cooperation are interpreted so as to prevent authorities from demanding additional evidence from the party that produced the document. Nonetheless, this statement holds true only if the cooperation with the authorities of the state of origin is the exclusive option open to the authority of the state of destination in cases where doubts arise over a document's authenticity.
If administrative cooperation under these Conventions is indeed compulsory, the Burden of Proof on the party producing the foreign document is effectively shifted to the authority that is to administer it. Accordingly, the authority has the burden of disproving the document’s authenticity in cases of doubt.

We will shortly highlight a number of the Conventions in which the system of compulsory legalisation has been replaced by a system of administrative cooperation.

1) **London 1968 Convention**

The London 1968 Convention provides that each Contracting Party to the Convention must provide for the verification, where necessary, of the authenticity of the documents to which the Convention applies. In other words, the correct implementation of the Convention implies the setting up of a national system of verification of the authenticity of the documents, as, for example, in cases of dispute about the authenticity of a signature (see Article 4(2) of the Convention).

The Conventions leaves it to each state to establish the system of verification which it considers most suitable, having regard to the cases which may arise and to its legal and administrative system. Besides, the Convention does not contain a provision indicating the channel to be used for transmission of requests for verification.

However, the Convention’s Explanatory Report clarifies that the central authorities of each state should control the requests for verification in a manner sufficiently strict to avoid the multiplication of pointless requests. Accordingly, it was foreseen that requests for verification should only be used in exceptional cases and, in general, by official channels.

Under the Convention, Germany has been the only country to explicitly declare how the system of verification was to operate. Germany declared that: “the authenticity of a document executed by a diplomatic agent or by a consular officer of the Federal Republic of Germany is verified by the Federal Ministry of Foreign Affairs at Bonn. The request for verification by a court or by an authority of another Contracting Party may be transmitted to the Federal Ministry of Foreign Affairs by a diplomatic or consular representation of that State in the Federal Republic of Germany. Requests should be drafted in German or accompanied by a German translation.”

2) **Athens 1977 Convention**
The Athens 1977 Convention also provides for administrative cooperation (see Article 3 of the Convention). It enables a check to be made in a case where serious doubts exist either as to the authenticity of a signature or the identity of a seal or stamp, or regarding the capacity of the signatory of a document within the scope of the Convention.

The Explanatory Report clarifies that recourse to administrative cooperation should be had only in exceptional cases and in principle not where the document has been transmitted through diplomatic or consular channels or where the issuing authority has sent it to the foreign authority through another official channel.

It is further stressed in the Explanatory Report that requests concerning doubts in relation to the competence of a foreign public authority or the accuracy of a document’s contents recourse should be had to existing practice and not to the special procedure provided for in the Convention, which only concerns the authenticity of a signature or the identity of a seal or stamp, or the capacity of the signatory of a document.

**a) Facilitated and accelerated cooperation: multilingual forms**

In order to facilitate and accelerate direct correspondence between the two authorities concerned, the Convention provides that a verification request may be made by means of a multilingual form, a model of which is appended to the Convention (see Article 4 of the Convention).

The Convention’s Explanatory Report indicates that the procedure involving the model form is optional and does not prevent verification being requested in the traditional manner (letters rogatory, procedure through consular channels, direct correspondence).

The form, which is to be sent to the issuing authority, is standardised and drafted in six different languages. It uses numbered sections and allows the form to be used by ticking the relevant boxes. The form contains sections for the verification of the authenticity of the document’s signature (Section 7 of the form), of the authorisation of the signatory to sign the document (Section 8 of the form) and of the authenticity of the stamp or seal on the document (Section 9 of the form).

The fact the form has not been updated to reflect the current (Member) states party to the Convention (Austria, France, Italy, Luxembourg, Netherlands, Poland, Portugal, and Spain) suggests that states have generally used the model form infrequently, if at all, in practice.

---

269 See also Article 11(2) of the ICCS Convention No 27 on the issue of a life certificate (signed Paris 10 September 1998, entered into force 1 September 2004); and Article 5(1) of the ICCS Convention No 24 on the recognition and updating of civil status booklets (signed Madrid 5 September 1990, entered into force 1 July 1992)
3) Brussels 1987 Convention

The Brussels 1987 Convention also provides for administrative cooperation in case doubts as regards the authenticity of Public Documents that originate in a Member State that provisionally applies the Convention (Belgium, Cyprus, Denmark, France, Ireland, Italy, Latvia).

The scope for cooperation under the Convention is very limited, however: the Convention states that authorities may request information directly from the relevant central authority of the State from which the act or document emanated only if they have serious doubts, with good reason, as to the authenticity of the document’s signature, the capacity in which the person signing the document has acted or the identity of the seal or stamp (see Article 4(1) of the Convention).

The Convention further limits the scope for administration by stressing that requests for information may be made only in exceptional cases and must set out the grounds on which they are based (see Article 4(1) of the Convention).
(d) Ancillary requirements of form and language

(i) Introduction

Above we have discussed in depth the requirement of proof of a Public Document’s authenticity which may involve legalisation, in case of foreign documents, and certain formal requirements (e.g. signatures, stamps, seals). Besides, we have seen that domestic documents that purport to be Public Documents are generally presumed to be authentic as long as they appear on their face to be authentic.

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 precise content and application of these requirements tend to vary from one category of Public Documents to another and from one type of public authority to another. Furthermore, different requirements apply depending on the whether the document in question is domestic or foreign. Again, fragmentation of relevant international sources - be it on the European or intergovernmental level - has led to further disparities in this regard.

(e) The form in which Public Documents are accepted

(i) The form in which domestic Public Documents are accepted

The form in which domestic Public Documents are accepted varies according to the document in question and its intended use. For instance, different requirements may apply depending on whether the document in question is a judgment or a diploma, or whether the document is intended for judicial or administrative proceedings. Understandably, originals of Public Documents are generally accepted in all Member States since as a means of proof they stand closest to the act of public authority contained in it. The questions of if and when (certified) copies of Public Documents are accepted cannot be answered uniformly for all Member States.

A large group of Member States accepts originals and certified copies of Public Documents (Cyprus\textsuperscript{270}; Czech Republic\textsuperscript{271}; Estonia\textsuperscript{272}; Greece, Hungary\textsuperscript{273}; Italy\textsuperscript{274}; Latvia\textsuperscript{275}; Malta\textsuperscript{276}; Netherlands\textsuperscript{277}.

\textsuperscript{270} Secondary evidence is acceptable provided that the presentation of originals is not feasible: S.35 of the Evidence Law, Chapter 9
Poland; Portugal; Slovak Republic; Sweden; and United Kingdom). Simple photocopies are therefore not generally 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 into evidence at all; they may be admissible into evidence, but will in these circumstances generally produce a weaker evidential value (for example in Poland).

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 (Austria, France, Germany, Slovenia). In France, depending on the situation, either originals or copies were required, as the formality of the 'certified copy' no longer exists in French internal law. This position was also supported for Germany. In Germany, courts may demand presentation of the originals of Public Documents, and if these cannot be produced, the evidential value of those documents is left to the discretion of the court.

In other Member States, the type of the Public Document will dictate whether the original or a certified copy is sufficient (Denmark, Ireland, Spain). In Ireland, in some cases certified copies are acceptable, but in others, originals are a must (i.e. under the Statutory Instrument implementing EC Regulation 1346/2000, a certified copy of a judgment and certified translation are required, whereas in child abduction cases governed by the Hague Convention, an original copy of the order giving rise to custody rights is required).

(ii) The form in which foreign Public Documents are accepted

Generally, the Member States requirements for the acceptance of foreign Public Documents are the same as those associated with domestic Public Documents, with a few exceptions. For example, Austria allows for the production of originals or simple photocopies in judicial and administrative situations.

---

271 Section 134 Code of Civil Procedure; Section 53 Code of Administrative Procedure
272 §55 Administrative Procedure Act
273 Article 52 of Act No. CXI of 2004 on Public Administration Procedure; Articles 191 and 195 (2)-(3) of Act No. III of 1952; Article 2 of PM Regulation No. 15/2004. (IV. 5)
274 Article 2719 Civil Code
275 Section 111(2) and 111(3) Civil Procedure Law, Section 168 of Administrative Procedure Law; Section 111(4) Civil Procedure Law, Section 168(4) of Administrative Procedure Law
276 Article 271 & Article 279 Code of Organisation and Civil Procedure
277 Article 160 Civil Procedure
278 Article 244 CPC; Article 75 §1 and Article 76 CPA
279 Article 140 Civil Procedure Code
280 Sec. 129 of Civil Procedure Code
281 Chap. 38 Section 1 Code of Judicial Procedure (Rättegångsbalken, SFS 1942:740)
282 Article 244 CPC in conjunction with Article 1138 CPC
283 §299 Zivilprozessordnung
284 Article 107 of ZPP and Article 173 of ZUP
285 §435 ZPO
286 §415 et seq. ZPO; Bundesverwaltungsgericht, Decision of 15.07.1986, Az. 9 C 8/86
287 Dutch Article 160 Dutch Code of Civil Procedure
288 Article 319 Ley 1/2000 de 7 de enero de Enjuiciamiento Civil
However, only original documents can be legalised by the competent Austrian authorities. In France, originals are asked for as far as civil status documents are concerned. For other documents, certified copies (e.g. judgments), or simple photocopies (diplomas) are usually accepted, although the authority administering the document may ask for the original in cases of doubt.

(iii) **Point for reflection in the EC context: general acceptance of certified copies of Public Documents in addition to originals (U.S.)**

The Federal Rules of Evidence generally follow the `Best Evidence Rule` which requires that originals be produced to prove the content of a writing. Public records, however, are specifically addressed by the Rules which allow for the admissibility of certified copies. Presumably, the same rules are applicable to third state Public Documents as no specific reference is made to such situation and often the rules refer to foreign documents in other contexts.

(f) **Requirement of a (certified) translation prior to acceptance of the document**

In the Member States, foreign Public Documents must as a rule be accompanied by certified translations to be accepted in judicial and administrative situations. A number of Member States indicated that a certified translation was necessary without exception (Austria, Lithuania, Luxembourg, Malta, Poland, Slovak Republic, Slovenia, Spain).

The majority of remaining Member States also require certified translations, but provide for exceptions depending on the original language of the document (Denmark, Finland, Germany, Netherlands), the authority's discretion (Cyprus, Estonia, Hungary, Italy, Latvia), the parties in contentious

---

289 FRE 1002
289 FRE1005 in conjunction with FRE 902
290 § 190 Außerstreitiggeset; § 78 Notariatordnung (Notaries Act)
290 Article 21 Code of Organisation and Civil Procedure
290 Examples: §16a Nationality Act; §35 Decree implementing the Act on Registers; §80 The Act on the Stay of Foreigners
290 Article 226 of ZPP and Article 177 of ZUP
290 Article 144 of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil
290 §149. 2 and 3 of the Danish Law on Judicial Procedure
290 Language Act (423/2003)
290 Article 986 Civil Procedure Code
290 Sofocleous and others v Stylianou Civil Appeal 8342 of 21/1/92/, 81/Thomas Norman Atkinson v Minister of Justice and Public Order, Appeal.201, 21 December 2006
290 Example: §27 of Commercial Code
290 Article 52 para (2) of Act No. CXL of 2004 on Public Administration Procedure (the "Public Administration Act"
291 Language Act (423/2003)
291 Article 123 Code of Civil Procedure
291 Section 10(2) Official Language Law
court proceedings (Denmark\textsuperscript{304}, Portugal\textsuperscript{305}) or the circumstances in which the document is intended for use (Greece\textsuperscript{306}, Hungary\textsuperscript{307}, Sweden\textsuperscript{308}).

Notwithstanding this being the rule, certification of translations is not always required. For instance, in the Czech Republic, documents in a foreign language generally need to be accompanied by a certified (official) translation in order to be admissible. However, when the document originates from an EU or EEA State, the requirement of certification is waived and a simple translation is deemed sufficient.

Moreover, the understanding of what constitutes “a certified translation” sometimes differs between the Member States. In the UK, for example, 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 (France) or notaries (Estonia\textsuperscript{309}).

\textbf{(i) Foreign certified translations}

Only a small number of the Member States indicated specifically whether foreign certified translations were 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 Austria, foreign certified translations must be legalised separately, but cannot be Apostilled. Furthermore, Austria will not accept foreign certified translations that have been certified by means of an Apostille since it considers that documents executed by official translators are outside the scope of the Convention.

In France, foreign certified translations are sometimes accepted, especially if the document is to be produced before an administrative body. In cases where an official translation is required, foreign certified translations will usually not be acceptable; however, this is not strictly the rule.

In Germany, the question whether a foreign certified translation will be accepted depends on the type of document which it accompanies, as well as the country of origin and the authorities involved. Generally, a foreign translation may be (1) notarised or legalised at an embassy or consulate of the Federal Republic of Germany stating that it was viewed in the embassy for legalisation; (2) legalised in that country with an Apostille stamp by a notary public; (3) legalised by the consulate of that country in Germany; or (4)

\textsuperscript{304} §149. 2 and 3 of the Danish Law on Judicial Procedure
\textsuperscript{305} Article 140(1) and (2) Civil Procedure Code
\textsuperscript{306} Areios Pagos 1462/1996
\textsuperscript{307} Article 191 (6) of Act No. III of 1952 (the “Civil Procedure Act”)
\textsuperscript{308} Chapter 33 Section 9(1)Code of Judicial Procedure (Rättegångsbalken, SFS 1942:740)
\textsuperscript{309} Example: §27 of Commercial Code
examined and legalised by an officially sworn translator in Germany. Translations in Germany are governed by the Länder and must include the seal of the translator which specifies the languages for which he or she is competent.

In Greece, foreign documents must be submitted along with an official translation certified by the Ministry of Foreign Affairs or other competent authority, or Greek diplomatic or consular agents located in the country where the document was drawn up.

In Hungary, unless documents originate from a Hungarian-speaking country, they must be accompanied by a translation issued by the Hungarian Office for Translation and Attestation Company (OFFI) which are non-rebuttable.

Finally, the Slovenian Report indicated that all Public Documents must be accompanied by certified translations by a Slovenian-appointed translator.

1) Note on the surveys conducted in the course of the study

One of the questions of the survey conducted in the course of the study sought to ascertain general practice as regards the form in which foreign documents are accepted, for instance whether the original is required or if a copy is satisfactory.

As far as the experiences of citizens are concerned, in 37.36% of the cases, those surveyed chose original as the form in which their document was accepted. Following closely behind was the original plus a certified translation (16.48%); and certified copy plus certified translation (14.29%). The original plus a translation was required in 5.49% situations. A certified copy was required 4.40% of the time, just as a certified copy plus a translation was required in 4.40% of the situations. A large percentage of respondents (17.58%) chose ‘other’ for the form accepted abroad and specified: often documents were required in a number of combinations of copies, certified copies, originals, translations and certified translations.

As far as the experiences of companies are concerned, in 30.77% of the cases in which documents were required, those surveyed were asked to submit the original document plus a certified translation. Likewise, 30.77% of the respondents were asked to submit a certified copy as well as a certified translation. Also selected were just the original (15.38%), the original plus a certified translation (7.69%),

---

310 http://www.en.uni-muenchen.de/intstud/applying/norm_degree/gemeinsam/trans/index.html#trans-other
311 http://www.adue-nord.de/archiv/merkblatt.pdf
312 Areios Pagos 464/1985; Athens Court of Appeals 12724/1987
313 Article 226 of ZPP and Article 177 of ZUP
and a certified copy plus translation (7.69%). Some respondents (7.69%) chose ‘other’ indicating that the original, a certified copy, and certified translations were required together.

(g) Available judicial or administrative remedies against a decision refusing to accept a document due to the lack of legalisation or doubts as regards its authenticity

(i) The available remedies in the Member States

The Member States’ legal practice shows an apparent lack of reported case-law concerning disputes in relation to refusals by judicial or administrative authorities to accept (foreign) Public Documents for the purpose of being admitted into evidence. Nonetheless, the Member States generally have systems in place, which provide for remedies under the normal law of remedies.

Notwithstanding the general availability of remedies against substantive decisions of the judiciary or the administration, indications were found that in a significant number of Member States, no separate remedies are available against decisions not to accept a Public Document motivated, for example, by an authority’s suspicions regarding authenticity.

For example, in the Netherlands, refusals to accept a document by public authorities are not considered administrative decisions that can be appealed against before an administrative court.314 Similarly in Germany, it is often only possible, due to reasons of efficiency, to appeal against a substantive decision. Any questions regarding non-accepted documents will be dealt with incidentally as part of the substantive appeal.

Other countries that do not have specific remedies for negative decisions on the acceptance of documents include: Cyprus, Czech Republic315, Denmark316, Finland317, France, Germany, Hungary318, Italy319, Latvia320, Luxembourg, Poland321, Slovenia, Spain322, and UK. Rather, these countries apply their general procedural rules and have similar rights of appeal judicially and administratively. For instance, in

314 Case NL 1 Raad van State of 8 September 2004
315 Judicial context: §§ 201ff (appeal) and 236ff (recourse) Code of Civil Procedure; administrative: §§81ff (appeal) and 94ff (review) Code of Administrative Procedure; §§244ff Code of Civil Procedure (action against decision of admin body)
316 §§63 Danish Constitution and Law on the Folketingets Ombudsmand
317 Sections 4 and 5 Administrative Judicial Procedure Act 586/1996
318 Articles 220-221 and 235 of Act No. III of 1952 (the “Civil Procedure Act”); Article 98 of Act No. CXL of 2004 on Public Administration Procedure (the “Public Administration Act”)
319 Article 1, C.2, I 1034/1971; Article 323 Code of Civil Procedure
320 Section 184 of Administrative Procedure Law
321 Article 367 et seq. CPC; Article 127 et seq. APA
322 Administrative: Article 35 and 79 of Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común; Article 107 and followings Ley 30/1992, de 26 de noviembre, de Regimen Juridico de las Administraciones Publicas y del Procedimiento Administrativo Comun; Judicial: Article 285, 451and 455 of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil
Denmark, a complaint based on a decision by an administrative authority may be brought before a higher administrative authority, and also before the court system and the Ombudsman. This is the procedure that applies in all cases within public administration.
3.03 The recognition of the legal status of a Public Document for evidentiary purposes

(a) Introduction

Prior to recognising a Public Document’s legal status as a means of evidence, which is usually attributed a privileged evidential value, a public authority may scrutinise the document’s validity. Likewise, at common law, a public authority may verify the due execution of a Public Document in the process of considering its admissibility into evidence.

We will see below that, in practice, documents that purport to be public in nature are often presumed to be valid (i.e. issued by a competent authority in the required form) as far as their authenticity can be established, and the form and language in which they are submitted is acceptable.

This practical approach is adopted in most member States in relation to domestic documents. However, in a number of Member States, the same applies in respect of foreign documents that purport to be Public Documents. One explanation for this is that in situations where legalisation is still required, the capacity (i.e. public official status) of the foreign public official is attested, which provides some assurance that the document originates from an official source.

Notwithstanding the prevalence of practicality in relation to the questions of validity, there are at the same time Member States that do scrutinise the validity of foreign documents that purport to be Public Documents.

(i) The validity of Public Documents

As we will discuss in detail below, some Member States will scrutinise a (foreign) Public Document for its validity prior to recognising its legal status. Considering that this study is concerned only with Public Documents (i.e. documents that have been executed either by, facing, or with cooperation of a public official) some clarifications are in order when we speak of a document’s validity and the rules that are relevant in this regard.

1) Requirements of competence and form

The validity of a Public Document may depend on rules relating to the capacity or competences of a public official, (i.e. so-called “formae habilitantes”), 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 (i.e. “formae extrinsicae”).

**a) Delimitation: validity of acts of public authority**

The subject of validity of acts of public authorities falls outside the scope of this study. Requirements related to the validity of acts of public authorities are those that relate to the grounds and consequences of the act of public authority (i.e. “formae intrinsecae”) and requirements relating to the enforcement of the act of public authority (i.e. “formae executionis”) contained in a Public Document.

**b) Requirements of competence in relation to the execution of Public Documents**

As we will consider in more detail below, a number of Member States will scrutinise whether a foreign authority was competent to execute a Public Document prior to recognising the document’s legal status for evidentiary purposes. The question which law applies to the determination of competence is discussed below. We will first clarify a bit further the substance of the question.

We have indicated above that the reference made here to the competence of a foreign public authority only relates to the competence of the authority to execute the Public Document; it does not concern the competence of an authority to perform the act of public authority contained in the Public Document.

Within the concept of competence, we distinguish between the capacity in which a Public Document is signed and the competence to execute 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.

For instance, when a public official issues a marriage certificate, we are not concerned with the question whether or not the official was competent to conclude the marriage (i.e. the act of public authority), but with the question whether the official is an authorised authority (capacity) and whether the official was competent in the particular case to issue the marriage certificate in question (competence).

**c) Requirements of form in relation to the execution of Public Documents**

Besides competence, some Member States will scrutinise whether a Public Document satisfies the applicable requirements in terms of its form prior to recognising the document’s legal status for evidentiary purposes. The question of which law applies to those requirements is discussed below. The substance of the question concerning formal requirements is first clarified.
Requirements as to the form of Public Documents may vary depending on the type of act involved. For instance, a specific form is generally prescribed by law for Public Documents executed by court officials, notaries, administrative officials, diplomatic and consular agents, etc. Formal requirements may impose the obligation to use a particular type of document (e.g. the type of paper to be used), to clearly identify the author of the act of public authority on the document (name, credentials, etc.), and to mark the document (signature, stamp, seal, etc.).

We emphasize that requirements applicable to the form of a Public Document ("formae extrinsicae") 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 (i.e. "formae executionis"). Although some of these requirements may overlap in practice, our focus is on those requirements the fulfilment of which is necessary for the validity of a Public Document, not on those requirements whose fulfilment is necessary to render the act of public authority contained in the Public Document enforceable.

2) The law that determines the validity of Public Documents

As discussed above, rules concerning validity establish the competence of a public official to execute Public Documents and the way in which this competence must be exercised. In contrast to private documents, 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. On the other hand, it is not a priori clear whether it is the function of the rules on validity that requires the application of the law of the state to which the public official belongs who executed the Public Document ("lex magistratus"), or that it is, more generally, the principle of state sovereignty that prevents the application of foreign law.

From this point of view it is questionable whether the question concerning a Public Document’s validity can be subject to a conflicts analysis in the first place. As far as this is deemed appropriate, however, a conflicts rule referring to the lex magistratus is the only acceptable rule since it structurally refers the question of validity to the law of the state to which the public official belongs who executed the Public Document.

In practice however, as far as the validity of a Public Document in terms of its form is subject to scrutiny during administrative or judicial proceedings, the locus regit actum rule, which generally applies to private documents, has been applied by analogy to Public Documents. In other words, the scope of the locus regit actum rule (i.e. the law of the place where the act is done applies) has been extended to include Public Documents, while it is suitable only in relation to private documents.
The idea of extending the scope of the *locus regit actum* rule to include Public Documents must be dismissed since its application may, in practice, lead to the designation of “foreign law”, which is unacceptable with a view to the public law nature of the rules involved. For instance, the validity of a Public Document executed by a consular officer could be subject to the rules of the place where he resides when he executed the document, if the *lex loci actus* applies.

Admittedly, under international law, official representations (including consulates) enjoy an extraterritorial status and are thus sovereign territories of the home state, although remaining part of the host country’s territory. In this perspective, the *lex loci actus* rule still refers the question of validity to the law of the country to which the consular officer belongs.

However, ultimately, the rule’s inadequacy is clear when considering the situation where a consul executes a Public Document outside of the consulate, or, more accurately, the sovereign territory of the state to which he belongs. Under these circumstances, the *locus regit actum* rule undesirably refers the question of validity of the Public Document of one state to the law of another, which is unacceptable for the reasons indicated above.

3) Conflicts rules for the determination of the law applicable to the question of the validity of foreign Public Documents

a) The law that determines the competence of a public official to execute a 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 (Belgium; Czech Republic323; Denmark; Estonia324; Finland; Germany325; Greece; Hungary326; Italy; Latvia327; Luxembourg; Malta328; Netherlands; Portugal329; Slovak Republic330; and Slovenia331).

Only Austria, Cyprus, Poland, and Spain have no specific rules that apply in relation to questions of competence of the foreign authority. In Ireland, no conflicts of law rules appear to exist and any applicable rules in this context are the result of practice. Similarly, Swedish law does not attribute much value to the question of competence, as a document’s evidentiary value does not depend on its formal recognition.

323 Article 52 Private International Law Act
324 § 234 Code of Civil Procedure; § 28 Consular Act; § 241 Administrative Procedure Act
325 OLG Düsseldorf, IPRax 1996, p 423 (regarding an Iranian notary public)
326 Article 15 (4) of the Consular Act
327 Section 654 and 655 of Civil Procedure Law
328 Article 742 Code of Organisation and Civil Procedure
329 Article 365 Civil Code
331 Article 225 of ZPP and Article 177 of ZUP
b) The law that determines the form in which a Public Document is to be executed

A rule that is applied generally in relation to the formal validity of all types of document, including Public Documents, is the rule of *locus regit actum* (Belgium; Cyprus; Czech Republic; Demark, Estonia; Finland; France; Germany; Greece; Hungary; Italy; Lithuania; Luxembourg; Malta; Netherlands; Portugal; Slovak Republic; Slovenia; and United Kingdom).

Notwithstanding the inappropriateness of the rule to determine the law applicable to the validity of Public Documents (see the discussion above), it is conceded that in practice, in most situations the law designated by the *lex loci actus* rule will be the same as the law designated on the basis of the *lex magistratus* rule.

A number of Member States indicated some exceptions to the general rule, depending on the context of the situation involved, for example when the document concerned the transfer of movable or immovable property, or when the issue concerned a consumer contract. In the UK, although *locus regit actum* applies normally, in the case of contracts, the principle of *lex loci executandi* (the law of the place of execution) will apply.340

In German judicial proceedings, either *lex loci actum* or the law applicable to the substance of the decision contained in a document applies, with the following exceptions: (1) *locus regit actum* fully applies in the context of rights *in rem* in immovable property; and (2) the law applicable to the substance of the decision applies fully regarding rights *in rem* in the transfer of movable property.

Similarly, in Spain several rules apply according to the situation. The following five principles can be mentioned here, for which applicability depends on the circumstances. The following rules apply cumulatively in order to guarantee the formal validity of a document: (1) *lex loci actum*; (2) the law applicable to the substance; *lex patriae* of the conveyor or the common to the grantors; (4) *lex rei sitae* regarding documents concerning rights *in rem* in immovable property; or (5) *actor regit actum* in the case of acts authorised by Spanish diplomatic or consular agents abroad.

---

332 Section 52 Private International Law Act
333 §234 Code of Civil Procedure; §8 Private International Law Act
334 Articles 1.38 and 1.39(1) Civil Code
335 Luxembourg 29 novembre 1917, Pas. 10.532
336 Article 742 Code of Organisation and Civil Procedure
337 Article 365 Civil Code
338 Sec. 52 of Act on Private International and Procedural Law
339 Article 225 of ZPP and Article 177 of ZUP
340 Cf Rome Convention 1981, Article 9
341 Article 11 EGBGB (civil law matters); OLG Düsseldorf, IPRax 1996, p 423 (regarding an Iranian notary public)
In a couple of Member States, if the substance and form of a document are closely linked, reference is made to the law that is applicable to the substance of the document (Luxembourg\textsuperscript{342}, Slovak Republic\textsuperscript{343}). In Ireland, no explicit conflict rules exist in matters of formal validity, but nonetheless are derived from legal practice. Finally, in Sweden, the question of applicable law is not of great importance since a document’s formal validity is not determinative of its evidential value.

It is interesting to refer to the Rome Convention on the law applicable to contractual obligations. Although applicable to contractual obligations, the Convention also applies to contracts drawn up by, in front of or with cooperation of a public official.\textsuperscript{344} The Convention’s Explanatory Report submits that due to the fact that a public official can only draw up an instrument in accordance with the law from which he derives his authority.

Consequently, if, for example, a notary has not observed the law from which he derives his authority, the contract he has drawn up will not of course be a valid Public Document. However, under the Convention the contract will not be entirely void if the law which governs its substance (and which may also determine its formal validity by virtue of Article 9 of the Convention) does not require a special form for that type of contract.

(b) The recognition of domestic Public Documents for evidentiary purposes

(i) Automatic recognition for evidentiary purposes (civil law)

In a majority of member States, 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 (Austria\textsuperscript{345}, Cyprus\textsuperscript{346}, Czech Republic\textsuperscript{347}, Estonia\textsuperscript{348}, Finland, France, Germany\textsuperscript{349}, Greece\textsuperscript{350}, Hungary\textsuperscript{351}, Ireland\textsuperscript{352}; Italy, Latvia, Luxembourg, Netherlands\textsuperscript{353}, Poland\textsuperscript{354}, Portugal, Slovak Republic, Slovenia, and Spain\textsuperscript{355}).

\textsuperscript{342} Luxembourg 29 novembre 1917, Pas. 10.532
\textsuperscript{343} Sec. 52 of Act on Private International and Procedural Law
\textsuperscript{344} Reference can be made here to Article 9 of the Rome 1980 Convention on the law applicable to contractual obligations. Article 9 of the Convention also applies to “public acts” within the scope of the Convention (i.e. contracts and unilateral acts intended to have legal effect drawn up by a public authority in the exercise of an attributed public authority), see the Giuliano/Lagarde Report [1980] OJ C 282 1.

\textsuperscript{345} § 310 Zivilprozessordnung
\textsuperscript{346} Order 38 (6) of the Civil Procedures Rules
\textsuperscript{347} Section 134 Code of Civil Procedure; Section 53 Code of Administrative Procedure
\textsuperscript{348} § 272-284 Chapter 29 Code of Civil Procedure
\textsuperscript{349} BGHZ 45 362-372; Reichsgericht, RGZ 86 390; and BGH NJW 1963 1630
(ii) Admissibility of evidence (common law)

The starting point in the common law system was that documentary evidence was hearsay and inadmissible as such, as the party was obliged to tender the best evidence (‘the best evidence rule’) which involved calling the person who executed the document to give live evidence as a witness. Over time, documentary evidence has come to be considered the best evidence and reliable, and so the rationale for the rule against hearsay no longer applies.

In England and Wales, a document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof. For this purpose, a document will be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong. A document purporting to be a certificate signed by an officer of a business or public authority will be deemed to have been duly given by such an officer and signed by him. A certificate will be treated as signed by a person if it purports to bear a facsimile of his signature.\(^{356}\)

(c) The recognition of foreign Public Documents for evidentiary purposes

In a 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 into evidence (Austria\(^{357}\), Estonia\(^{358}\), Hungary\(^{359}\), Latvia\(^{360}\), Lithuania\(^{361}\), Luxembourg, Malta\(^{362}\), Slovak Republic\(^{363}\) and Slovenia\(^{364}\)).

---

\(^{350}\) Article 13 of the Penal Code; Thessaloniki Court of Appeals 474/1994; Athens Court of Appeals 7602/1977

\(^{351}\) Article 195(6) Civil Procedure Act

\(^{352}\) Both administrative and judicial authorities often enjoy a degree of discretion in their recognition of domestic and foreign Public Documents. Irish law generally leans in favour of recognition unless there is a basis for suspecting a lack of authenticity or (in a judicial proceeding) the other party will put the party tendering the document on proof.

\(^{353}\) Article 156(2) Dutch Code of Civil Procedure

\(^{354}\) Article 244 CPC and Article 76 § 1 APA

\(^{355}\) Article 1216 of the Civil Code; Article 317 of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil

\(^{356}\) Section 9 Civil Evidence Act 1995

\(^{357}\) §§ 293 and 311 Zivilprozessordnung

\(^{358}\) § 272-282 Code of Civil Procedure

\(^{359}\) Article 195(7) Civil Procedure Act

\(^{360}\) Section 153 Administrative Procedure Law; Section 11 Draft Document Certification (Legalisation) Law; Section 12 Draft Document Certification (Legalisation) Law

\(^{361}\) Part II Article 5 Instruction on Consular on the Legalisation of Documents

\(^{362}\) Article 629 Code of Organisation and Civil Procedure

\(^{363}\) Section 63 Act on Private International and Procedural Law; Notwithstanding, Section 134 Civil Procedure Act suggests that a confirmation of the foreign public authority’s competence is additionally required

\(^{364}\) Article 225 of ZPP; Article 177 of ZUP
In other Member States, formal validity is verified as a precondition for the recognition of foreign Public Documents for the purpose of being admitted into evidence (Cyprus\(^{365}\), Czech Republic\(^{366}\), Finland, France, Poland\(^{367}\)).

An issue that is worth mentioning here concerns France: the person who produces the document in France, may be required to produce a document called the “certificat de coutume” in order to provide an explanation of the law of the country of the document’s origin in relation to the Public Document’s formal validity. A similar requirement may be imposed in Malta, where a legal expert may also be called upon to verify whether a document has been drafted in accordance with the law of its country of origin.

Finally, there are 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 into evidence (Denmark, Germany, Greece\(^{368}\), Italy\(^{369}\), Netherlands\(^{370}\) and Spain\(^{371}\)). The same applies to Portugal although foreign documents are presumed to be authentic.\(^{372}\)

Contrary to the general rule, two Member States, Italy and Spain\(^{373}\) require that foreign Public Documents meet the minimum requirements established for domestic Public Documents: the controls underlying foreign Public Documents must be equivalent to those that apply to domestic Public Documents.

(i) Admissibility of evidence (common law)

By way of example, in Ireland, there are statutory authorisations of admissibility in evidence of certain foreign Public Documents, for example documents from foreign tribunals are prima facie admissible in evidence, by virtue of the simple attachment of the court’s seal, or the presence of the judge’s signature coupled with a statement.\(^{374}\)

In adversarial proceedings, Irish courts frequently admit foreign Public Documents into evidence without requiring proof of authenticity. As a consequence, courts will usually only put a party on proof if the other party insists on such proof – and as a matter of practice this rarely happens.

---

\(^{365}\) Order 38(6) Civil Procedures Rules

\(^{366}\) Section 52 Private International Law Act

\(^{367}\) Article 244 CPC in conjunction with Article 1138 CPC; Article 76 APA

\(^{368}\) Areios Pagos 517/1988; Athens Court of Appeals 875/1995

\(^{369}\) Article 2657 Civil Code

\(^{370}\) Case NL (not reported in case notes) Hoge Raad 14 June 1985

\(^{371}\) Article 1216 of the Civil Code; Article 323.2.I and II and 144 of Ley 1/2000, de Enjuiciamiento Civil

\(^{372}\) Article 365 Civil Code

\(^{373}\) Dirección General del Registro y del Notariado’s decision of 11 June 1999

\(^{374}\) Section 7 Evidence Act 1851
Under the rules of court, a party who unreasonably puts another party on proof of documents is liable for the costs of such proof. As a result, a party will only put the other party on proof where there is a real dispute as to the authenticity of the document.

1) Special treatment of Public Documents of England and Wales and vice versa

Between Ireland, England and Wales, there is provision for reciprocal preferential treatment of Public Document: every document which by law is or will be admissible in evidence in any court in England or Wales without proof of the seal or stamp or signature for authentication, or of the judicial or official character of the person that appears to have signed the document, is admitted in evidence to the same extent and for the same purposes in any court in Ireland, or before any other person competent to hear, receive, and examine evidence, without proof of the seal or stamp or signature, or of the judicial or official character of the person appearing to have signed the document.

(ii) The requirement of reciprocity

Member States do not generally impose a condition of reciprocity on each other with regard to the recognition of a foreign document’s legal status for purpose of evidential value. Overwhelmingly, the Member State rapporteurs indicated that notwithstanding the existence of any international agreements, such conditions either do not exist or are unknown (Cyprus; Czech Republic; Estonia; France, Germany, Greece, Italy, Latvia, Luxembourg, Netherlands, Poland, Slovak Republic; Spain, and Sweden).

Neither for Ireland nor for the UK was it indicated whether or not such a condition exists. Presumably, this is due to the fact that as they are both common law countries, with a system for recognition of documents that operates differently from most civil law countries. The recognition of documents is usually conducted on a case-by-case basis in which different documents may be required depending on the circumstances.

A small number of Member States indicated that reciprocity - in one form or another - is a precondition to recognition (Austria, Hungary, Malta, and Slovenia). In Austria, foreign Public Documents are

375 O 32 2 RSC
376 Section 9 Evidence Act 1851
377 §276 Code of Civil Procedure; §28 Consular Act
378 Sec. 64 of Act on Private International and Procedural Law
379 Article 195 (7) of Act No. III of 1952 (the “Civil Procedure Act”); Article 52 (2) of Act No. CXL of 2004 on Public Administration Procedure (the “Public Administration Act); Act No. CXLI of 1997 on Real Estate Registry Art 35 (2) (on private documents in the procedure); Information Communication of the Ministry of Justice No. 8001/2001 (IK 4.) on the Managing of International Cases (Points 72, 800)
380 Article 628 & Article 630 Code of Organisation and Civil Procedure
according the same legal status as domestic Public Documents if domestic documents are treated equally abroad in terms of their evidential value. However, it is not necessary that domestic documents be given the same evidential weight as they would have in Austria.382

(iii) Point for reflection in the EC context: admissibility (US)

As far as the US is concerned, like the systems under both British and Irish common law, the starting point here is the old rule on the general inadmissibility of hearsay evidence. Under the Federal Rules, hearsay is defined as “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.”383

However, the Rules provide for many exceptions to that rule, allowing for the admissibility of several types of documentary evidence. For example, the Rules provide for the admissibility into evidence of: public records and reports; records of vital statistics such as births, deaths or marriages; marriage, baptismal, and similar certificates; records of documents affecting an interest in property; and certain types of judgments.384

Before documents may be admitted into evidence, they must be properly authenticated.385 The Federal Rules state that “authentication is a precondition to admissibility and “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims”. Like the hearsay rule, there are several exceptions to the requirement of authentication that provide for self-authentication of certain types of evidence so that extrinsic evidence of authenticity is unnecessary.386

381 Article 225 of ZPP and Article 177 of ZUP
382 § 311 Zivilprozessordnung
383 FRE 801(c)
384 FRE 803
385 FRE 901(a)
386 FRE 902
3.04 The proof for which Public Documents are admissible into evidence

(a) Introduction

The function of a Public Document is to provide factual proof of a public authority’s act which the document incorporates. In other words, the Public Document’s function is to demonstrate what was officially decreed, declared (i.e. conclusions of law) or witnessed (i.e. findings of fact) by a public authority.

The proof provided by a Public Document is factual: the document attests the existence of an act of public authority. For example, a marriage certificate enables its holder to demonstrate the actual conclusion of a marriage.

A Public Document does not provide proof of the validity of the act of 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.

Accordingly, both the act of public authority and the legal act or relation may be found to be invalid after the examination of their compliance with the applicable legal requirements, notwithstanding the fact that their existence is attested by a Public Document.

This limited nature of the function of a Public Document becomes the clearer when it is used as a means of evidence in a cross-border situation. On the one hand, the authorities of the country where it is produced may accept it as proof of the fact that a foreign public authority performed an act of public authority. On the other hand, the validity of the act of public authority will usually be examined in accordance with the law that is deemed applicable in the country where the Public Document has been produced.

Besides, the question whether the act of public authority, if valid, had the effect of forming a valid legal act or relation will furthermore have to be determined in accordance with the law that is deemed applicable in the country where the Public Document has been produced.
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 authority by public policy, may hamper the usefulness of a foreign Public Document.

Although a foreign Public Document may be recognised as factual proof of the act of public authority, this does not guarantee that the validity of the act of 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.

Trust in a system of public administration may lead to the presumption that a public official belonging to this system will consent only to performing acts of public authority that are valid in accordance with the law of the country to which he belongs.

Consequently, a Public Document executed by this public official, whose purpose it is to provide proof of an act of public authority, can be defined as an instrument that provides factual proof of the validity of an act of public authority under the law of the country in which the act was done.

Further, if a Public Document indicates that an act of public authority by a public official has resulted in the formation of a legal act or relation under the law that was deemed applicable in the country where the act of public authority was performed, the document may have an additional evidentiary meaning.

Subject to the same condition of trust in the system of public administration to which the public official belongs who executed the Public Document, the Public Document is suitable to provide factual proof of the validity of the legal act or relation under the law that was deemed applicable by the public official who performed the act of public authority.

(i) **Point for reflection: concerns of validity or public policy in relation to the act of public authority that is recorded in a Public Document may prevent the Public Document’s use as a means of evidence to prove the existence of an EC right**

The question is raised here in the report, although the provision of any clear answer is beyond the scope of the study, whether the Member States may be required on the basis of EC law to treat as valid an act of public authority of another Member State and its effect of creating a legal act or relation under the law applicable in that state, as evidenced by a Public Document executed in that state, without actually being required to recognise their validity under their law.

This question is particularly relevant in situations where a Public Document that was executed in another Member State is rejected on the basis of concerns (e.g. validity or public policy) in relation to the act of
public authority performed in another Member State that was recorded in the Public Document in question. This rejection has the practical effect that the Public Document in question can not be used as a means of evidence by its holder with a view to claiming a right upheld by EC law.

By way of example, we refer to the case of Tennah-Durez387, a case concerning the mutual recognition of professional qualifications, where the Court held that with a view to the aim of the EC system for the recognition of diplomas, certificates and other evidence of professional qualifications, which is that – subject to specific conditions that have been harmonised at the EC level - qualifications should be given automatic and unconditional recognition, the system would be seriously jeopardised if it were open to Member States at their discretion to question the merits of a decision taken by the competent institution of another Member State to award a diploma.

Consequently, the Court held that it is not open to the Member States to question at their discretion the merits of a decision taken by the competent institution of another Member State to award a diploma and that the Member States are principally bound by such decisions in that they must be granted automatic and unconditional recognition.

The host Member State has two ways of satisfying itself that the diploma submitted to it is eligible for automatic and unconditional recognition under the relevant EC Directive (Directive 93/16/EC to facilitate the free movement of doctors and the mutual recognition of their diplomas388).

Firstly, the Directive allows the host Member State, in the event of justified doubts, to require from the competent institution of the Member State which awarded the diploma confirmation of the authenticity of the diploma, which is relevant in relation to possible legalisation requirements, but also a confirmation of the fact that the person concerned has fulfilled all the requisite training requirements (see Article 22 of Directive).

Second, if a diploma does not conform with the designations listed in the Directive for the Member State which awarded it, that Member State may issue a certificate stating that the diploma in question was none the less awarded following training in accordance with the requirements of the Directive.

The Court held that: "the host Member State is to recognise such a certificate as sufficient proof of the fact that the diploma submitted to it is treated by the Member State of origin as one of those mentioned for that State in (...) Directive 93/16, as appropriate."

387 Case C-110/01 Tennah-Durez v Conseil National de l'ordre des Medecins ECR-I 76
388 Directive 93/16 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications [1993] OJ L165 1
In *Colegio de Ingenieros de Caminos*\textsuperscript{389}, the Court further emphasised in relation to another Directive providing for the mutual recognition of diplomas (i.e. Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration\textsuperscript{390}) that “according to the system established by the Directive, a diploma is not recognised on the basis of the intrinsic value of the education and training to which it attests, but because it gives the right to take up a regulated profession in the Member State where it was awarded or recognised.”

Differences, the Court held “are not sufficient to justify a refusal to recognise the professional qualification concerned. At most, where those differences are substantial, they may justify the host Member State’s requiring that the applicant satisfy one or other of the compensatory measures set out in (...) that directive (...).”\textsuperscript{391}

Another example concerns (Public Documents proving) the decision granting to a person the *nationality* of a Member State. Under international law, it is for each Member State, having due regard to EC law, to lay down the conditions for the acquisition and loss of nationality.\textsuperscript{392}

It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.\textsuperscript{393}

If a Member state were entitled to refuse nationals of other Member States the benefit of a fundamental freedom upheld by EC law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under EC law for a national of a non-member country, that would be precisely what would happen.

Nonetheless, there may, of course, be justified doubts as to whether a person does actually possess the nationality of a Member State or the legality of the nationality may be challenged, from the point of view of international or EC law, of the grant of that nationality by the Member State. For instance, there is a question whether any provision of general international law exists to the effect that no State is required to recognise nationality granted to an individual by another State in the absence of a real and effective link

\textsuperscript{389} Case C-330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos v Administración del Estado* [2006] ECR I-00801 19


\textsuperscript{391} See also Case C-102/02 *Beuttenmüller* [2004] ECR I-5405 52

\textsuperscript{392} Case C-369/90 *Micheletti and Others* [1992] ECR I-4329 10; and Case C-192/99 *Kaur* [2001] ECR I-1237 19

\textsuperscript{393} Case C-369/90 [n 24] 10; Case C-148/02 *Garcia Avello* [2003] ECR I-11613 28; Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-09925 39
between the individual and that State, which is supported by the judgment of the International Court of Justice in the *Nottebohm* case in relation to matters of diplomatic protection. 394

Concerns have consistently been pointed out by the Member States about the abuse of EC law. However, the Court has clarified in *Gloszczuk* 395 that abuse of EC law requires that EC is improperly or fraudulently invoked failing to observe the scope and purposes of the provisions of the EC legal system. However, the Court found that the situation in which a person - apprised of the nature of the freedoms provided for by EC law - takes advantage of them by legitimate means, specifically in order to attain the objective which the EC provision seeks to uphold, cannot be considered an abuse of EC law.

The Court uses the example, when a future parent decides that the welfare of his or her child requires the acquisition of EC nationality in order to allow him to enjoy the rights associated with that status, and in particular the right of establishment under Article 18 EC. The Court concluded that there is nothing ‘abusive’ about taking action, in compliance with the law, to ensure that the child, when born, satisfies the conditions for acquiring the nationality of a Member State.

The problem may lie, according to the Court, in the criterion used by a Member State for granting nationality. This criterion could be moderated by the addition of a condition of settled residence of the parent within the territory of the Member State.

Suspicious of abuse could be raised in almost all cases of intentional acquisition of nationality of a Member State. Paradoxically, that could lead to a situation in which the enjoyment of rights deriving from citizenship of the Union was subject to the condition that such citizenship had to have been acquired involuntarily.

That would be equivalent to restricting the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. And as the Court of Justice has made clear, that is not allowed in the EC legal order. 396

Both examples mentioned above must, perhaps, be read in the light of the requirement in the EC context to ensure the stability of legal relations in cross-border situations between the Member States. Stability in legal relations is a value traditionally associated with the rule of law in that the principle of legal certainty

---

precludes any reassessment of the past in order to safeguard the stability of legal relations, which is one of the pillars of our coexistence in society.\(^{397}\)

For instance, in \textit{Commission v Greece}\(^{398}\), the Court held that measures of EC institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.

By way of exception to that principle, measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the EC legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent.

The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

The Court concluded that the gravity of the consequences attaching to a finding that a measure of an EC institution is non-existent means that, for reasons of legal certainty, such a finding might be reserved for \textit{quite extreme situations}.

What is usually in question, however, is not the foreign law in the abstract or its manifestation in the form of an act of public authority, but the results of its enforcement or recognition in the concrete case. Thus, the courts may well regard a foreign law which permits polygamy, a same-sex marriage, or the marriage of the step-father and step-daughter as unwise or even immoral. But if such a marriage has taken place under a foreign law according to which it is valid, and especially if children can and have been born, it may be better to recognise it than to disturb settled family relationships by holding the marriage invalid and the children illegitimate on grounds of public policy.

This may have the result that no polygamously-married spouse can obtain a divorce from the courts, but that the spouses would be treated as married persons and thus incapable of contracting a marriage locally; the children would be treated as legitimate; and the wife is entitled to assert rights of succession and other rights on the footing that she is a wife. Public policy in such cases is not \textit{absolute} but \textit{relative}.

The issue we have shortly highlighted here is arguably more an underlying \textit{substantive} issue than an issue concerning the acceptance and recognition of foreign Public Documents as a means of evidence.


\(^{398}\) Case C-475/01 \textit{Commission of the European Communities v Hellenic Republic} [2004] ECR I-08923 18-20
Therefore, it is merely identified and highlighted here and it is suggested that the Commission evaluates the expedience of its further examination.

Nonetheless, both subjects are necessarily related in that due to public policy concerns foreign Public Documents may be rejected in administrative or judicial proceedings, thereby preventing their use as a means of evidence. This problem has been reported both for Cyprus and Germany.

(b) The proof for which domestic Public Documents are admissible into evidence

Domestic Public Documents are generally admissible into 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 (i.e. conclusions of law) or witnessed (i.e. findings of fact) therein by a public authority (Austria\textsuperscript{399}, Belgium, Denmark, Estonia, Finland, France, Germany\textsuperscript{400}, Greece, Hungary\textsuperscript{401}, Italy\textsuperscript{402}, Latvia\textsuperscript{403}, Lithuania\textsuperscript{404}, Luxembourg\textsuperscript{405}, Malta\textsuperscript{406}, Netherlands\textsuperscript{407}, Poland\textsuperscript{408}, Portugal\textsuperscript{409}, Slovak Republic\textsuperscript{410}, Slovenia\textsuperscript{411}, Spain\textsuperscript{412}, and UK\textsuperscript{413}). The proof provided by the document usually includes aspects such as the date of the public act and the execution of the Public Document and the identity of the public authority\textsuperscript{414}.

In respect of a number of Member States it was indicated in the national reports that 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 (Austria – in administrative situations\textsuperscript{415}, Estonia, Finland, Germany\textsuperscript{416}).

\textsuperscript{399} § 292(1) Zivilprozessordnung
\textsuperscript{400} § 415 ZPO; § 10 Beurkundungsgesetz; § 417 ZPO; § 418 (1) ZPO; § 65 S. 2 BeurkG : Amtliche Beglaubigungen
\textsuperscript{401} Article 82 Public Administration Act; Articles 193 and 195 Civil Procedure Act
\textsuperscript{402} Articles 2699 and 2700 Civil Code
\textsuperscript{403} See for example Section 14(2) Law on Civil Status Register in conjunction with Section 168(1) Administrative Procedure Law
\textsuperscript{404} Article 197(2) Civil Procedure Code
\textsuperscript{405} Article 1319 Civil Code
\textsuperscript{406} Article 627 Code of Organisation and Civil Procedure
\textsuperscript{407} Article 157(2) Code of Civil Procedure
\textsuperscript{408} Article 244 § 1 Civil Procedure Code; Article 76 § 1 Administrative Procedure Code
\textsuperscript{409} Article 371 Civil Code
\textsuperscript{410} Section 134 of the Civil Procedure Act
\textsuperscript{411} Article 224 ZPP; Article 169 ZUP
\textsuperscript{412} Article 319 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil
\textsuperscript{413} Section 7(2)(b) Civil Evidence Act 1995
\textsuperscript{414} See for example for Spain: Article 319 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil
\textsuperscript{415} § 47 Allgemeines Verwaltungsverfahrensgesetz
\textsuperscript{416} See for example paragraph 66 Personenstandsgesetz
(i) Example: German civil status documents

Under German law, records of civil status have the same probative value as registers of civil status: provided that they are properly maintained, they are admissible into evidence as proof of marriage, birth and the particulars entered in relation to those events\footnote{Paragraphs 60 and 66 Personenstandsgesetz}. Accordin\n
g to German case law and academic legal writing this applies only to German and not to foreign documents. As we will see below, in contrast, foreign Public Documents concerning civil status are admissible as evidence of the actual occurrence of facts, circumstances or legal dispositions that are witnessed in the document, but not as evidence of the (validity of the) acts and legal relationships that were prerequisite for the execution of the document in question.

(c) The proof for which foreign Public Documents are admissible into evidence

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 (Austria\footnote{§ 292(1) Zivilprozessordnung}, Belgium, Denmark, Estonia, Finland, France, Germany\footnote{§ 415 ZPO; § 417 ZPO; § 418 (1) ZPO; § 65 S. 2 BeurkG : Amtliche Beglaubigungen}, Greece, Hungary\footnote{Article 82 Public Administration Act; Articles 193 and 195 Civil Procedure Act}, Italy\footnote{Articles 2699 and 2700 Civil Code}, Latvia\footnote{See for example Section 14(2) Law on Civil Status Register in conjunction with Section 168(1) Administrative Procedure Law}, Lithuania\footnote{Article 157(2) Code of Civil Procedure}, Luxembourg\footnote{Article 244 § 1 Code of Civil Procedure; Article 76 § 1 Administrative Procedure Code}, Malta\footnote{Article 371 Civil Code}, Netherlands\footnote{Article 319 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil}, Poland\footnote{Section 7(2)(b) Civil Evidence Act 1995}, Portugal\footnote{§ 134 of the Civil Procedure Act}, Slovak Republic\footnote{Article 224 ZPP; Article 169 ZUP}, Slovenia\footnote{§ 139 of the Civil Procedure Act}, Spain\footnote{Article 319 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil}, and UK\footnote{See for example for Spain: Article 319 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil}). The proof provided by the document usually includes aspects such as the date of the public act and the execution of the Public Document and the identity of the public authority\footnote{See for example for Spain: Article 319 Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil}.

No reference was made in any of the national reports to the fact that foreign Public Documents are admissible into evidence as proof of the public acts contained therein and legal acts and relationships that were prerequisite for their execution.
(i) Point for reflection in the EC context: full faith and credit (US)

Generally, between the states the concept of full faith and credit is applied to certain types of documents. This means that every court in the U.S., including administrative courts, must give such documents the same effect as they would be given in the state of their origin.

Once a document is deemed admissible under the Best Evidence Rule and the requirement of authentication, it may be offered as proof of the contents therein. The Federal rules of evidence provide that “the contents of an official record, or of a document authorised to be recorded or filed and actually recorded or filed…may be proved by copy, certified (…) (self-authentication) or testified to be correct by a witness who has compared it to the original.”

Full faith and credit originally applied only to the “public Acts, records, and judicial Proceedings” of every state, but was expanded by statute to include properly authenticated and proved non-judicial records or books (and copies) kept in any public office of any state, as well as specific documents such as child custody determinations, and child support orders.

Documents that are not covered by the Full Faith and Credit clause (and its implementing statues) are most often covered by the concept of interstate comity. For example, states allow visitors with out-of-state driving licenses to drive within the state and they recognise out-of-state marriages and adoptions, barring any legitimate public policy concerns.

As discussed above, the term “foreign” in the context of a federal system means a country other than the United States; it does not refer to the different states’ relationships with each other. Therefore, recognition of foreign Public Documents’ legal status is dependant upon comity in the international sense. Comity is based on a sense of reciprocity between nations so that if another country promises to accord legal recognition to a document originating from the United States, the United States will agree to the same for the foreign document. Conventions such as the Apostille Convention operate as a formal agreement to accord comity if certain conditions are met.

434 FRE 1005
3.05 The evidential value of Public Documents

(a) Introduction

The evaluation of a means of evidence presented in judicial and administrative situations is a problem of fundamental importance where the cross-border proof of EC rights by means of Public Documents is concerned.

(i) The ALI/UNIDROIT principles of transnational civil procedure

The solution of this problem is nowadays sought in the principle of free evaluation of proofs. This approach is reflected in international initiatives for the harmonisation of rules of civil procedure, for example the ALI/UNIDROIT principles and rules of transnational civil procedure.

The ALI/UNIDROIT rules indicate, as follows, that: “courts should make free evaluation of the evidence and attach no special significance to evidence according to its type or source” (see rule 13.7 of the ALI/UNIDROIT rules). The commentary of this rule clarifies that no special legal value, positive or negative, should be attributed to any kind of relevant evidence, including Public Documents.

The reference to the principle of free evaluation of means of evidence appears obvious in modern legal systems, in particular in common law systems where means of evidence have always been appreciated according to the free evaluation of the court.

Conversely, continental procedural systems have historically been inspired by the opposite principle, according to which the evidential value of means of evidence was determined a priori by general legal provisions leaving courts no, or very little, discretion.

One can, for instance, distinguish between conclusive evidence (i.e. evidence that must, as a matter of law, be taken to establish some fact in issue and that cannot, in principle, be disputed) and prima facie evidence (i.e. evidence of a fact that is of sufficient weight to justify a reasonable inference of its existence but does not amount to conclusive evidence of that fact).

(ii) Public document generally have a privileged evidential value

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 (i.e. a public authority).

**(iii) The law that determines the evidential value of foreign Public Documents**

Another controversy concerns the question which law determines their evidential value before the administering authorities of the state of destination. Most countries historically distinguish between procedural and substantive rules of evidence: Procedural issues of evidence are generally considered subject to the *lex fori* (the law of the authority that administers the evidence); Substantive issues are sometimes considered subject to the law that is applicable to the subject matter of the case. Disagreement persists, however, where the line between procedural and substantive is to be drawn.

In this regard it is useful to refer to the 1947 Lausanne Resolution of the Institute of International Law on the conflicts of laws concerning evidence in civil matters (“Les conflits de lois sur la preuve en droit privé”), which distinguishes between procedural and substantive issues concerning evidence.

The Resolution states, as follows, that evidence, in civil matters, ought to be *administered* in accordance with the *lex fori*: “La preuve, en matière de droit privé, est administrée suivant la procédure de la lex fori” (see Article 1 of the Resolution).

On the other hand, in relation to the *admissibility* and *evidential value* of means of evidence, the *Burden of Proof, and legal presumptions*, the Resolution stipulates, as follows, that those matters ought to be governed by the law applicable to the facts, legal acts or legal relationships whose proof is sought: “L’admissibilité des moyens de preuve, leur force probante, le fardeau de la preuve et les présomptions légales, sont réglementés par la loi applicable aux faits ou aux actes juridiques ou aux rapports de droit qu’il s’agit de prouver” (see Article 2 of the Resolution). 436

436 See also Institut de Droit International Session de Zurich – 1877: Règles internationales proposées pour prévenir des conflits de lois sur les formes de la procedure [1878] 44: Article 3 of the Resolution stipulates, as follows, that the admissibility of means of evidence and its evidential value ought to be determined in accordance with the law of the place where the fact or legal act that is sought to be proved, occurred: "L’admissibilité des moyens de preuve (...) et leur force probante seront déterminées par la loi du lieu où s’est passé le fait ou l’acte qu’il s’agit de prouver."
1) Conflicts rules for the determination of the law applicable to the evidential value of foreign Public Documents

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* (Austria\(^{437}\), Czech Republic\(^{438}\), Estonia\(^{439}\), Finland\(^{440}\), Germany, Greece, Latvia, Lithuania\(^{441}\), Luxembourg\(^{442}\), Malta\(^{443}\), Portugal, Slovak Republic\(^{444}\), Slovenia\(^{445}\), Spain\(^{446}\), Sweden, and United Kingdom).

In other words, domestic law determines the evidential value of a foreign Public Document. Moreover, the *lex fori* was generally described as governing all aspects of evidence. In other words, in practice no distinction is made as suggested by the 1947 Laussanne Resolution of the Institute of International Law.

There are only a few exceptions to the general application of the *lex fori*, one of which occurs in Italy, where the principle *locus regit actum* applies. However, *lex fori* will apply to any challenge to the evidence. In the Netherlands there is no specific rule; rather, the appropriate principle depends on the law at issue and the specific situation. It may be that foreign law will be applicable, depending on the issue.

In Hungary a theoretical distinction is made between the rules applicable in the civil versus administrative or criminal law context. As regards civil procedure, before a document is given any evidentiary weight, it must go through a process of characterisation to determine whether it qualifies as a Public Document.

This characterisation is conducted according to the *lex fori* principle. If the forum’s law is insufficient, foreign law may be considered additionally. Once a document is characterised, *lex fori* is applied to determine the document’s evidential value. In the administrative and criminal law contexts, domestic law applies all of the time.\(^{447}\)

In Germany *lex fori* applies in determining the evidential value of a document, although the law of the place of origin is used to evaluate whether a document is indeed considered a Public Document under the law of the country of its origin.

\(^{437}\) § 293(2) Zivilprozessordnung
\(^{438}\) Section 52 Private International Law Act
\(^{439}\) § 234 Code of Civil Procedure; § 272-284 Code of Civil Procedure
\(^{440}\) Administrative Judicial Procedure Act (586/1996); Code of Judicial Procedure (4/1734)
\(^{441}\) Article 185 of the Code of Civil Procedure
\(^{442}\) Cass. Fr. 10 January 1951, Journal de droit international, 195, 882, note Goldman
\(^{443}\) Article 630 Code of Organisation and Civil Procedure
\(^{444}\) Sec. 52 of Act on Private International and Procedural Law
\(^{445}\) Article 10 of ZOLMP
\(^{446}\) Article 3 of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil
\(^{447}\) Tvr Decree No. 13 of 1979 on Private International Law, Art 3 (characterization), Art 63 (on the application of Hungarian law on procedural issues)
(b) The evidential value of domestic Public Documents

In a large majority Member States, domestic Public Documents have a privileged value in terms of the proof for which they are admissible into evidence (Austria 448, Belgium 449, Denmark 450, France, Germany 451, Greece, Hungary 452, Italy 453, Lithuania 454, Luxembourg 455, Malta 456, Netherlands 457, Poland 458, Portugal 459, Slovak Republic 460, Slovenia 461, Spain 462, and UK).

This privileged evidential value generally consists of the fact that its production shifts the Burden of Proof in relation to the proof for which the document is admissible into evidence. Consequently, a party that 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 (Austria 463, Belgium 464, Denmark 465, Germany 466, Hungary 467, Italy 468, Lithuania 469, Portugal 470, Slovak Republic 471, Slovenia 472). In some Member States special procedures apply for the purpose of challenging the (proof provided by a) domestic Public Document (Belgium 473, France, Italy 474).

In a number of Member States, different categories of domestic Public Documents are distinguished that accordingly have a different evidential value (France, Netherlands 475). For example, in France so-called “actes authentiques” - mostly documents issued by notaries, civil status officers, and members of the
justice public service like the judge or the civil notary - have an elevated evidential value, in that counter
evidence is generally not admitted, subject to particular criminal procedures in cases of fraud (“procedure
d’ inscription en faux”).

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 (Cyprus, Estonia, Finland, Latvia, Sweden).

(i) The evidential value of foreign Public Documents

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 (Austria, Denmark, Estonia, Finland, France, Germany, Greece, Hungary,
Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Spain, Sweden, and UK).

In contrast, in the Netherlands, authentic instruments (i.e. documents executed by civil notaries or civil
registrars) have to be accepted as compulsory evidence only if they were executed by Dutch public
authorities. Consequently, any other instruments - including Public Documents originating in another state
- are subject to the free evaluation by the Dutch courts.

This Dutch rule is subject to certain exceptions under the influence of international treaties or other
international instruments, such as EC Regulations, which may stipulate that certain instruments drawn up
by authorities from another (Member) state are rendered the same effect as Dutch authentic
instruments. These instruments, however, mainly relate to matters of recognition and enforcement (see
for example Article 56 Regulation 44/2001 and Article 46 Regulation 2201/2003).

1) Point for reflection in the EC context: admissibility and evidential value
(US)

In the United States, matters of evidence are considered procedural. Specifically, the Restatements refer
only to admissibility of evidence, not its evidential value once it is deemed admissible. The First
Restatement of Conflicts on Procedure says that the law of the forum governs the admissibility of a particular piece of evidence and presumably all other issues concerning evidence, since they are considered to be procedural in nature. The Second Restatement of Conflicts follows the same rule, with some exceptions.

Notwithstanding the fact that the *lex fori* governs the question of admissibility, under the concept of Full Faith and Credit, a domestic Public Document from one state is accorded the same value it would receive in its home state. Once the document is admissible, it may be offered to prove the truth of the matter asserted therein in the same way a domestic document would be.

487 Restatement of Conflicts §597
488 Restatement (Second) Conflicts §138
PART IV. THE LEGALISATION OF PUBLIC DOCUMENTS

4.01 Introduction

(a) The concept of legalisation

For the purpose of this project, legalisation was defined as a process of certification of the authenticity of a Public Document’s signature, the capacity in which the person signing the Public Document has acted and, where appropriate, the identity of the seal or stamp which the document bears.

The project was based on the presumption that legalisation is a process by which a document’s authenticity (i.e. integrity and origin of the document) is certified and not one which concerns its validity (i.e. the due execution of the document in accordance with requirements of competence and form) or accuracy (i.e. the accuracy of the particulars of and facts stated in the document).

Accordingly, the legal effects associated a priori with legalisation were considered to be limited to the certification of the authenticity of the signature, the capacity of the signatory, and the identity of the seal or stamp of a Public Document; excluding matters such as the public authority’s competence to execute the Public Document, the document’s formal validity and the accuracy of its contents.

For instance, the certification of the capacity of a public authority through legalisation does not warrant assumptions as regards the competence of the public authority, since the certification of an authority’s capacity merely relates to his credentials in terms of actually being (registered as) a public authority.

In other words, the certification that a person is duly authorised as a public official to perform certain acts of public authority (which may naturally include the execution of Public Documents) does not warrant the assumption that this person – acting in his official capacity - was actually competent to execute the legalised document in question.

Accordingly, it is possible that a person acting in his capacity as a notary performs an act of public authority outside the scope of his attributed competences. Notwithstanding the lack of competence to execute the Public Document (resulting in its invalidity) the authenticity of the signature, the capacity of
the signatory, and the identity of the seal or stamp of the invalid Public Document could still be duly certified through a process of legalisation.\footnote{This issue is particularly relevant in relation to the question of the possible liability of the authority that is competent to legalise Public Documents when confusion exists over the precise meaning in terms of attestations of the legalisation formality. This question is addressed elsewhere.}

The same is true for the document’s validity in terms of the form in which it was executed and ultimately the accuracy of its contents. Since legalisation does not involve the certification of those matters, assumptions in this regard are in principle unjustified.

\textit{(i) The concept of legalisation in international agreements}

1) The Hague 1961 Convention

The definition of the term “legalisation” used in the Hague 1961 Convention has influenced significantly the way in which the concept of legalisation has been interpreted and used afterwards. This is reflected both in later Conventions and the legal practice of the majority of the Member States.

In the Convention, this concept consists of the minimum common understanding of the process and legal effects of legalisation in the largest number of states. Accordingly, for the purpose of the Convention, the concept is not concerned with the wider effects of legalisation sometimes attributed to it by states.

Several reasons were advanced to justify a less ambitious attitude. Firstly, reference was made to a comparative study of the various types of legalisation in the Droz report.\footnote{G Droz La Légalisation de Actes Officiels Etrangers Hague Conference for Private International Law Preliminary Documents [1959] 1} This report concluded that the term ‘legalisation’ is interpreted differently from one legal system to the other.

The report distinguished legalisation "\textit{au sense strict}” (the core of the process of legalisation) and ‘\textit{aspects élargis}’ of legalisation (broader aspects associated with legalisation). The core of the process of legalisation concerned the authenticity of the document’s signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Broader aspects associated with legalisation related, for example, to the certification of the competence of the author of the Public Document under the law of the country of his or her administrative centre (\textit{lex magistratus}) and the validity of the Public Document under the law of the country of origin (\textit{lex loci actus}).

The report concluded that most countries, if not totally unfamiliar with the concept of legalisation, interpreted legalisation in a strict manner and used terms such as ‘légalisation large’ or required an
explicit indication in situations in which a legalisation concerned matters such as competence or formal validity.\textsuperscript{491}

Secondly, in some countries certification of competence and formal validity, while allowed, was carried out separately from legalisation. For these countries, a link established by the Convention between two different formalities would have been strange.

For these reasons, the drafters of the Convention deemed it impossible to abolish a requirement of differing formalities not uniformly used by the Member States of the Hague Conference on Private International Law and ultimately settled for a definition that concerned the core of what most states associated with the process of legalisation.

Legalisation was defined so as to concern only: “the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears” (see Article 2 of the Convention).

The desire to define the concept of legalisation as precisely as possible is evident in the intentional use of the negative “For the purposes of the present Convention, legalisation means only the formality (…), and also in the statement that it is solely the formality “by which the diplomatic or consular agents of the country in which the document has to be produced (…)”, and finally in the limitative enumeration of the effects of the legalisation referred to in the agreed text. These limitative effects are described, as follows, in the Convention: “it [the Apostille certificate] will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears” (see Article 5 of the Convention).

2) The concept of legalisation in other international agreements

The definition of the concept of legalisation contained in the Hague 1961 Convention is reflected in all Conventions that were established subsequently, although certain Conventions do not explicitly define the concept. Below, we will discuss a number of Conventions that contain explicit references to the meaning of the term either in their provisions or explanatory reports to give an impression of its predominant use.

a) London 1968 Convention

In line with the Hague Convention, the 1968 Convention on the abolition of legalisation of documents executed by diplomatic agents or consular officers\textsuperscript{492} defines the concept of legalisation as follows: “(…)

\textsuperscript{491} G Droz La Légalisation de Actes Officiels Etrangers [n 490] 4

\textsuperscript{492} G Droz La Légalisation de Actes Officiels Etrangers [n 490] 4
legalisation means only the formality used to certify the authenticity of the signature on a document, the capacity in which the person signing such a document has acted and, where appropriate, the identity of the seal or stamp which such document bears” (see Article 1 of the Convention).

**b) Washington 1973 Convention**

The 1973 Convention providing a uniform law on the form of an international will indicates that the signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, are exempt from legalisation (see Article 6(1) of the Convention).

The Convention’s Explanatory Report indicates that the concept of legalisation contained in the Convention follows closely the example of a number of existing bilateral agreements and multilateral conventions, in particular the Hague 1961 Convention.

**c) Athens 1977 Convention**

The Commission Internationale de l’État Civil (CIEC) has established a large number of Conventions that deal with the issue of legalisation. These Conventions are discussed in more detail elsewhere.

In order to clarify the concept of legalisation as used in the CIEC Conventions, we will refer to the 1977 CIEC Convention on the exemption from legalisation of certain records and documents which concerns exclusively legalisation requirements.

The Convention defines the concept of legalisation as the formality intended to certify the authenticity of the signature on a record or document, the capacity in which the person signing it has acted and, where appropriate, the identity of the seal or stamp which it bears (see Article 1 of the Convention).

The Convention’s Explanatory Report states explicitly that the definition of legalisation is derived from the Hague 1961 Convention, and that the drafters of the Convention considered this definition to be generally accepted in international circles.

---

493 UNIDROIT Convention providing a uniform law on the form of an international will (adopted Washington 26 October 1973, entered into force 9 February 1978)
495 CIEC Convention No 17 on the exemption from legalisation of certain records and documents (signed Athens 15 September 1977, entered into force 1 May 1981)
496 Explanatory Report for the ICCS Convention No 17 on the exemption from legalisation of certain records and documents (adopted by the General Assembly in Strasbourg on 23 March 1977)
The report further stipulates that legalisation does not certify the accuracy of the information contained in the document or that the issuing authority was acting within the limits of its powers. In addition, legalisation as used under the Convention is not linked to the evidential value of the document.

d) **Brussels 1987 Convention**

The 1987 Convention abolishing the legalisation of documents in the Member States of the European Communities (applied provisionally by Belgium, Cyprus, Denmark, France, Ireland, Italy and Latvia) explicitly defines legalisation as the formal procedure for certifying the authenticity of a signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears (see Article 3 of the Convention). This definition fully reflects the definition of the Hague 1961 Convention.

(b) **The Member States’ legal practice**

An evaluation of the legal practice in the Member States shows that the concept as defined by the Hague 1961 Convention has generally prevailed. With the exception of Greece, where the process of legalisation also concerns the competence of the public authority signing the Public Document, all Member States have adhered to an interpretation and use of the concept of legalisation that is the same or similar to that introduced by the Hague 1961 Convention.

In certain Member States, legalisation has been described as concerning merely the authenticity of the signature of the public authority signing the Public Document (Hungary, Latvia, Lithuania, Portugal, Slovak Republic, Slovenia, and Spain).

However, in order to administer a process for the certification of signatures of public authorities, normally an up-dated register of signatures will be used which is likely to consist of the signatures of persons acting in their capacity as public authority.

The meaning of legalisation is therefore generally considered to be limited to the certification of the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

---

497 Convention abolishing the legalisation of documents in the member states of the European Communities (adopted Brussels 25 May 1987, has not entered into force)
(i) The lack of a clear legal framework for legalisation

It has become apparent in the process of evaluating the laws of the Member States that the practice of legalisation within the Member States is sometimes unregulated or merely contained in (internal) ministerial guidelines not aimed at binding the relevant domestic competent authorities *erga omnes* (Denmark, Finland, France, Greece, Lithuania, Luxembourg, Netherlands, Poland, Spain, and Sweden).

Generally, quasi-legislation or governmental instructions and/or guidelines tend to be used as regards issues of contention or issues subject to frequent change. Less formal rules are useful for executives in seeking to control the practice of subordinate officials; they pass on useful and often complex information as well as encourage consistency in the exercise of discretions; they allow officials to operate at a level that is high considering their training; they play an important role in rendering difficult or technical issues intelligible to affected parties; they offer a flexibility unavailable with primary legislation; they can deal with broad policies in a way that strictly legal language cannot and they allow rules to be introduced into places where legislation is either inappropriate or of dubious feasibility in political terms.

On the other hand, the status and legal effects of quasi-legislation or governmental instructions and/or guidelines may be uncertain and thus their consequences may be unclear. They allow judicial and administrative authorities (arguably too much) leeway in choosing whether and how to give effect to them and this leads to uncertainties for individuals.

In relation to the subject of legalisation the lack of a clear legal framework constitutes a retreat from law and certainty in an important area. Accordingly, values associated with the rule of law and stability of legal relations are thus not served.

In combination with the apparent fragmentation of international legal sources relevant for the topic, legal certainty may currently not be deemed adequately ensured, both for the users of Public Documents and for the domestic administrative and judicial authorities in the Member States.

4.02 Legalisation of Public Documents outside the scope of EC law and international agreements

(a) Introduction

Situations in which the process of legalisation of Public Documents is governed strictly by the national rules and procedures of the Member States are increasingly rare. Effectively, the issue of legalisation in accordance strictly with national law arises only in situations outside the scope of EC law and
international agreements. As we have clarified in our discussion of EC law and relevant international agreements, such situations are themselves progressively rare.

In situations in which documents circulate between the EU Member States, the relevance of legalisation under domestic law is all but non-existent. EC law has abolished legalisation formalities between the Member States completely in relation to specific types of Public Documents.

Also in the EC context, seven Member States have mutually abolished legalisation completely by applying provisionally the Brussels 1987 Convention Abolishing the Legalisation of Documents in the Member States of the European Communities.

Besides EC law, the Member States have concluded a large number of bi- and multilateral agreements.

In total, more than one hundred bilateral agreements apply between the Member States that provide explicitly for the exemption of Public Documents from legalisation requirements.

Those bi-lateral agreements sometimes exempt all Public Documents that circulate between two Member States from legalisation requirements.498 Other agreements provide for the exemption of Public Documents in particular situations involving for example civil matters499; commercial matters500; criminal

498 Austria-Germany 1924 Agreement on Legalisation; Austria-Hungary 1967 Agreement on mutual co-operation in civil matters and on documents; Austria-Slovak Republic Agreement 10 November 1961 on mutual legal co-operation in civil matters, on documents and on legal information; Austria-Slovenia 1955 Agreement on mutual legal co-operation; Belgium-France Agreement of 9 November 1981 concerning the abolition of the legalisation of Public Documents; Belgium-Germany Treaty of 13 May 1975 concerning the abolition of the legalisation of Public Documents; Czech Republic-Hungary Agreement of 28 March 1989; Czech Republic-Poland Agreement of 21 December 1987 on legal assistance and legal relations in civil, family and labour and criminal matters; Denmark-Germany Agreement of 17 June 1936 abolishing the legalisation of documents concerning the citizens of both States; Estonia-Latvia-Lithuania Treaty of 11 November 1992 on legal aid and legal relations; France-Germany Treaty of 13 September 1971 on the exemption from legalisation of Public Documents; France-Czech Republic Convention of 10 May 1984 on judicial cooperation; France-Hungary Convention of 31 July 1980 on judicial cooperation; France-Italy Convention of 12 January 1955 on judicial cooperation; France-Portugal Convention of 20 July 1983 on judicial cooperation; France-Slovak Republic Convention of 10 May 1984 on judicial cooperation; France-Slovenia Convention of 29 October 1969 on the exemption from legalisation of Public Documents; Germany-Italy Agreement of 7 June 1969 on the abolition of legalisation of public documents (applies generally with some exceptions, see Article 2 of the Agreement); Hungary-Italy Convention 26 May 1977; Hungary-Slovak Republic Convention of 28 March 1989; Hungary-Slovenia Convention of 7 March 1968; Latvia-Lithuania Treaty of 11 November 1992 on legal aid and legal relations; 499 Austria-Czech Republic 1963 Agreement on mutual legal co-operation in civil matters, on documents and on information on law; Austria-Poland 1974 Agreement on mutual legal relations in civil matters and on documents; Belgium-Slovak Republic Agreement of 15 October 1984 on mutual legal cooperation in civil, family and commercial matters; Cyprus-Greece Agreement on legal assistance in civil, family, commercial and criminal law; Cyprus-Hungary 1983 Agreement on legal assistance in civil and criminal matters; Cyprus-Poland 1997 Agreement on legal assistance in civil and criminal matters; Cyprus-Slovak Republic Agreement of 23 April 1992 on legal assistance in civil and criminal matters; Czech Republic-Greece 1980 Convention on judicial assistance in civil and criminal matters; Czech Republic-Slovak Republic Agreement of 29 October 1992 on legal assistance provided by judicial authorities and on regulation of legal relationships in civil and criminal matters; Estonia-Poland Treaty of 27 November 1998 on legal aid and legal relations in civil, employment and criminal matters; Finland-Hungary Agreement 22 May 1981 on legal protection and legal aid in civil, family law and criminal matters; Finland-Poland Agreement of 27 May 1980 on legal protection and legal aid in civil, family law and criminal; Germany-Greece Agreement of 11 May 1938; Germany-Luxembourg 1966 Agreement concerning the abolition of legalisation, the exchange of civil status records and the issue of certificates of the absence of impediments to marriage; Greece-Hungary Convention of 8 October 1979 on judicial assistance in civil and criminal matters; Greece-Poland 1979 Convention on judicial assistance in civil and criminal matters; Greece-Slovak Republic Convention of 22 October 1980 on judicial assistance in civil and criminal matters; Hungary-Poland Agreement of 6 March 1959 on legal relations in civil and family law and criminal matters; Italy-Slovak Republic 1990 Agreement on legal assistance and on legal relationships in civil, family and criminal matters; Latvia-Poland Agreement of 23 February 1994 on legal aid and judicial relations in civil, family, labour and criminal matters; Poland-Slovak Republic Agreement of 21 December 1987 on legal assistance and on regulation of legal relationships in civil, family, labour and criminal matters; Portugal-Slovak Republic Agreement of 23 November 1927 on mutual legal assistance in civil and commercial matters; Portugal-Spain Convention of 19 November 1997 on judicial cooperation on criminal and civil matters.
criminal matters501; employment matters502; family law matters503; or social security matters504. Lastly, there are agreements that merely provide for the exemption from legalisation requirements of specific types of Public Document, for example civil status documents505; marriage licenses506; judgments507; public records508; or certifications of private documents509.

In addition, more than twenty-five multilateral agreements apply between the Member States that explicitly exempt Public Documents from legalisation requirements. Such agreements have been established within different frameworks, such as the Council of Europe, the Hague Conference on Private International Law and the CIEC.

Most significant, as far as legalisation is concerned, is arguably the Hague 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. The application in practice of this Convention is discussed in detail later on in this report, but its effect ought to be mentioned here. The
Convention has effectively abolished the conventional legalisation formalities that are discussed in this part between all the Member States in relation to most types of Public Documents.

(i) Note on the surveys conducted in the course of the study

The survey used during the study sought to determine what percentage of those using documents abroad needed to fulfil the legalisation formalities (including the Apostille formality) before doing so.

Just over half of the citizens surveyed (51.65%) said they did not have to fulfil any formality before using their document abroad. Those who did have to fulfil a formality chose the Apostille formality at a rate of 61.90%. Most of the German language survey respondents did not have to fulfil any legalisation formality requirement before use abroad.

Of the companies surveyed, over 83% said that they had to fulfil a formality (either Apostille or legalisation) before they could use their document abroad, and in 70% of the time, the Apostille formality was required.

(b) The table of bi- and multilateral agreements that abolish legalisation

Notwithstanding the fact that the scope of application of legalisation in the conventional sense is virtually non-existent under the influence of EC law and international agreements, the precise legal framework has never before been accurately described for all the Member States.

One of the main tasks of the study was, therefore, to clarify this legal framework and to make it more accessible and transparent. This effort has resulted in the creation of a comprehensive database of all bi- and multilateral agreements that apply between the Member States that completely exempt Public Documents from the requirement of legalisation (the table is annexed to the report).

The table allows a public official or user of a Public Document to identify rapidly and with ease whether an agreement exists between the state to which he belongs and the Member State in which a particular foreign document originates or where a particular domestic document is to be used.

The analysis of the table clearly shows the complexity of the legal framework for legalisation of Public Documents between the Member States. In addition, the following findings can be reported: firstly, the abolishment of legalisation formalities (including alternative forms of legalisation like the Apostille formality) is a measure known to all the Member States and has been used extensively in relation to specific types of documents or situations in the framework of the European EC, the Hague Conference on
private international law, the Council of Europe and the CIEC; and, secondly, in 75 out of 600 possible situations in which documents move between Member States (25 Member States in relation to each other) legalisation formalities have been completely abolished on the basis of the Brussels 1987 Convention (not in force, but applied provisionally between seven Member States) and approximately twenty-two bilateral agreements.

Furthermore, in most cases where legalisation formalities have not been abolished between the Member States, they have been replaced and simplified by the Hague 1961 Convention, which abolished the conventional process of legalisation applicable between the Member States, and replaced it with another simplified formality with the same effect as legalisation.

(c) Legalisation in accordance with domestic rules and requirements

(i) Introduction

Legalisation in accordance with domestic rules and requirements usually constitutes a two-tier process of certification, involving the national authorities in the Public Document’s country or origin and the authorities of the country of the document’s destination.

Accordingly, we distinguish the legalisation of domestic Public Documents from that of foreign Public Documents. We note that de facto we speak about the same Public Document since this will be considered domestic by the country where it was executed and foreign by the country where it is subsequently produced.

Legalisation formalities as implemented in the country of a document’s origin necessarily depend to a large extent on the requirements imposed by the country of the document’s destination. This can be explained with reference to the fact that, on the basis of the principle of state sovereignty, countries determine autonomously what conditions are to be fulfilled before they will accept the documents executed by another state. Prior legalisation by the authorities of a document’s country of origin is a regular requirement in this regard.

Countries that want to see their domestic Public Documents accepted abroad, therefore usually comply with requirements of prior legalisation as much in accordance with their own internal rules and procedures as with those of the countries of the destination of domestic documents.
(ii) Legalisation depends on the availability of specimen signatures and seals

In practice, the process of comparing a Public Document's signature (and/or seal) to specimens maintained for this purpose by the competent authority is the only method commonly accepted for verifying a document’s authenticity in the process of legalisation; besides, of course, the possibility of contacting the purported author of the document directly to receive confirmation.

The division of competence amongst authorities in the process of legalisation is not uniform in the Member States. It is normally closely linked to and determined by the internal organisation of a state and therefore necessarily differs between states.

Consequently, there is no uniform rule that can be used in relation to all the Member States to determine which authority is competent to certify the authenticity of a specific type of Public Document. In other words, the fact that a particular authority (e.g. the Ministry of Justice) is competent in one Member State to certify the authenticity of the document executed by another public authority in that state (e.g. a court) does not imply that the same will be true as regards the other Member States.

Since competences to legalise Public Documents are not attributed in a uniform manner in the Member States, the question of which authority musters specimen signatures and seals for the purpose of legalisation is also subject to diverging answers from one country to another.

We have discussed above that in general the ability of a competent authority to legalise Public Documents depends on whether or not holds of a specimen signature or seal of the authority that purportedly executed the Public Document in question.

Similarly to domestic authorities, embassies and consulates only legalise Public Documents that have been certified by authorities for which the mission keeps specimen signatures and/or seals allowing for the verification of the document’s authenticity.

Embassies and consulates generally do not gather specimen signatures and/or seals of all authorities that are competent to execute or certify documents in the country where they are based. This applies in particular to large countries where the process of maintaining (up-to-date) specimen would involve a huge responsibility given the high number of public authorities.

Instead, embassies and consulates usually dispose merely of specimen signatures and/or seals of the authority that is competent to super-legalise domestic Public Documents in the country where they are based (usually the Ministry of Foreign Affairs).
Sometimes they will gather, in addition, specimen signatures or seals of the authorities that are competent to perform the intermediate legalisation of Public Documents (usually the superior authorities of the officials who execute Public Documents in a specific sector of government).

By way of example, in Germany, legalisation is carried out by the diplomatic or consular mission of the country in which the document is to be used. It is up to the foreign mission to choose how it shall decide that a document is authentic.

If the mission itself does not have an up-to-date sample signature or seal from all potential issuing authorities, or does not look at the register of the issuing authority for each legalisation, then it will have to develop its own special procedures.

This is especially the case in states like Germany that have a very large number of authorities that may execute Public Documents. It is particularly hard for the missions of other states to keep track of multiple authorities and any changes in their formation or competences.

Consequently, missions will demand intermediate legalisation of German Public Documents by a German authority, and sometimes super-legalisation by the Federal Foreign Office is also required.\footnote{The Federal Foreign Office has delegated the task of validating German documents to the \textit{Bundesverwaltungsamt} (Federal Office of Administration) (directive of 21 February 1969). Since transferring this competence to the Federal Office of Administration, the Federal Foreign Office no longer certifies documents.}

In Germany, super-legalisation of domestic Public Documents by the Federal Administration Office is only possible after intermediate legalisation by the domestic authority that is competent to carry out this formality. The question which authority is competent for the purpose of intermediate legalisation depends on the specific type of Public Document involved.

If a foreign country agrees not to require super-legalisation by the Federal Foreign Office (i.e. the Federal Administration Office), the Ministries of Justice of the Länder usually transmit specimen signatures of the competent certifying authorities to the country’s embassy which can be used for the purpose of legalisation.

Subject to agreement, foreign countries may even decide to allow their consulates or embassies to legalise German Public Documents without prior intermediate legalisation by the competent German authorities. In practice, this sometimes occurs when the executing authority (and its signature) is known to the consulate or embassy that is to legalise its document, for example in relation to notarial acts executed by German notaries who have made direct contact with consulates or embassies.
(iii) General trends in the practice of legalisation in the Member States

In relation to all the Member States, consulates and/or embassies are generally competent to legalise Public Documents executed in the foreign countries in which they are based. Also, in some Member States the Foreign Ministry is competent to legalise foreign Public Documents (this may be the case for most Member States, but was only indicated for Austria, Belgium, Greece, Italy, Lithuania, Poland, Slovenia and Spain).

Before the competent authorities in the Member States proceed to the legalisation of a foreign Public Document, they usually require the document’s prior legalisation by the domestic authorities competent to carry out this task in the country of its origin. In this regard, we speak of the legalisation of domestic Public Documents.

Prior legalisation by the competent authorities in the state of execution is thus a prerequisite before embassies, consulates or the Foreign Ministries of the Member States will accept documents for the purpose of legalisation.

The need for prior legalisation is related to the issue of whether the competent authority of the country of a document’s destination usually disposes of specimen signatures, seals and/or stamps of all authorities competent to execute Public Documents.

Instead, the competent authorities of the country of destination will usually muster the specimens of signatures, seals and stamps of higher authorities of the country of origin that are competent to legalise the documents executed by all authorities under their authority (e.g. the Ministry of Justice in relation to the courts), or the authority that is deemed competent to legalise all the Public Documents of the country it represents (e.g. the Ministry of Foreign Affairs).

Accordingly, three situations can be distinguished as far as the requirement of prior legalisation by the competent 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.

In the Member States, it is largely the case that domestic Public Documents are legalised through a chain of certifications involving differing levels of authority. In situations where the prior legalisation by the
Ministry of Foreign Affairs is required by the country of destination, the holder of a document may be required to seek intermediate legalisation of the document from the competent authority depending on whether or not the Foreign Ministry disposes itself of the necessary specimen signature, seal and/or stamp to verify the authenticity of the document it is asked to legalise.

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 generally ultimately competent (Austria, Belgium, Czech Republic, Denmark, Germany, Greece, Hungary, Italy, Netherlands, Poland, Slovak Republic, Slovenia and Spain).

In some Member States, the Ministry of Foreign Affairs maintains specimen signatures, seals and/or stamps of all the public authorities that are competent to execute Public Documents, therefore rendering intermediate legalisation unnecessary (Cyprus, Estonia, Finland, France, Ireland, Malta, Latvia, Lithuania, Luxembourg, Sweden and UK).

As regards the practical aspects of the legalisation of domestic Public Documents, we have found that almost all the Member States allow application in person or by post (with the exception of France and Malta) and the costs range anywhere from no fee at all to a maximum of €80.

As indicated, subsequent to the prior legalisation by the competent authorities of the country of origin, a Public Document will usually require legalisation by the competent authorities of the document’s country of destination in accordance with this country’s rules and procedures.

1) The use of control figures and on-line register

One Member State (Belgium) has indicated that its consulates and embassies attach a sticker to documents that are legalised containing a number consisting of 16 figures (called “control figure”) that is generated and enciphered by a computer programme. Subsequent users of legalised Public Documents can check the control figure on an internet site maintained by the Belgian Foreign Ministry: www.diplomatie.be/LegaliNet/index.aspx. This system is used both for the Apostille and the legalisation procedure.

2) The form in which foreign Public Documents can be legalised

---

511 Certificates from the register of births, deaths, and marriages legalised directly Legalisation Division of the Dutch Ministry of Foreign Affairs, while others have to undergo a wide array of procedures in what is called the ‘legalisation chain’ by the relevant domestic authorities.
Some diversity has become apparent between the Member States as regards the question in which form foreign Public Documents can be legalised. Some Member States will only legalise originals (Austria, Germany\textsuperscript{512}) while other Member States will also legalise certified copies (Belgium, France\textsuperscript{513}, Netherlands\textsuperscript{514}). Generally, simple photocopies will not be accepted for the purpose of legalisation.

3) Note on the surveys conducted in the course of the study

Respondents were asked to indicate whether they considered the legalisation formality to be too difficult. Most of the citizens surveyed (56.25\%) responded yes to the question of whether they considered the legalisation formality to be difficult. Of the responding companies, all of those surveyed responded yes to the question of whether they considered the legalisation formality too difficult.

(d) Proof provided by legalisation

In a majority of Member States, the fulfilment of legalisation formalities is presumed to establish a presumption of a foreign Public Document's authenticity (Cyprus, Czech Republic\textsuperscript{515}, Estonia\textsuperscript{516}, Germany\textsuperscript{517}, Greece, Hungary\textsuperscript{518}, Italy\textsuperscript{519}, Lithuania\textsuperscript{520}, Netherlands, Portugal, Slovak Republic, Slovenia, and Spain\textsuperscript{521}).

Other Member States adhere more closely to the original concept of legalisation described above and indicate that legalisation is deemed suitable to prove the authenticity of a Public Document's signature and the identity of the seal or stamp which the document bears (Austria\textsuperscript{522} and Denmark), and in certain Member States, the capacity in which the person signing the Public Document has acted (Finland, France, Luxembourg, Malta, Poland, and Sweden).

In Ireland, foreign documents that have been legalised are admissible (deemed prima facie authentic and duly executed) in evidence without proof of the seal or signature being the seal of such person or mission or signature of such person, or of the status and official character of such person.\textsuperscript{523}

\begin{itemize}
\item \textsuperscript{512} Normally originals are required, although certified copies that have been issued by the same authority that executed the original are also accepted.
\item \textsuperscript{513} Some French Public Documents (i.e. passports, certain civil status documents) can only be legalised in the original form
\item \textsuperscript{514} Certified copies can be legalised, but the original must then accompany the copy for the purpose of legalisation.
\item \textsuperscript{515} Section 52 Private International Law Act
\item \textsuperscript{516} § 276(2) Code of Civil Procedure
\item \textsuperscript{517} § 438 (2) ZPO
\item \textsuperscript{518} Act No XLVI of 2001 on Consular Protection; Chapter No IV of Information Communication No. 8001/2001 (IK.4.) of the Ministry of Justice (and relevant international agreements)
\item \textsuperscript{519} Article 33, c. 1, DPR 445/2000
\item \textsuperscript{520} Article 807 of the Code of Civil procedure
\item \textsuperscript{521} Case ES No 8 Supreme Court of 6 November 1998
\item \textsuperscript{522} Regulation of the Federal Minister of Foreign Affairs of 16 March 1984 on legalisations by Austrian representations abroad
\item \textsuperscript{523} Section 5 of the Diplomatic and Consular Officers (Provision of Services) Act 1993
\end{itemize}
In contrast, Apostille certification only proves that the foreign competent authority is certifying that the document has been signed or stamped by a public authority. The foreign Public Document may still be objected to on the basis that it offended the rule against hearsay or the best evidence rule (objections that can no longer be made as against domestic documents). Nonetheless, in practice, the Irish court would be likely to admit the document into evidence when it bears an Apostille.
(e) Proof provided by the legalisation by another Member State

An important question that was not initially dealt with in the national reports is whether Member States insist on the fulfilment of additional formalities as regards third state Public Documents which fulfil the formalities enforced by another EU Member State.

In other words, the question is whether the Member States accept a Public Document emanating from a third country that has been legalised by the competent authorities of another Member State.

With some exceptions, four types of answers were received in relation to this question: (1) legalisation by another Member State produces no effects; (2) whether such document is accepted as authentic depends on a case-by-case determination; (3) no additional formalities are imposed; and (4) it proves the authenticity of the document.

Those Member States in which legalisation by another Member State did not remove the requirement for another round of legalisation were Austria, Estonia, Italy, Latvia, Malta, and Slovenia. In Malta, where a foreign document has been legalised by another Member State, the legalisation procedure carried out by Maltese officials will be much more prompt than in cases where the normal procedure applied.

Member States that engage in a case-by-case analysis of the document's authenticity included Czech Republic, Denmark, Germany, Greece, Hungary, and Sweden. In Germany and Sweden, in practice, the fact of legalisation by another Member State will influence the method of assessment of authenticity, but it will also depend on the document itself and the official who is inspecting it. In Greece, legalisation by another Member State is not given the same credence as legalisation in the strictest sense, but such documents may be admitted as evidence based on the principle that administrative courts are free to accept foreign Public Documents as evidence without legalisation. In Hungary, legalisation by another Member State may be taken into consideration in determining whether the document is authentic. 524

No additional formalities are required in Cyprus, Finland, Luxembourg, and the Slovak Republic. In Cyprus there has been to date no reported cases of this instance, but the rapporteur indicated that under the Brussels 1987 Convention, such documents would presumably be considered as authentic. In Finland and Luxembourg, although no additional formalities are required in principle, the document will be reconsidered if there is doubt as to its authenticity. However, in practice, the general rule is to accept such documents without further examination. In the Slovak Republic these cases have not yet occurred.

524 Information Communication of the Ministry of Justice No. 8001/2991 (IK 4) on Managing of International Cases 74
but based on a statement by the Ministry of Foreign Affairs, such documents would be accepted without additional procedural requirements.

Only three of the Member States questioned responded in the absolute that legalisation by another Member State would serve as proof of authenticity of the Public Document (France, Spain and the UK).

(i) **Point for reflection in the EC context: self-authentication (U.S.)**

Legalisation does not exist in the United States as such. Certain types of documents are automatically considered authentic and are therefore admissible in court without the need for extrinsic evidence to prove authenticity. In the federal context, the term “domestic” refers not only to intra-state documents, but also to all documents originating from any of the states. Although the U.S. is a signatory to the Apostille Convention, it applies only to documents originating from the U.S. and going to other signatory countries; it does not apply between the states.

(f) The legalisation of domestic Public Documents by the Member States

(i) **Austria**

In Austria, different procedures apply depending on the type of document involved. Generally, intermediate legalisation is first required (see below), followed by super-legalisation by the Ministry of External Affairs.

Judicial documents may be legalised by either a notary or Bezirksgericht (district court), or the President of the competent Landesgericht (regional court). The latter is also competent for certified translations, as well as business register extracts.

Regarding civil status documents, the procedure is different: there must be legalisation by the District Administrative Authority and the Provincial Governor.

Other competent authorities include the Landesschulrat (regional school board) and the Federal Ministry for Education, Science, and Culture (for school and university diplomas), the Federal Ministry of Health and Women (for medical certificates) and authorities such as the President of the Handelsgericht.

---

525 Section 430 of the Geschäftsordnung für die Gerichte I. und II. Instanz (Rules of the courts of first and second instance).
526 Section 40 Gerichtsorganisationsgesetz (Act on court organisation); Section 189 Außenstreitgesetz (Act on Non-Contentious Proceedings).
527 Section 52 Paragraph 2 Personenstandsgesetz (Civil Status Act).
(Commercial Court), the Bundespolizeidirektion and Federal Ministry of Interior (for clearance certificates), among others.

The legalisation of electronic documents has also been newly covered under Austrian law.\textsuperscript{528}

\textbf{(ii) Belgium}

In Belgium, the competent authorities for the intermediate legalisation of domestic Public Documents vary according to the type of document at issue (see below). The Federal Public Service Foreign Affairs is competent to super-legalise domestic Public Documents if required by the country of the documents’ destination.

The Legalisations Service of the Federal Public Service Foreign Affairs is competent to legalise the documents executed by local administrative authorities. It also has competence to super-legalise the documents legalised by the Federal Public Service Justice if required.\textsuperscript{529}

The Federal Public Service Justice is competent to legalise the documents executed by notaries and magistrates, as well as various authorised clerks of court or civil servants of the Federal Public Service Justice.

The presidents of Belgian courts of first instance are competent to legalise the documents signed by sworn translators.

Private documents must be certified by the relevant municipal administration or a notary and then legalised by the Federal Public Service Foreign Affairs.

Subject to the requirements of the country of a document’s destination, formalities may sometimes be combined. For example, documents carrying the signature of a Belgian magistrate are legalised by both Federal Public Service Justice and ultimately the Federal Public Service Foreign Affairs.

Notarial documents are legalised successively by the justice of the peace or by the president of the court of first instance of the notary’s judicial district, the Federal Public Service Justice and finally the signature of the Minister of Justice is legalised by the Federal Public Service Foreign Affairs. In practice the latter

\textsuperscript{528} Berufsrechts-Änderungsgesetz für Notare, Rechtsanwälte und Ziviltechniker 2006 (Act amending professional rules for notaries, attorneys and civil engineers 2006), Bundesgesetzblatt I 2005/164. The new rules will come into effect on 1 January 2008.

\textsuperscript{529} Article 45, §2, subparagraph 2 Civil Code of 21 March 1804, B.S. 3 September 1807.
possesses a list containing the signatures of all notaries in Belgium. Consequently, the signature of a notary can also be directly legalised by the Federal Public Service Foreign Affairs. 530

The applicant may request legalisation in person or by post, although in the case of the latter, use of registered mail is advised. He or she may also send a representative without sending authorisation. In addition to the document to be legalised, the applicant must present identification papers to the authority.

The legalisation procedure followed differs depending on the competent authority. For instance, at the Federal Public Service Justice, a large stamp and seal are placed on the document which is dated and signed. The legalisation method at the Federal Public Service Foreign Affairs is similar, though it uses protected paper with numbered stickers.

Legalisation is normally completed within one day and a flat rate of €10 is charged by both the municipal authorities and the Federal Public Service Foreign Affairs. 531 There is no charge for foreign diplomats in Belgium or for insolvent persons provided with a certificate of the Public Centre for Social Well-being. Legalisation at court and at the Federal Public Service Justice is also free of charge.

(iii) Cyprus

In Cyprus, the Permanent Secretary of the Ministry of Foreign Affairs for Certification is competent for the legalisation of any domestic Public Document that is to be used abroad. Procedurally, the Permanent Secretary certifies that the signature or seal on the document is authentic and then inserts the seal of the Ministry along with a stamp of CYP 1 on the top of the seal. 532

Certified private documents are considered Public Documents for which the following procedure applies: the signature and stamp of the certifying officer must be verified by the District Officer 533 of the town in which the Certifying Officer resides before it is sent to the Permanent Secretary for re-verification.

Legalisation can be requested in person or by post addressed to the Permanent Secretary of the Ministry and the applicant need only produce the document to be legalised. Legalisation is completed immediately for applicants applying in person. No information was given as to how long it takes to complete legalisations requested by post.

530 Article 600 Judicial Code of 10 oktober 1967, B.S. 31 oktober 1967; Article 28 and 49 Law of 25 ventose Year XI (16 March 1803) on the regulation of the office of notary public, B.S. 6 mei 1980. See also “Arrondissementrechtbank” Liège, 12 October 1972: the concurrent competence of the president of the court of first instance and the justice of the peace is only applicable to notarial acts and does not exist when an informal agreement was simply recognized in front of a notary. In that case, the only legal authority with competence is the justice of the peace.


532 Section 6 of the Certifying Officers Law, Cap 10 (Schedule 10). Such competence is granted by the Ministry of Internal Affairs of the Republic of Cyprus pursuant to Article 3 of the Certifying Officers Law, Cap. 39.

533 Certifying Officers Law, Cap. 39.
(iv) Czech Republic

In the Czech Republic, the authorities competent to legalise domestic Public Documents also vary depending on the particular type of Public Document involved.

For example, the Ministry of Justice is competent to legalise judicial documents and documents executed by notaries.534

Administrative documents are first legalised by the administrative body superior to the issuing authority (e.g. the relevant Ministries of Health, Education, etc.). Subsequently the Ministry of Foreign Affairs is competent for the purpose of super-legalisation.

The procedure for legalisation usually takes as long as the Apostille procedure, although the total time may increase according to whether foreign embassies are located within the Czech Republic. Cost varies depending on factors such as the legalising body or the document. Legalisation of documents required for entry into civil status registries costs 300 CZK; legalisation by the Ministry of Foreign Affairs costs 600 CZK, except for legalisations by diplomatic representatives or other consular officers under the Convention for the Abolition of Legalisation of Documents Executed by Diplomatic Agents or Consular Officers.

(v) Denmark

In Denmark, domestic Public Documents to be used abroad are legalised in the manner required by the country of the documents’ destination. Typically, this involves the legalisation by the Ministry of Foreign Affairs since the foreign embassies and consulates generally trust its endorsement of a document’s authenticity.535

The Danish Foreign Ministry will only legalise documents that have undergone prior intermediate legalisation by the relevant Ministry that exercises authority over the authority that initially executed the Public Document in question.

Applications can be made in person or by post; however, if more than 15 signatures must be legalised, postal requests are encouraged. The legalisation procedure will usually be completed on the spot if requested in person, whereas documents received by post will be returned the day after receipt by the authority. Legalisation costs DKK 160 (€20) per stamp.

534 Section 62 of the Private International Law Act
(vi) Estonia

In Estonia, domestic documents that are to be used abroad are legalised by the Ministry of Foreign Affairs “in accordance with customary international law”. In addition to the Ministry of Foreign Affairs, Estonian consular officers are also competent to legalise domestic Public Documents to be used in foreign states.

(vii) Finland

In Finland, domestic Public Documents are legalised by the Head of the Legal Department of the Ministry of Foreign Affairs. Private documents must be certified by a notary before legalisation can be requested of the Ministry of Foreign Affairs.

The Ministry of Foreign affairs maintains a register of specimen signatures and seals of the domestic authorities competent to execute or certify domestic documents and further sends specimens of the signatures and seals of authorities competent to legalise domestic Public Documents to the foreign embassies and consulates established in Finland.

Legalisation may be requested in person or by post; in the case of the former, the process will be completed while the applicant waits unless more than 10 legalisations are requested. The cost is €20 and the applicant need only supply the document to be legalised.

(viii) France

In France, the legalisation of domestic documents intended to be used abroad is handled by the Bureau of Legalisation of the Ministry of Foreign Affairs or the French Consular Officer in the country where the document is to be used.

The Rapporteur did not indicate the exact procedure, but rather explained that legalisation in France is very much a matter of administrative and judicial practice. This implies that there is no real law on legalisation as such, although there are some ‘décrets’ and ‘circulaires’.

---

536 Article 28 Consular Act
537 The basic regulation on legalisation is the Act on Notary Public (287/1960); see also, the Report of the Legal Affairs Committee 5 / 1960, The Report of the Grand Committee 34/1960 and Response of the Parliament to the Government Bill.
538 Section 7 Act on Notary Public.
539 The requirement of legalisation is to be found in a very old text still used in courts : the Royal Ordinance on Maritime Affairs of 1681.
540 Décret n°71-941 of 26 of November 1971 (D. 1971. 453), which simplified the legalisation procedure for public notaries acts. This simplification has been extended to all French Public Documents to be produced abroad by the already mentioned “circulaire” of 4 May 1981 (OJ. 16 May 1981).
Legalisation must be applied for by post and the applicant must provide a certified copy of the document, unless it cannot be copied. The cost of legalisation varies depending on the nationality of the applicant and the nature of the documents. For instance, legalisation of documents executed by notaries is more expensive.

(ix) Germany

In Germany, the authorities competent to legalise domestic documents to be used abroad vary depending on the document at issue. Normally, foreign missions will demand prior intermediate legalisation by a competent German authority and sometimes super-legalisation, known as validation, before it will agree to legalise a domestic document.\(^{541}\)

If there is an agreement to not require additional super-legalisation, the German authorities usually transmit specimen signatures of the authorities competent for intermediate legalisation to the foreign embassies. Some foreign embassies will legalise without any prior legalisation if they are familiar with the executing authority and its signature.

German consular agents are empowered to certify the authenticity of German Public Documents for use in their respective countries.\(^{542}\)

In practice, German judicial documents (including documents of the judicial administration “Justizverwaltung”) and notarial documents are legalised by the President of the Regional Court (Landgericht), and sometimes the Local Court (Amtsgericht) notably in the City States of Berlin and Hamburg).

Administrative documents (including certificates of civil status [Personenstandsurkunden]) are legalised by the Chief Administrative Officer of the District (President of the administrative district/district authority = Regierungspräsidium / Bezirksregierung). In Länder without district authorities, the Land Ministries of the Interior are responsible, while in Bremen and Hamburg, the Senate Department for the Interior and Department for the Interior are responsible respectively. In the Land of Berlin, the Registry Office (Standesamt Berlin I) is competent; in Rhineland-Palatinate, the Supervisory and Service Directorate in Trier, and in Thuringia, the Landesverwaltungsamt (Land Office of Administration) in Weimar.

School and university certificates are legalised by the same authorities competent for administrative documents, although in the following Länder different offices to those named above are responsible: in Baden-Württemberg, the Ministry for Culture and Sport (school exams) and the Ministry for Science and

\(^{541}\) The Federal Foreign Office has delegated the task of validating German documents to the Bundesverwaltungsamt (Federal Office of Administration) (directive of 21 February 1969).

\(^{542}\) Section 14 KonsG.
Research (university exams); in Bavaria, the Bavarian State Ministry for Science, Research and the Arts and the Bavarian State Ministry for Education and Culture; in Brandenburg, the Ministry for Science, Research and Culture; in Saarland, the Ministry for Education, Culture and Science.

As a re-exception, in some Länder (e.g. Baden-Württemberg) the domestic competence for specific areas is concentrated with a Regierungspräsidium, notably for medical and law degrees, which are issued not by the university but by the state (Staatsexamen). In such cases, said Regierungspräsidium is usually also competent for questions of recognition of foreign diplomas and for questions of legalisation.

Commercial documents (e.g. certificates of origin, trade accounts) are legalised by Chambers of Commerce and Industry and Chambers of Crafts and Trades.

Certificates of clean criminal record are legalised by the Federal Public Prosecutor – Federal Central Criminal Register (in Bonn).

**Greece**

In Greece, competence for legalisation belongs to either the issuing authority or the authority exercising hierarchical control or supervision over the authority that drew up the document.

Civil and administrative court documents are legalised by the competent court officer appointed by the President of the respective court formation. 543

Public Prosecutors are competent to legalise criminal court documents executed by officials at the Public Prosecutor’s office and members of their staff. The public prosecutor of the court of first instance is further competent to legalise documents executed by a number of other authorities, for example investigators, notaries, keepers of land registers and ship and aircraft registers. 544

The procedure for legalisation is similar to that of the Apostille Convention: books containing samples of signatures and seals of all competent organs of the authorities issuing documents are kept (in many cases, both legalisation procedures are carried out by the same organ).

Once verification of capacity, signature and seal is made, the organ performing legalisation affixes a seal stating authenticity of the above qualities, or completes a similar statement in writing on the legalised

---

543 Regulation on Internal Functioning of the respective court, issued in accordance with article 17 of Law 1756/1988 (GG A 35) on the Code of court organisation and status of judicial officials. There is no explicit legal provision relating to legalisation of outgoing administrative documents. This has led to the formulation of a requirement according to which the competent civil servant, officer or person exercising public authority certifies authenticity of the capacity, signature and seal of the person who drew up the administrative document. As for administrative court documents, legalisation is also handled by article 17 of the abovementioned law regarding civil courts.

document, followed by the organ’s signature and official seal. The legalisation is then documented in a registry (similar to the one kept for the purposes of the Apostille Convention).

The applicant may submit a request for legalisation in person, by post or through a KEP (Kentra Exypiretisis Politon or citizen service center) and must bring with them only the document to be legalised. The legalisation procedure takes 5 to 15 minutes. Apart from court documents, most documents are legalised free of charge.

**(xi) Hungary**

The Hungarian Ministry of Justice legalises documents executed by ministries and authorities with nationwide jurisdiction. Documents of lower level bodies (e.g. school documents) are first legalised by the competent ministry (e.g. the Ministry of Education), before being legalised by the Ministry of Justice. Domestic authorities send seal and signature samples to the organisational unit of the Ministry of Foreign Affairs entrusted with consular duties who will subsequently super-legalise the document.545

However, an Information Communication by the Ministry of Justice specifies that documents for foreign use usually undergo legalisation and specifies a process of certification before legalisation.546 Judicial documents, notarial documents and documents executed by Hungarian Office for Translation and Attestation Company are legalised by the Department of International Law of the Ministry of Foreign Affairs.547

Certification of a head of a unit of justice on documents destined for foreign use costs 500HUF and certification or legalisation by the Minister of Justice is 1,000HUF. However, the information given on costs has since been outdated.548

**(xii) Ireland**

Given the character of the Irish legal system as one of common law, legalisation is not such a concern.549 However, evidence law shares some of the main concerns with the rules of legalisation in other jurisdictions.

As regards outgoing documents, the situation is varied, as many other countries require legalisation before acceptance of a document. In such cases, legalisation is handled by the Consular Section of the Department of Foreign Affairs.

---

545 Article 13, Act No LXXIX of 1993 on Common Education.
546 Information Communication No. 8001/2001 (IK.4.) of the Ministry of Justice, Chapter IV Section 77.
547 Id. Section 76-78.
548 Id. Section 81.
549 N.B. the Irish Rapporteur did not indicate any relevant legal provisions regarding legalisation of outgoing documents.
The Consular Section of the Department of Foreign Affairs will check the notary’s or public official’s signature and stamp against samples maintained for this purpose. Documents executed by Irish state authorities need not be notarised in advance of legalisation by the Consular Section of the Department of Foreign Affairs.

Some countries require the intermediate legalisation by the Irish Supreme Court Office followed by the super-legalisation by the Consular Section of the Department of Foreign Affairs.

The applicant may apply in person or send the request by mail or courier, and the procedure varies depending on both the requirements in the state of destination and the document at issue. The applicant must submit original documents which have been notarised or signed and confirmed by a state official. The process usually takes only a few minutes and costs €20 unless a bundle of documents requires legalisations in which case the maximum fee applied is €50.

(xiii) Italy

In Italy, domestic Public Documents are legalised by the competent organs, central or decentralised, of the competent Ministry, or by other authorities that have been attributed this competence.\(^{550}\) This is not a very clear situation. However, in practice, the territorially competent Prefect’s Office (the State’s representative in a province) is competent to legalise the documents executed by local authorities.

For example, Public Documents executed by the local bodies of the Ministry of Education that are intended to be used abroad are legalised by the territorially competent bureau of the Prefect’s Office.\(^{551}\)

Some exceptions apply. For example, documents executed by local offices of the Financial Administration (Ministry of Finance), due to be used abroad, are legalised by the Intendenti di Finanza (the Chief of the Intendenza, a peripheral office of the finance administration that performs an activity of control on public revenues within the province of each Province).\(^{552}\)

(xiv) Latvia

In Latvia, only very recently a national law was drafted which regulates legalisation.\(^{553}\) Before the establishment of this law, the relevant rules and procedures could only be found in internal governmental documents, which ceased to be valid with the coming into force of the Law on Administrative Procedure on 1 January 2006.

---

550 Article 33(1) d.p.r. 28 dicembre 2000, n. 445 (President of the Republic’s decree n. 445 on December 28th 2000)
553 Draft “Document verification (legalisation) Law”.
Domestic documents for use abroad must be legalised by the Ministry of Foreign Affairs or the diplomatic or consular mission in the country of destination. By law, Latvian public authorities that are competent to execute Public Documents are required to submit signature and seal specimens to the Ministry of Foreign Affairs and specific procedures for this are to be developed by the Cabinet of Ministers.

Depending on both the nationality of the person and document requiring certification/legalisation, the cost of legalisation ranges from 5LVL to 20LVL.

(xv) Lithuania

The main legislative act concerning legalisation is the New Instruction for the legalisation and Apostille certification which came into force on the 5th of November, 2006 and repealed The Foreign Ministry instruction for the legalisation of documents (21st of July, 1997, order Nr. 39).

Domestic documents intended to be used abroad must be signed by the executing official and certified by means of the stamp of the Institution that issued the document and the official seal of the State before they can be legalised by the Consular department of the Ministry of Foreign Affairs. Alternatively, a Lithuanian document can also be legalised by a consular officer of diplomatic agent in the country of destination.

The competent authority will verify the authenticity of the signature, the capacity in which the person has acted and, the identity of the seal in order for the document to be capable of producing legal consequences in another State.

Legalisation can be requested only in person or by an authorised person. The competent authorities use samples of signatures and seals and compare them with the information on the document. All legalised documents are registered in the computer system or in the legalised documents registration book.

Legalisation usually takes no more than 5 days, but may take longer if there is a need to verify the authenticity of the document. The following fees are payable, which appear discriminatory in nature: (1) for Lithuanian nationals at the Foreign Ministry – 1 euro (1 document); (2) for Lithuanian nationals at the diplomatic mission or consular post – 5 euro (1 document); (3) for Estonians, Latvians and CIS country nationals – 10 euro (1 document); (4) other country nationals – 15 euro (1 document); (4) urgent legalisation: in 24 hours – 20 euro extra, in 48 hours – 15 euro extra; (5) services provided in other places then diplomatic mission or consular post and on bank holiday, weekend or at night – double fee.

554 Article 9 Draft “Document verification (legalisation) Law”.
555 Article 10 Draft “Document verification (legalisation) Law”.
556 Article 7 Draft “Document verification (legalisation) Law”.

The system used for the registration of legalisations is electronic. Each item consists of a unique serial number, information about applicant, date when application was submitted, date when document was legalised, submitted document, information about official who scrutinised the document, paid fee.

(xvi) Luxembourg

The passports bureau of the Ministry of Foreign Affairs legalises domestic Public Documents by stamping the documents. Certain states impose specific requirements regarding documents destined for those countries.

Luxembourg allows an applicant to apply for legalisation by the Ministry of Foreign Affairs in person or by registered post. The procedure lasts a minimum of four days and applies to all documents.557

(xvii) Malta

The authority competent for legalisation of outgoing documents in Malta is the Minister of Foreign Affairs. The procedure is the same regarding all documents. Generally, the Minister of Foreign Affairs office possesses an electronic database of signature specimens which will be used to check the signature on the document. Subsequently, a Legalisation Certificate is issued.

The applicant must apply for legalisation in person and must present the documents to be legalised. The procedure takes about 5 minutes, and the fee is Lm 7 (€17) for general documents and Lm 5 (€12) for University certificates and Public Registry documents.

(xviii) Netherlands

The Legalisation Division of the Dutch Ministry of Foreign Affairs is competent for legalisation of outgoing Public Documents. The procedure varies according to the receiving state, but also according to the type of document at issue.558 For instance, certificates from the register of births, deaths, and marriages can be legalised immediately, while others have to undergo a wide array of procedures in what is called the 'legalisation chain' by the relevant domestic authorities.

The applicant may apply in person (including representatives) or by post and must bring the original document, even in cases where certified copies are submitted. A certified translation may also be required if the receiving state so requests and this translation must be legalised by the court and the

557 Under domestic Luxembourg law the legalisation of documents is governed by an Act of 14 April 1934.
558 N.B. the Rapporteur did not indicate any specific legal provision relating to legalisation of outgoing documents.
Ministry of Justice. Documents not in Dutch, English, French or German, but issued in the Netherlands must be accompanied by a certified translation.

Documents submitted in person and before 11:30, will be legalised on the same day as the process takes about one hour. Documents submitted after 11:30 can be collected the next working day. If the documents are submitted by post, the process takes at least two working days. The cost of legalisation is €10 per document and a self-addressed stamped envelope must be included with documents submitted by post.

(xix) Poland

In Poland, the Consular Department of the Ministry of Foreign Affairs is generally competent for legalisation. Notwithstanding this general competence, certain special procedures apply for the prior certification of the authenticity of specific types of documents.

For example, judicial and notarial documents (and translations thereof) are certified by the President of the circuit court or the court of appeal (or an authorised judge or court division officer). Subsequently, as far as required, the authenticity of the signature of the President of the circuit court or a court of appeal (or the authorised judge or court division officer) and the authenticity of the official seal can be certified by the Ministry of Foreign Affairs. The courts and other authorised public officials are required to provide the Ministry of Foreign Affairs with specimens of their signatures and seals.

Requests for legalisation may be made in person or by post and the applicant must present a certified Public Document. Legalisation costs around 20-25€, depending on the document, as does the cost of certification of the authenticity of a stamp or seal.

(xx) Portugal

The competent authorities for the legalisation of Portuguese documents abroad are the Portuguese Consulates of the residence or domicile of the applicant for legalisation. Costs differ according to the document's country of origin; for instance, legalisation of documents coming from Brazil costs between 11 and 25€.

---

560 Sections 20(1) and 20(2) Regulation of the Minister of Justice on detailed actions of courts with regard to the case under international civil and criminal proceedings in international relations (Dz. U. 2002.17.164). With regard to documents issued by a higher education school; see also Sections 13 to 15 and 18 of the Regulation of the Minister of National Education and Sports of 18 July 2005 on the Documentation and the Course of Studies (2005) Dz.U.2005.149.1233.
561 Sections 22(1) Regulation of the Minister of Justice on detailed actions of courts with regard to the case under international civil and criminal proceedings in international relations (Dz. U. 2002.17.164).
(xxi) **Slovak Republic**

The competent authorities for legalisation in the Slovak Republic vary according to the type of document. For example, for documents issued by courts, notaries, judicial officers and translations of court-appointed translators, the regional court or Ministry of Justice performs intermediate legalisation and ultimately the Ministry of Foreign Affairs super-legalises documents. Subsequently, documents that have been legalised by the Ministry of Foreign Affairs are legalised by the embassy or consulate of the state of destination.

Similarly, the Office of Regional Administration is competent to legalise documents from registers of births, deaths and marriages, documents issued by health facilities established by the Office, and documents issued by the authorities of local government.

The Ministry of Interior certifies Public Documents from authorities within its jurisdiction (with one exception) as do the Ministry of Health, Ministry of Education, Ministry of Defence, or Ministry of Foreign Affairs.

( xxii ) **Slovenia**

Procedurally, domestic judicial documents are legalised in three stages. First, the document is submitted to the District Court for legalisation which essentially follows the procedure as laid out in the Apostille Convention.

The applicant need not submit a translation; however, if the applicant does do so and requests that it be legalised, the translation must have been completed by an official court translator whose signature and seal can be verified by the Ministry of Justice.

Second, the legalised document (and translation) must be given to the Ministry of Justice which authenticates the signature of the judge in the first stage of the legalisation process.

Finally, the document is submitted to the Foreign Ministry which authenticates the signature and seal of the official at the Ministry of Justice. The first two stages of this process are not applicable to documents issued by a Slovenian governmental body.

---


564 Legalisation is governed generally by the Act on Verification of Documents in International Affairs (ZOLMP).

565 Article 10 ZOLMP.

566 Article 12 ZOLMP.
The legalisation process at the District Court takes one full day and so the document may not be retrieved until the following day, whereas at the Ministry of Justice, the process is completed on the same day. The cost of legalisation is 255 SIT at each stage, although a court tax is applicable to the first stage which varies according to the type and length of the document.

**Spain**

In Spain there are no statutory provisions which establish the process of legalisation; consequently, the established procedures are the result of legal practice. As in most other Member States, however, a domestic Public Document goes through a chain of legalisations that is different depending on the specific type of Public Document involved.

Judicial documents and civil status documents are to be certified by the Chairmanship of the Regional High Courts (Presidencia de los Tribunales Superiores de Justicia) and the Ministry of Justice (Ministerio de Justicia) before being certified by the Ministry of Foreign Affairs and Cooperation (Ministerio de Asuntos exteriores y Cooperación).

Notarial documents must be certified by the Association of Notaries Public (Colegio de Notarios), the Ministry of Justice and finally the Ministry of Foreign affairs and Cooperation.

Diplomas and other certificates relating to professional qualifications are certified by the General Section for Diplomas, Recognitions and Official Approvals (Subdirección General de Títulos, Convalidaciones y Homologaciones) of the Ministry of Education and Universities and the Ministry of Foreign affairs and Cooperation. However, if a diploma or certificate is executed by Autonomous Communities, the competent authority is designated in separate regulations followed by the Ministry of Foreign affairs and Cooperation.

For Public Documents of the Central Administration, the competent authority is the body designed by the respective Ministry where the document is issued followed by the Ministry of Foreign Affairs and Cooperation.

Public documents of the Territorial Administrations are grouped in documents that are executed by the autonomous communities and those executed by local administrations. In relation to the former, the competent authorities are designated in special regulations followed by the Ministry of Foreign Affairs and Cooperation. Documents from local administrations are again divided into two types: firstly, judicial and notarial documents that are certified by General Direction for the Local Administration of the Ministry of Public Administration (Dirección General para la Administración Local del Ministerio de Administraciones Públicas) and subsequently the Ministry of Foreign Affairs and Cooperation; and
secondly certificates of the Land and Business Registers, Professional Associations and other documents which are certified by the Ministry of Justice and then the Ministry of Foreign Affairs and Cooperation.

Ultimately, a Public Document that has been legalised in one of the ways described above will still have to be legalised in accordance with the specific requirements imposed by the state of the document’s destination. This usually involves the legalisation of the document by the consular or diplomatic representation of the country of the document’s destination.

Legalisation can be requested in person or by post and the applicant must provide the original documents. There is no fee for the legalisation of outgoing documents.

(XXIV) Sweden

In Sweden, the Judicial Office of the Ministry for Foreign Affairs is competent to legalise domestic Public Documents that are intended to be used abroad. In exceptional cases, Swedish Embassies can also legalise a Swedish Public Document in the country of the document’s destination.

Legalisation is performed directly (i.e. without intermediate legalisation) for documents bearing the signature or seal of a Swedish government agency or other specific authorities, notaries public, chambers of commerce, Church of Sweden, state universities and schools, etc.

Documents may be given in person to the Judicial Office or sent by post. The applicant must indicate his address as well as the destination country and whether he requires the legalisation to be done in Swedish, English, French, Spanish, or German. The document in question must bear the original signature with the name printed in block letters (i.e. email or fax applications are not accepted).

In practice, the process of legalisation is similar to the Apostille procedure. Documents submitted in person may be retrieved in two working days or between two and five working days if submitted by post. The fee is 120 Swedish crowns (€13), but the Ministry for Foreign Affairs has discretion to waive the cost.

(XXV) United Kingdom

The Legalisation Office of the Foreign and Commonwealth Office provides a legalisation service with respect to outgoing documents under a procedure that is identical to that of the Apostille Convention.

---

567 Swedish governmental ordinance SFS 1999:154. There are no other regulations of the Swedish process of legalisation or similar or equivalent requirements.
(xxvi) **Point for reflection in the EC context: authentication of domestic documents (U.S.)**

In the United States, the ultimate authority responsible for authentication of documents to be used abroad is the Department of State Authentications Office, which is responsible for signing and issuing certificates under the Seal of the U.S. Department of State.

If the destination country is not one that is a member of the Apostille Convention, the document must undergo what is termed the "chain authentication method" which usually begins with a local authority and ends with authentication by the relevant foreign embassy or consulate within the United States.

The applicable procedure varies according to the type of document involved and the country of destination. For instance, regarding documents such as diplomas, powers of attorney, agreements, bylaws, transcripts, deeds of assignments, etc., the following procedure applies: the document must first be notarised, followed by certification of the notarisation by the clerk of court of the county in which the notary is commissioned. This part of the procedure varies from state to state, but this is generally what happens.

Then, the Secretary of State (or comparable authority) in the state in which the document was executed must certify the clerk’s certification by impressing upon the document the seal of the state. Afterwards, a typical procedure of authentication takes place in which the seal of the Secretary of State (or comparable authority) may, depending on the requirements in the receiving country, be authenticated by the U.S. Department of State Authentications Office.

Finally, the seal of the U.S. Department of State may be authenticated by the foreign embassy or consulate in the U.S. Specifically regarding diplomas, it was noted that once an official copy of the academic credentials has been notarised and certified by the court clerk, it should be sent to the state Notary Public Administrator for application of the state seal, and it will then be sent to the Authentications Office.

The process is very similar in relation to state and local documents and court records such as birth, marriage, and death certificates, divorce decrees, probate will, judgments, etc.; only the beginning is different: the document must be certified by the custodian of the document before it is passed on for certification by the Secretary of State.

Documents issued by federal agencies must first be certified under the official seal of the agency or of the Court and will then be transmitted to the U.S. Department of State Authentications Office, and finally, on to the foreign embassy or consulate.
Authentication by the Authentications Office may be requested either in person or by post/courier. If applied for in person, authentication will be completed while the applicant waits; however, no more than 15 documents will be legalised at one time. If by post, authentication takes approximately five business days from the date of receipt of the document.

Additionally, if the application is sent by post, it must be accompanied by a cover letter stating the applicant’s name and contact details, including email address, as well as the name of the country in which the document will be used. It is also suggested that the applicant include a self-addressed stamped envelope for faster return of the documents. The fee for authentication is $7.00.

(g) The legalisation of foreign Public Documents by the Member States

(i) Austria

To avoid instances of fraud, Austrian law provides that a foreign document must be legalised by the competent Austrian representation in the country of origin. If this is not done, the document must be legalised by the Ministry of the Exterior of the country of origin and by that country’s representation in Austria. Finally, they are legalised by the Austrian Ministry of External Affairs.

If the document is missing the internal legislation, the Ministry of External Affairs makes a note on it to the effect that its legalisation does not certify the accuracy or authenticity of the document. Furthermore, Austrian legislation provides that only original documents will be legalised.

It is important to note that Austrian representations abroad may only legalise documents bearing the seal and signatures of the Ministry of External Affairs or other such central authority and they may do so only if they possess samples of such signatures and seals.

Furthermore, Austrian representations may only legalise signatures or seals of diplomatic and consular representations of third states within their jurisdiction if authenticity can be proven, possibly through what is called ‘intermediate’ legalisation by the Ministry of External Affairs of the receiving state.

Lastly, in every case, the court must assess whether the document is to be considered as authentic without further proof, but legalisations by the Ministry of External Affairs or an Austrian ambassador constitute sufficient proof.


569 This information can be located in the verbal note of 8 February 2001 of the Austrian Ministry of External Affairs.

570 Internal guidelines, no reference provided.
(ii) Belgium

In Belgium, competence for legalisation is granted to all diplomats and consuls, not just those professional civil servants of the Federal Public Service Foreign Affairs.\(^{572}\) Also, a head of a post is entitled to delegate his or her competence to an employee, but only in specific cases.\(^{573}\) The minister for Foreign Affairs may still legalise a foreign document that is missing legalisation by a Belgian diplomat or consul, although prior legalisation may then be mandatory.\(^{574}\)

Special circumstances are applicable to documents emanating from Poland. Such documents may be legalised without the additional legalisation by Belgian diplomatic representation in Poland. However, if there is doubt as to the document’s authenticity, full legalisation may be required.

In all cases, the applicant must produce the original document or a certified copy and if the applicant requests legalisation of a translation, the original document in the foreign language is required as well. Any refusals to legalise must be strongly backed by evidence in support of the refusal.

Legalisation may be requested by post or the applicant may authorise another person to submit the document in his or her place.

(iii) Czech Republic

In relation to foreign Public Documents, the Czech Republic requires their prior intermediate legalisation in the country of origin by the authority competent in relation to the type of document at issue, and subsequently they must be super-legalised by the Foreign Ministry of the country in question.

Upon fulfilment of the requirements of prior legalisation, the Czech Republic embassy based in the document state of origin will legalise the document in question.\(^{575}\)

Legalisation by a Czech embassy abroad costs 600 CZK.

---

\(^{571}\) Section 311 Paragraph 1 Zivilprozessordnung (Code of Civil Procedure).

\(^{572}\) Wet van 31 december 1851 betreffende de consulaten en de consulaire rechtsmacht, B.S. 7 januari 1852 and Koninklijk besluit van 23 maart 1857 betreffende de bevoegdheden van consuls inzake legalisaties en gerechtelijke betekeningen, B.S. 29 maart 1857.

\(^{573}\) Telegram of March 5, 2004 (N° 04/tc162); see also Court of appeal Brussels, 22 June 1960, Procurerur general / Van Poucke, Goedertier and Sasse: the Minister of Foreign Affairs can, explicitly or tacitly, delegate his competence to legalise the signature of Belgian consuls to a civil servant of his department.

\(^{574}\) Article 30(2) Code on Private International Law.

\(^{575}\) Section 52 of the Private International Law Act.
(iv) Denmark

Denmark requires the prior legalisation of foreign Public Documents by the competent ministry of the country of a document’s origin and thereafter by the country’s Ministry of Foreign Affairs. The latter requirement appears not to be compulsive, but the circumstances as to why are not indicated. Upon the fulfilment of this requirement, the signature of the Ministry of Foreign Affairs will be legalised by the Danish embassy or consulate established in the country of origin.

(v) Estonia

Foreign Public Documents must be legalised by the foreign Ministry of Foreign Affairs “in accordance with customary international law”, before an Estonian consular officer will legalise the document for the purpose of its use in Estonia.576

The consular officer will legalise a foreign Public Document if he or she disposes of a specimen signature of the signatory and the signatory has acted within the limits of his or her competence. Legalisation will be refused in the following circumstances: (1) the original document issued in a foreign state has not been legalised in accordance with customary international law; (2) the content of the document is untrue; (3) according to an international agreement, the Public Document is valid without any further attestation; (4) circumstances exist which imply that unauthorised changes have been made to the original content of the Public Document; (5) the Public Document is spoiled; (6) the Public Document was issued for a specified term and is no longer valid; (7) there is reason to believe that the person who authenticated the Public Document was not competent to do so; (8) the Public Document has been legalised for use in another state; or (9) the Public Document has been legalised by another Estonian consular officer.

(vi) France

In France, the law on which legalisation procedure is based is quite old and much of the procedure followed is derived from practice. Generally speaking, French consuls are competent to legalise foreign Public Documents.

Alternatively, France also accepts foreign Public Documents that have been legalised by the consul in France of the country of a document’s origin; such documents will not be subjected to further legalisation by the French authorities. This practice is the result of an internal agreement between the Ministry of Foreign Affairs, the Ministry of Interior, and the Ministry of Justice.577

---

576 Article 28 Consular Act
577 Press Release of the Ministry of Foreign Affairs of 18 January 1967, published in the Journal des Notaires, 1967, 249. This has never been officially adopted through a décret or statute.
(vii) Germany

German consular agents are responsible for the legalisation of foreign documents. Usually, the prior legalisation of the foreign documents by the Foreign Ministry or other (high ranking) authorities of the foreign country is necessary.

In practice, procedural details vary according to the country of origin, but generally the rules are as follows: if the applicant is unable to appear in person to make the request, a written request may be submitted. It is also possible to submit the request by proxy, in which case authentication of representation through power of attorney and identification must be provided, along with the original documents to be legalised (and sometimes certified copies).

The cost of legalisation ranges between €20 and €80 and certification for the purpose of legalisation by the superior German authority costs €10. If legalisation cannot be completed because the document is found to be false, a charge of 75% of the normal fee is applied.

(viii) Greece

In Greece, the legalisation of foreign Public Documents in their country of origin is not mandatory. Public documents are accepted providing they are legalised by the Ministry of Foreign Affairs or a diplomatic agent or consular officer.

Different rules apply depending on both the origin of the document and its intended use. Legalisation of incoming documents in an administrative context is governed by the Code of Civil Procedure which provides that the courts may regard foreign Public Documents as authentic without further proof.

Administrative courts follow the rules as set out in the Code of Administrative Court Procedure. The rules are similar to those found in the Code of Civil Procedure in that administrative courts may accept a document that has been legalised by the Ministry of Foreign Affairs or a consular agent as authentic without requiring legalisation in its country of origin.

(ix) Hungary

Hungarian consular officers are competent to legalise foreign Public Documents executed in the country where they are based if the specimen signatures and/or seals (stamps) of the documents that are to be legalised were submitted by the foreign country.

---

578 Section 13 of the Konsulargesetz (KonsG).
579 Id. at Article 456.
580 Article 175 Code of Administrative Court Procedure.
In practice, Hungarian consular officers dispose of the signature and stamp of the Minister of Foreign Affairs of the country where they are based. Therefore, the consular officer will demand a document signed by the Minister of Foreign Affairs. In relation to documents executed by other public authorities this results in the requirement of a legalisation chain.

In consideration of the time and expense of this procedure, Hungarian consular officers usually also legalise documents issued by lower authorities of the legalisation-chain if their signature and/or seal (stamp) is known *ex officio*.

Prior legalisation by the foreign authorities is not strictly required in all situations. For example, foreign documents to be used in civil court proceedings must be legalised by the competent Hungarian mission in the country of origin.\(^581\) Legalisation by the competent authority of the state of origin is, however, not necessary. Furthermore, the enforceability of judgments does not depend on whether a judgment is legalised.\(^582\)

In the context of the Real Estate Registry, foreign documents must either be legalised by the Hungarian mission abroad whether or not the document is certified by a competent public authority.\(^583\) If the document is not legalised, it is submitted by the Registry of Deeds to the Minister of Justice who will determine its use.

Foreign Public Documents and certified private documents (by a foreign court, administrative authority, notary, etc.) that are to be used in an administrative context must be legalised.\(^584\)

(x) **Ireland**

Irish law rarely imposes a legalisation requirement for incoming documents because issues of authenticity are dealt with on a case-by-case basis by the court and differing levels of evidential weight can be applied to the same type of document, depending on the strength of the evidence of authenticity.

Irish evidence law prescribes that some documents are automatically considered authentic depending on whether they possess an official seal of the foreign body or a signature and letter in support of the signature when no such seal is available. For instance, this applies to foreign judgments, decrees, orders or other judicial proceedings.\(^585\) Such documents are considered *prima facie* admissible in evidence.\(^586\)

---

581 Article 195(7) Civil Procedure Act.  
582 Act No. LIII of 1994.  
583 Articles 35 and 36, Act No. CXLI of 1997 on Real Estate Registry.  
584 Article 52(2) Public Administration Act.  
585 Section 7 of the Evidence Act 1851.  
586 LRC Report No. 48, p. 43.
In the absence of specific statutory provisions, courts still have the discretion to determine whether foreign Public Documents will be admitted into evidence without additional proof of authenticity.

Legalisation may occur when there are serious disputes as to the authenticity of a document. In such a case, the party seeking to prove the document’s authenticity may put the document through legalisation in the state of origin. However, legalisation in this sense is different from full legalisation in that the court is entitled to accept verification of an Irish consular representative or notary public in the state of origin, rather than force the document to be legalised by the foreign authorities as well. However, a full process of legalisation is an option if reasons remain for suspecting the document’s authenticity.587

(xi) Italy

Foreign Public Documents intended to be used in Italy are to be legalised by the competent Italian diplomatic or consular representatives based in the country of execution.588 Public documents executed by a foreign diplomatic or consular representative based in Italy can be legalised by the Prefect’s Office (the State’s representative in a province).589

No information was provided in relation to the question whether and what type of prior legalisation by the competent authorities in the country of a document’s origin is required. Some references have been found indicating that prior legalisation by the Ministry of Foreign Affairs is generally required.

(xii) Latvia

Foreign Public Documents must first be legalised by the competent authority in the issuing Member State and thereafter by the Ministry of Foreign Affairs and lastly the diplomatic or consular mission of the Republic of Latvia.590

(xiii) Lithuania

Foreign Public Documents intended to be used in Lithuania must be signed by the executing official and certified by means of the stamp of the Institution that issued the document and the official seal of the State before they can be legalised by a consular officer or diplomatic agent based in the country of the

587 Order 40, r. 7 RSC.
588 Article 33(2) d.p.r. 28 dicembre 2000, n. 445 (President of the Republic’s decree n. 445 on December 28th 2000)
589 Article 33(3) d.p.r. 28 dicembre 2000, n. 445 (President of the Republic’s decree n. 445 on December 28th 2000)
590 Article 12 Draft Document Certification Law.
document’s origin. Alternatively, foreign documents can also be legalised in Lithuania by the Consular department of the Ministry of Foreign Affairs.\footnote{New Instruction for the legalisation and Apostille certification which came into force on the 5th of November, 2006 which repealed The Foreign Ministry instruction for the legalisation of documents (21st of July, 1997, order Nr. 39).}

**Malta**

(xiv) Maltese law is very much like the law in Ireland regarding legalisation of foreign Public Documents. Little importance is placed on the actual fact of legalisation; rather, the issue is largely whether a document is admissible in evidence. In Malta, certain documents are admissible in evidence without further proof of their authenticity, including some foreign documents.

The following documents are admissible as evidence in the same manner as the documents mentioned in the last preceding article: the acts of any foreign Government, department of a foreign Government, foreign courts of justice, or any foreign establishment, authenticated by the diplomatic or consular representative of the Government of Malta in the country from which they emanate, or by a person serving in a diplomatic, consular or other foreign service of any country which by arrangement with the Government of Malta has undertaken to represent this Government’s interests in that country, or by any other competent authority in the country from which they emanate.\footnote{Article 628 of Chapter 12 of the Code of Organisation and Civil Procedure.}

**Netherlands**

(xv) Dutch missions abroad will legalise Public Documents after they go through the legalisation process of the host country, followed by legalisation by the host country’s Ministry of Foreign Affairs.

As part of the legalisation process, since May 2006, Dutch representations abroad provide a questionnaire that must be answered by the applicant and submitted with his or her legalised documents to the relevant authorities. This is applicable even with respect to documents that originate from signatory countries to the Apostille Convention; however, the questionnaire is not used with regard to the other Member States, as well as several other countries.\footnote{Id. at C.3.}

In the Netherlands, different rules are applicable to foreign court decisions and foreign documents on personal status. In the former instance, the Code of Civil Procedure provides that legalisation of a foreign court decision, as well as its underlying documents, may be demanded by the enforcing court, unless deviating provisions of law or treaty apply.\footnote{Articles 986(3) Rv and 992 Rv 1964 Code of Civil Procedure.
(xvi) Poland

The legalisation of a foreign Public Document is carried out by Polish consuls in the country of their origin and requires the prior legalisation by the Ministry of Foreign Affairs of the host state.

Alternatively, foreign Public Documents can be legalised in Poland by the Polish Consular Department of the Ministry of Foreign Affairs. The Consular Department requires the prior legalisation of the foreign document by the embassy of the country of the document’s origin (usually in the form of a particular seal).  

The fee for legalisation carried out by Polish consuls outside Poland is €40.  

(xvii) Portugal

In Portugal, legalisation of Public Documents is not required unless there is doubt as to their validity. In such cases, the competent authorities for the legalisation of foreign documents are the Portuguese Consulates abroad who will legalise documents with a consular white stamp. This procedure applies to public and private documents.

(xviii) Slovak Republic

The embassy of the Slovak Republic accredited in the country of a foreign Public Document’s origin is competent for its legalisation with a view to its use in the Slovak Republic. Diplomatic agents will only legalise foreign Public Documents that have been legalised before by the Ministry of Foreign Affairs of the country of the document’s origin. This can be explained by the fact that consular officers at Slovak embassies only gather specimens of stamps and signatures of consular officers working at the Ministry of Foreign Affairs in country for which the embassy is accredited.

If the Slovak Republic is not represented in the country of a document’s origin, the Ministry of Foreign Affairs (Consular Department) of the Slovak Republic is competent for the purpose of legalisation. In this case, the stamp and signature of Ministry of Foreign Affairs of the country of origin of a Public Document will be legalised by the embassy of country of origin of Public Documents accredited for the Slovak Republic.

597 Article 365 of the Portuguese Civil Code.
598 Article 540(1) and (2) Portuguese Civil Code.
599 Bylaw of the Ministry of Foreign Affairs No. 80/1993 on Legalising Administration of Representations Abroad.
For example, the Slovak Republic does not have an embassy in Tunisia. For Tunisian Public Documents, the stamp of Tunisian Ministry of Foreign Affairs will be legalised by the Tunisian Embassy accredited for Slovakia, which is situated in Vienna.

Subsequently, the stamp and signature of the competent official at the Tunisian embassy in Vienna will be legalised by the Slovak Ministry of Foreign Affairs which maintains specimen signatures of all consular officers of embassies accredited for Slovakia (in Bratislava, Vienna, Berlin, Bonn, Moscow etc.).

In practice, the person requiring the legalisation of a foreign Public Document will bring or send by mail the Public Document that was previously legalised by the foreign Ministry of Foreign Affairs. The document does not have to be an original, but the stamp and signature of the competent official at the foreign Ministry of Foreign Affairs must be; a photocopied stamp or signature can not be legalised.

The foreign document is to be translated into the Slovak language by the consular officer, or a person authorised by the consular officer, or, alternatively, the consular officer will only check the translation that has been provided or it will be translated in Slovakia by a court interpreter or sworn translator.

Consular officers of the Slovak Embassy will verify the authenticity of the stamp and signature on the document. This formality is usually carried out immediately, the next day or in accordance to specific agreement. A fee of approximately 500 Slovak korunas is payable for the legalisation service.

(xix) Slovenia
The Foreign Ministry and the diplomatic missions or consular posts of Slovenia are competent to legalise foreign Public Documents intended to be used in Slovenia. The Slovenian competent authorities require the prior legalisation of the foreign document by the competent authorities in the country of origin (i.e. the Ministry of Foreign Affairs). The competent Slovenian authority only verifies the authenticity of the seal or stamp of the Foreign Ministry of the country of the document’s origin.

(xx) Spain
In relation to foreign Public Documents that are to be used in Spain, the Spanish consular or diplomatic representation in the country where the document in question was executed is competent for its legalisation. The Spanish Ministry of Foreign affairs and Cooperation is also competent to legalise foreign documents.
There is no requirement under English law for the legalisation of foreign documents by UK diplomatic or consular officers in order for them to be receivable before the judicial or administrative authorities in England and Wales (and, it may safely be asserted, before those authorities elsewhere in the United Kingdom).

Outside the specialised and relatively small group of lawyers whose practices have an international dimension, legalisation is a largely unknown concept. The leading English text-book and practitioners’ manual in the evidentiary field (Phipson on Evidence), contains no mention of legalisation even though it deals in some detail with the admissibility of foreign Public Documents.

It is understood that, prior to the entry into force of the Apostille convention, legalisations could be obtained at certain British consulates. However, it seems unlikely that this would have been intended to facilitate the reception of a document in the UK, but rather as the first link in a chain of legalisations leading to the legalisation of a document for a third country. In this scenario, the second link in the chain would have been the verification of the British consular official’s signature and seal by the Foreign and Commonwealth Office in London and the third and final link, the legalisation of the seal of the Secretary of State by the consulate in London of the State of the document’s ultimate destination.

This process is still followed in relation to a large number of documents originating in British Dependent Territories (including the Crown Dependencies of Guernsey, Jersey and the Isle of Man) which have to be produced in a foreign country. In these cases, the Foreign and Commonwealth Office will verify the signature and seal of the Crown representative in the territory concerned (typically the Governor-General, Lieutenant Governor or a member of his staff) as a preliminary to legalisation by the Consulate of the receiving State.

It is therefore clear that legalisation does not by itself render a document admissible before the courts of England and Wales. Moreover, in the case of documents verified by a notary, the recently introduced presumption of authenticity in relation to notarial acts renders legalisation entirely otiose.\(^\text{600}\)

---

Point for reflection in the EC context: authentication of foreign documents (U.S.)

In the U.S., foreign documents must go through a process similar to notarisation before they can be authenticated which can be performed either by consular officials at any U.S. embassy or consulate abroad, or by a local foreign notary. If the latter occurs, the document must then be authenticated either

---

\(^{600}\) Civil Procedure Rules 1998, r.32.20
by a U.S. consular officer or a similar foreign authority if the country is party to the Apostille Convention. This service is available to both U.S. Citizens and non-U.S. Citizens, as long as the document is intended for use within the jurisdiction of the United States. It was also noted that a consular official’s seal can be further authenticated by the Department of State’s Authentication Office.

Notarial services abroad performed by the consulate or embassy cost $30.00 for the first service required and $20.00 for each additional seal. Authentication abroad by the same authority costs $30.00. If the document is further authenticated by the Authentications Office in the U.S., a fee of $5.00 is applicable.

4.03 Legalisation of Public Documents under EC law and international agreements

(a) EC law

(i) Goods

Within the EC’s Customs Union, Public Documents are generally required to prove the origin of goods. The implementing provisions of the Customs Code provide for the use of harmonised Public Documents that may be required in relation to the declaration of third country goods, as well as specify the form and content of EC Certificates of Origin. Such provisions also stipulate and provide for a number of potentially required documents that vary depending on the preferential origin of goods. This has been done in order to enhance mutual trust between the countries involved.

Administrative cooperation within the sphere of the Customs Union and specifically related to the authenticity of documents is far-reaching. The Code provides for administrative cooperation between the competent authorities in the countries of export and import, as well as between the customs authorities of the Member States and provides for a method by which authenticity is to be established.

In relation to intra-EC trade, Public Documents may be required to prove the status of goods as EC goods and to demonstrate their compliance with the rules in their Member State of origin.

By way of administrative cooperation, national customs administrations 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 holds true in relation to proof of the conformity of EC goods.
To illustrate the current state of intra-EU free movement of goods and the role of Public Documents, we used the example of motor vehicles in relation to Directive 1999/37/EEC. Although nothing in the Directive specifically refers to exemptions from legalisation, we demonstrated that it generally provides for close cooperation between Member States based on the effective exchange of information, see Recital 9 and article 5 of the Directive and mutual recognition of registration certificates (see Article 4 of the Directive).

(ii) Entry and residence for Union citizens and their family members

In the context of entry and residence rights for Union citizens and their family members, we discussed that Directive 2004/38 does not contain any provisions that explicitly exempt Public Documents from the legalisation formalities in the Member States and that therefore, the regulation and implementation of legalisation formalities is the subject of national law.

However, the Directive indicates that any formalities linked to the free movement of Union citizens should be "clearly defined" (see Recital 7), and that a Union citizen's right to residence in other Member States of up to three months shall not be subject to any other conditions or formalities other than the possession of a valid identity card or passport (see Recital 9 and Article 6(1)).

The Directive allows Member State authorities to verify whether the conditions of the Directive have been satisfied but only in specific cases where there is reasonable doubt (see Article 14 in conjunction with Articles 7, 12, and 13). Furthermore, when such a situation exists, the Directive provides for a systematic procedure of verification of the applicable conditions.

The Directive also allows Member States to adopt necessary measures to protect themselves against certain fraudulent practices (see Article 35), but such measures are subject to proportionality and other safeguards (see Articles 31 and 31).

(iii) Workers and self-employed persons

As is the case with Directive 2004/38, we noted that Directive 2006/123 on services in the internal market does not contain any explicit provision exempting Public Documents from legalisation formalities.

However, the Directive is constructed in such a way so as to render legalisation formalities useless by including an express prohibition against requiring that foreign documents be produced in their original

---

form or as certified copies (see Article 5(3)). This prohibition means that Member States must accept copies, a form of Public Document to which, for example, the Hague 1961 Convention does not apply.  

Such a conclusion, however, cannot be made in relation to all forms of Public Documents, as the Directive contains exceptions for certain types of documents, e.g. documents proving professional qualifications (see Article 5(4)).

Furthermore, a general exception to the obligation to accept copies of Public Documents is found under Article 5(3) which allows Member States to require other forms where such a requirement is justified by an overriding reason relating to the public interest, including public order and security and the combating of fraud, for which legalisation may be considered a justifiable measure.

(iv) Taxation of migrant workers

There are no explicit provisions exempting Public Documents in this area from legalisation requirements of the Member States.

However, in connection with its Recommendation 97/79, the Commission has noted that specific EC instruments provide for the exchange of information between the tax administration of the taxpayer’s country of residence and that of his country of activity.

(v) Recognition of professional qualifications

Although Directive 2005/36/EEC on the recognition of professional qualifications does not explicitly exempt Public Documents from legalisation, it contains several provisions relating to administrative cooperation (see in particular Article 56).

For example, cooperation is required in case of justified doubts about the authenticity (or adequacy) of Public Documents required as proof of professional qualifications for the purpose of establishment (see Article 50 of the Directive).

(vi) Services and establishment

As stated above, Directive 2006/123 on services in the internal market does not contain any explicit provision exempting Public Documents from legalisation formalities.

---

602 See Conclusions and recommendations adopted by the Special Commission on the practical operation of the Apostille, Service and Evidence Conventions of 28 October to 4 November 2004 at point 11, available online at: http://hcch.e-vision.nl/upload/wcp/lse_concl_e.pdf
However, the Directive is constructed in such a way so as to render legalisation formalities useless by including an express prohibition against requiring that foreign documents be produced in their original form or as certified copies (see Article 5(3)). This prohibition means that Member States must accept copies, a form of Public Document to which, for example, the Hague 1961 Convention does not apply.\textsuperscript{603}

Such a conclusion, however, cannot be made in relation to all forms of Public Documents, as the Directive contains exceptions for certain types of documents, e.g. documents proving professional qualifications (see Article 5(4)).

Furthermore, a general exception to the obligation to accept copies of Public Documents is found under Article 5(3) which allows Member States to require other forms where such a requirement is justified by an overriding reason relating to the public interest, including public order and security and the combating of fraud, for which legalisation may be considered a justifiable measure.

\textbf{(vii) Refund of VAT to non-established taxable persons}

The relevant EC instruments do not provide for exemptions from legalisation requirements. However, with regard to the effect of a VAT certificate, the system of reimbursement established by the Eighth Directive necessarily rests on a mechanism of cooperation and mutual trust between the tax authorities of the Member States.

Furthermore, the authorities also 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.

Therefore, to ensure the harmonious functioning of that mechanism, the Eighth Directive provides that the certificate concerning the capacity as a taxable person liable to VAT must comply with a specimen annexed to the Directive (see Article 9(2) and Annex B of the Directive).

\textbf{(viii) Social security}

Regulation 883/2004/EC on the coordination of social security systems clearly exempts from legalisation formalities, “all statements, documents and certificates of any kind whatsoever required to be produced in application of this Regulation” (see Article 80(2) of the Regulation).

\textsuperscript{603} See Conclusions and recommendations adopted by the Special Commission on the practical operation of the Apostille, Service and Evidence Conventions of 28 October to 4 November 2004 at point 11, available online at: \url{http://hcch.e- vision.nl/upload/wop/lse_concl_e.pdf}
(ix) **Access to justice**

Directive 2003/8 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes exempts legal aid request forms and their supporting documents from all legalisation formalities (see Article 13(5) of the Directive).

(x) **Effective justice**

1) **Decisions and their accompanying EC certificates**

In an evaluation of recent Commission proposals, we noted first that Commission Proposal establishing a European Small Claims Procedure does not explicitly exempt copies of judgments which satisfy the conditions necessary to establish authenticity and the certificate which is to accompany the judgments in a European Small Claims Procedure from legalisation formalities (see Article 18), and that it is silent as regards legalisation or equivalent formalities. In contrast, COM (2005) 649 final exempts decisions relating to maintenance obligations from legalisation formalities (see Article 31 in conjunction with Article 28).

As regards the relevant EC instruments, Regulation 1896/2006 creating a European order for payment procedure does not explicitly exempt copies of European orders for payment from legalisation formalities, nor does Regulation 805/2004 in relation to judgments, court settlements or authentic instruments on uncontested claims which fulfil the requirements of Regulation 44/2001 or their accompanying certificates from legalisation formalities.

However, it does stipulate that mutual trust “justifies the assessment by the court of one Member State that all conditions for certification as a European Enforcement Order are fulfilled to enable a judgment to be enforced in all other Member States without judicial review” (see Recital 18). The Regulation further mandates that a judgment certified as a European Enforcement Order shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement (see Article 20(1)).

In connection with judgments, authentic instruments and party agreements in matrimonial matters and the matters of parental responsibility and their accompanying certificates, Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility exempts documents judgments in matrimonial matters or in matters concerning parental responsibility from legalisation formalities (see Article 52 of the Regulation).

Certificates drawn up in the standard forms required for certifying the authenticity of judgments, authentic instruments and agreements between parties are also exempt. Furthermore, documents formally drawn
up and registered as authentic and enforceable in one Member State must be recognised and enforceable under the same conditions as judgments in matrimonial matters or matters concerning parental responsibility and therefore exempt from legalisation (see Article 46 in conjunction with Article 52). The same is true for agreements between parties that are enforceable in the Member State in which they were concluded.

Similarly, Regulation 44/2001 exempts such documents in civil and commercial matters which satisfy the conditions necessary to establish their authenticity from legalisation formalities (see Article 56), as well as several other types of documents formally drawn up and registered as authentic and enforceable in the Member State of Origin (see Article 57(4) in conjunction with Article 56).

In relation to judgments and decisions in insolvency proceedings, Regulation 1346/2000 also contains a provision exempting from legalisation documents by which a liquidator is appointed in a Member state and translations of such documents from legalisation formalities (see Article 19). Finally, the Brussels Convention exempts certain types of judgments from legalisation (see Article 49).

2) Procedural documents and their accompanying EC certificates

In the context of procedural documents, specifically in relation to the implementation of the cross-border service procedure for judicial and extrajudicial documents in civil and commercial matters, Regulation 1348/2000 exempts all documents, requests, confirmations, receipts, certificates and any other papers used in the process of the service of judicial and extrajudicial documents in civil and commercial matters from legalisation formalities (see Article 4(4)). Furthermore, a related amended proposal exempts documents and all papers that are transmitted under the Regulation from legalisation formalities (see Article 4(4) of the proposed Regulation).

Regarding evidence taken in civil and commercial matters, Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters contains an explicit provision on exemption from legalisation of requests for taking evidence in other Member States, as well as all accompanying documents. The Regulation expressly states that such documents are to be exempted from “authentication or any equivalent formality” (Article 4(2)).

Documents appointing a representative ad litem in matrimonial matters or in matters concerning parental responsibility are exempted from legalisation in Article 52 of Regulation 2201/2003; similarly, documents appointing a representative ad litem in civil and commercial matters are freed from legalisation requirements under Regulation 44/2001 (see Article 56).
(xi) **Enforcement of decisions of several EC Institutions**

Regarding the enforcement of decisions of EC Institutions in the Member States, Article 256 EC does not explicitly exempt them from legalisation. The only formalities that Member States may impose in relation to such decisions are those aimed at verification of authenticity. The Treaty consequently provides no guidance on the types of formalities that may be imposed in such circumstances, although our findings indicate that the current practice of Member States is to impose a formality akin to legalisation whereby the permanent representations of Member States are asked to serve the enforcement order via the appropriate national authority.

(b) **The London 1968 Convention**

The 1968 European Convention on the Abolition of Legalisation of Documents Executed by Diplomatic Agents or Consular Officers is applicable in fifteen Member States (Austria, Cyprus, Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Spain, Sweden, and United Kingdom).\(^{604}\)

Between these Member States, the Convention has exempted from legalisation documents which have been executed by their diplomatic agents or consular officers, acting in their official capacity and exercising their functions in the territory of any state, and which have to be produced either in the territory of another state party to the Convention, or to the diplomatic agents or consular officers of another state party exercising their functions in the territory of a state which is not a party to the Convention (see Article 2(1) of the Convention).

The Convention further applies to official certificates (e.g. documents recording the registration of a document or the fact that it was in existence on a certain date), and authentications of signatures, appended by diplomatic agents or consular officers to documents other than those referred before (see Article 2(2) of the Convention).

(c) **CIEC Conventions**

(i) **Introduction**

Civil status documents and documents related to nationality are frequently necessary for the fulfilment of important legal requirements in a state, for example for the updating of civil status registers, for requesting residence permits, etc.

\(^{604}\) The Convention is further in force for Liechtenstein, Moldova, Norway, Switzerland, and Turkey
The Commission Internationale de l’État Civil (CIEC) has established thirty-one Conventions to facilitate cooperation in civil status matters and to further the exchange of information between civil registrars.

Three aspects make the CIEC Conventions particularly relevant in relation to the cross-border use of Public Documents: firstly, at least fourteen CIEC Conventions explicitly exempt from legalisation formalities specific types or categories of Public Documents concerning civil status or nationality. Secondly, the Conventions have introduced new types of Public Documents and model forms for (multilingual) Public Documents.

Lastly, the Conventions have strengthened and facilitated the administrative cooperation in terms of information and documents exchange between the competent public authorities of the Member States.

1) CIEC membership of EU Member States and states party to CIEC Conventions

Thirteen EU Member States are members of the CIEC: Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovenia, Spain and United Kingdom. In addition four Member States have the status of observer: Cyprus, Lithuania, Slovenia and Sweden.

The fact that less than half of the EU Member States are member of the CIEC implies that in the European context, legal diversity necessarily persists in relation to the issues covered by CIEC Conventions.

Furthermore, an evaluation of the status of the CIEC Conventions makes clear that the Conventions do not attract a constant number of state parties. For instance, in relation to the Conventions that will be discussed below, these numbers range between one (e.g. Convention No 18 on the voluntary acknowledgment of children born out of wedlock) and eleven Member States (e.g. Convention No 16 on the issue of multilingual extracts from civil status records).

2) Non-compliance with Convention obligations

Public officials who administer foreign Public Documents are sometimes unaware of relevant CIEC Conventions that exempt documents from legalisation requirements. This leads in practice to incorrect decisions. The most relevant example of this is that public authorities of Member States impose legalisation formalities which have in fact been abolished by a CIEC Convention.

Two cases were reported in the national reports that concerned the non-application of Convention No 17 on the exemption from legalisation of certain records and documents (the status and scope of the
Convention is discussed below). In both cases, foreign Public Documents were not accepted by national public authorities due to the lack of their legalisation, while a specific CIEC Convention provided for an exemption from legalisation of the documents in question.

a) Example 1: The Netherlands

In the first case, which concerns the Netherlands, a Surinam national made an application to the Dutch immigration authorities for a residence permit. This residence permit was refused by the authorities because the foreign birth certificate (French Guyana) that was produced by the applicant to prove his family relationship with his mother who already lived in the Netherlands was not certified by means of an Apostille.

The applicant appealed the decision of the immigration authority and argued that the 1977 Athens Convention exempts the birth certificate from legalisation formalities.

The court hearing the appeal did not have to reverse the decision of the immigration authority as the authority reversed its own decision and the appeal was subsequently withdrawn and the residence permit granted.605

b) Example 2: Spain

In the second case, which concerns Spain, the implementation of the CIEC Convention No 17 gave rise to a question concerning the appropriate legalisation formalities for a foreign court decision (Switzerland) on the separation of a married couple, which was produced - in the form of a certificate - as a means of evidence in Spanish court proceedings, initiated with the intention of having the marriage between the couple dissolved in Spain.606

The Spanish court of first instance stated that the foreign court decision required an exequatur in order to produce any effect in the Spanish proceedings, initiated with a view to dissolving the marriage in Spain. On appeal, it was further argued that the foreign court decision had not been legalised in accordance with requirements under Spanish law and could therefore not be admitted into evidence.

The Spanish court of appeal reversed the decision of the court of first instance. It concluded that the central question is whether the Swiss court decision is admissible into evidence as proof of the legal separation of the couple in Switzerland.607

605 Case NL No 2 Rechtbank Den Haag of 9 July 2001
606 Case ES No 6 Audiencia Provincial Murcia of 2 July 1993
607 Article 600 Law of Civil Procedure
The court subsequently referred to Article 2 of the 1977 Convention that requires Spain to accept the
document in question that was executed in Switzerland without legalisation or equivalent formality,
provided that the decision is dated and bears the signature and, where appropriate, the seal or stamp of
the Swiss issuing authority.

The Court of Appeal held that the Swiss court decision produced in Spanish proceedings in the form of a
certificate was to be exempt from any legalisation or equivalent formality regardless of its intended use
(i.e. also in situations where the certificate is produced as evidence in Spanish proceedings for the
dissolution of a marriage).

(ii) CIEC Conventions that exempt Public Documents from
legalisation

1) Convention No 1 on the issue of certain extracts from civil status
records for use abroad

CIEC Convention No 1 on the issue of certain extracts from civil status records for use abroad, which was
signed in Paris on 27 September 1956 and entered into force on 15 March 1958, applies between nine
Member States (Austria, Belgium, France, Germany, Italy, Luxembourg, Netherlands, Portugal and
Slovenia).

The Convention exempts extracts from civil status records intended to be used abroad under the
Convention from legalisation (see Article 5 of the Convention).

2) Convention No 2 on the issue free of charge and the exemption from
legalisation of copies of civil status records

Convention No 2 on the issue free of charge and the exemption from legalisation of copies of civil status
records, which was signed in Luxembourg on 26 September 1957 and entered into force on 3 January
1960, applies between eight Member States (Austria, Belgium, France, Germany, Italy, Luxembourg,
Netherlands and Portugal).

The Convention exempts from legalisation verbatim copies of or extracts from civil status records, which
bear the signatures and seal of the issuing authority (see Article 4 of the Convention).

3) Convention No 5 extending the competence of authorities empowered to
receive declarations acknowledging natural children
CIEC Convention No 5 extending the competence of authorities empowered to receive declarations acknowledging natural children, which was signed in Rome on 14 September 1961 and entered into force on 29 July 1963, applies between eight Member States (Belgium, France, Germany, Greece, Italy, Netherlands, Portugal and Spain).

The Convention exempts from legalisation certified copies of or extracts from instruments embodying the declarations acknowledging – without filiation - natural children (see Article 2 of the Convention) and declarations acknowledging – with filiation - natural children (see Article 3 of the Convention) as far as these documents bear the signature and seal of the issuing authority (see Article 5 of the Convention).

4) Convention No 12 on the legitimation by marriage

CIEC Convention No 12 on the legitimation by marriage, which was signed in Rome on 10 September 1970 and entered into force on 8 February 1976, applies between six Member States (Austria, France, Greece, Italy, Luxembourg and Netherlands).

The Convention exempts from legalisation notices and supporting documents concerning annotation of legitimation by marriage of children sent by the civil registrar of the state where a marriage is celebrated to another state where the record of the birth of a child was drawn up or transcribed (see Article 7 of the Convention).

5) Convention No 15 introducing an international family record book

CIEC Convention No 15 introducing an international family record book, which was signed in Paris on 12 September 1974 and entered into force 1 March 1979, applies between three Member States (Greece, Italy and Luxembourg).

The Convention exempts from legalisation the “international family booklet” that was created through the establishment of the Convention (see Article 11 of the Convention).

6) Convention No 16 on the issue of multilingual extracts from civil status records

CIEC Convention No 16 on the issue of multilingual extracts from civil status records, which was signed in Vienna on 8 September 1976 and entered into force on 30 July 1983, applies between eleven Member States (Austria, Belgium, France, Germany, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovenia and Spain).
The Convention abolishes legalisation between the Member States party of multilingual extracts from civil status records (see Article 8 of the Convention).

7) **Convention No 17 on the exemption from legalisation of certain records and documents**

CIEC Convention No 17 on the exemption from legalisation of certain records and documents, which was signed in Athens on 15 September 1977 and entered into force on 1 May 1981, applies between eight Member States (Austria, France, Italy, Luxembourg, Netherlands, Poland, Portugal and Spain).

The Convention abolishes legalisation requirements of the Member States party in relation to records and documents relating to the civil status, capacity or family situation of natural persons or their nationality, domicile or residence, regardless of their intended use, and all other records or documents if they are produced with a view to the celebration of a marriage or the establishment of a civil status record (see Article 2 of the Convention).

8) **Convention No 18 on the voluntary acknowledgment of children born out of wedlock**

CIEC Convention No 18 on the voluntary acknowledgment of children born out of wedlock, which was signed in Munich on 5 September 1980 and has not entered into force, was ratified by one Member State party (France).

The Convention exempts notices of voluntary acknowledgment of children born out of wedlock from legalisation (see Article 16 of the Convention).

9) **Convention No 20 on the issue of a certificate of legal capacity to marry**

CIEC Convention No 20 on the issue of a certificate of legal capacity to marry, which was signed in Munich on 5 September 1980 and entered into force on 1 February 1985, applies between seven Member States (Austria, Germany, Italy, Luxembourg, Netherlands, Portugal and Spain).

The Convention exempts from legalisation certificates of legal capacity to marry (see Article 10 of the Convention).

10) **Convention No 21 on the issue of a certificate of differing surnames**
CIEC Convention No 21 on the issue of a certificate of differing surnames, which was signed in the Hague on 8 September 1982 and entered into force on 1 July 1988, applies between four Member States (France, Italy, Netherlands and Spain).

The Convention exempts from legalisation certificates of differing surnames (see Article 10(2) of the Convention).

11) Convention No 22 on the international co-operation in the matter of administrative assistance to refugees

CIEC Convention No 22 on the international co-operation in the matter of administrative assistance to refugees, which was signed in Basle on 3 September 1985 and entered into force on 1 March 1987, applies between six Member States (Austria, Belgium France, Italy, Netherlands and Spain).

The Convention abolishes legalisation of forms containing information on the identity and civil status under which a refugee was admitted to or registered in a Contracting State (see Article 7 of the Convention).

12) Convention No 24 on the recognition and up-dating of civil status booklets

CIEC Convention No 24 on the recognition and up-dating of civil status booklets, which was signed in Madrid on 5 September 1990 and entered into force on 1 July 1992, applies between three Member States (France, Italy and Spain).

The Convention exempts civil status booklets concerning births, marriages and deaths and subsequent annotations thereto from legalisation (see Article 2 of the Convention).

13) Convention No 27 on the issue of a life certificate

CIEC Convention No 27 on the issue of a life certificate, which was signed in Paris on 10 September 1998 and entered into force on 1 September 2004, was ratified by one Member States (Spain).

The Convention exempts life certificates from legalisation (see Article 2 of the Convention).

14) Convention No 28 on the issue of a certificate of nationality
Convention No 28 on the issue of a certificate of nationality, which was signed in Lisbon on 14 September 1999, has not entered into force.

The Convention exempts from legalisation certificates of nationality (see Article 13 of the Convention).

(d) The Brussels 1987 Convention

The 1987 Brussels Convention Abolishing the Legalisation of Documents in the Member States of the European Communities has not entered into force. Nonetheless, it is applied provisionally in seven Member States (Belgium, Cyprus, Denmark, France, Ireland, Italy and Latvia) in accordance with Article 6(3) of the Convention. The Convention was further signed by Germany, Greece, Luxembourg, Netherlands, Portugal and UK, but these Member States have refrained from its ratification and provisional application.

Between the seven Member States, the Convention has abolished Public Documents within its scope of application “from all forms of legalisation or other equivalent or similar formality” (see Article 2 of the Convention).

De facto, the Convention applies to Public Documents which are drawn up in the territory of a contracting state and have to be produced in the territory of another contracting state or shown to the diplomatic or consular agents of another contracting state even if those agents are acting in the territory of a State which is not party to the Convention (see Article 1(1) of the Convention).

The Convention’s scope is all-encompassing and covers also the documents that were excluded from the scope of the Hague 1961 Convention (i.e. documents executed by diplomatic agents or consular officers and administrative documents dealing directly with commercial or customs operations, see Article 1 of the Hague 1961 Convention).

The documents within the scope of the Convention include: (1) documents drawn up in their official capacity by the diplomatic or consular agents of a Contracting State acting in the territory of any State, where such documents have to be produced in the territory of another contracting State or shown to the diplomatic or consular agents of another Contracting State acting in the territory of a State which is not party to this Convention; (2) documents emanating from an authority or an official connected with the courts of tribunals of the state, including those emanating from a public prosecutor, a clerk of the court of a process server (“huissier de justice”); (3) administrative documents; (4) notarial acts; and (5) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures (see Article 1(2) and (3) of the Convention).
(i) Administrative cooperation to replace legalisation

The 1987 Convention provides that if the authorities of the Member State in whose territory the document is produced have serious doubts, with good reason, as to the authenticity of the signature, the capacity in which the person signing the document has acted or the identity of the seal or stamp, they may request information directly from the Member State from which the document emanated.

This administrative process has provisionally replaced, between the Member States that apply the Convention, the legalisation process in those cases where it is required that some check be carried out on the seal and/or signature borne by a foreign Public Document. Furthermore, at an administrative level, the creation of the administrative structures that were necessary in order to implement the Hague 1961 Convention (see Article of the Convention) and the London 1967 Convention (see Article 4(2) of the Convention) facilitates implementation of this Convention.

Requests for information of the nature referred to above may be made only in exceptional cases and must set out the grounds on which they are based (see Article 4(1) of the Convention). Whenever possible, a request is to be accompanied by the original document or by a photocopy thereof. Besides, the request and the reply thereto are to be exempt from any tax, duty or charge (see Article 4(2) of the Convention).

The Member States that have declared to apply provisionally the Convention, have designated in their declaration a domestic authority that is competent to receive requests for information from the other Member States (see Article 5 of the Convention).

In the majority of Member States that apply the Convention provisionally, the Ministry of Justice is the authority competent to receive those requests (Cyprus, Denmark, France, Italy and Latvia). In the remaining Member States the Ministry of Foreign Affairs is the competent authority (Belgium and Ireland).

Requests are usually accepted, in addition to the language of the Member State to which the request is addressed, in English - with the exception of France - (Belgium, Cyprus, Denmark, Ireland, Italy and Latvia), French (Belgium, Denmark, Ireland, Italy, and Latvia) and German (Belgium, Cyprus and Denmark).

(ii) The Interaction of the 1987 Convention with other Conventions

The 1987 Convention has a field of application which encompasses that of the other Conventions we have discussed. The Convention provides that when a treaty, convention or agreement between two or more contracting States contains provisions which subject the certification of a signature, seal or stamp to
certain formalities, the Convention will override such provisions if those formalities are more rigorous than the formality provided for in the Convention (see Article 8 of the Convention).

Since the 1987 Convention contains less rigorous formalities than, for example, the Hague 1961 Convention, the Convention overrides the use of the Apostille formality as between the Member States that apply the 1987 Convention provisionally, substituting its own less rigorous provisions.

**(e) The Hague Conference on private international law**

The Hague 1961 Convention, which applies between all the Member States, has replaced the legalisation formalities as applicable under the national laws of the Member States for the Apostille formality.

This applies to all Public Documents except those excluded from the scope of the Hague 1961 Convention, i.e. documents executed by diplomatic agents or consular officers and administrative documents dealing directly with commercial or customs operations (see Article 1 of the Convention).

In addition, at least eleven of the thirty-seven Hague Conventions provide explicitly for the exemption from legalisation formalities of Public Documents that are within their scope of application. These exemptions are generally interpreted as including the Apostille formality.

This far-reaching exemption from formalities in the context of the Hague Conventions has been recognised as a well-established practice.\(^{608}\) No clear arguments have been advanced for this more liberal approach, although the fact that most of the Hague Conventions are based on co-operation, communication and trust between authorities of the States parties that are responsible for executing the Public Documents in question can be considered as an explanation.

The Hague Conventions that exempt the documents within their scope from legalisation are introduced and discussed in more detail below. Subsequently, the implementation by the Member States of the Hague 1961 Convention is evaluated.


The issue of legalisation is not addressed in every Hague Convention; for instance, the issue of legalisation is not addressed in the Hague Convention of 29 May 1993 on Protection of Children and Co-

---

\(^{608}\) See also the Explanatory Report of Trevor Hartley and Mosato Dogauchi on the 2005 Hague Choice of Court Agreements Convention 64; available on the Hague Conference's website at: [http://www.hcch.net/upload/expl37e.pdf](http://www.hcch.net/upload/expl37e.pdf) (last visited 11 June 2007)
operation in respect of Intercountry Adoption, which entered into force on 1 May 1995 and applies between all the Member States except Greece and Ireland.

Several proposals were made, but were not adopted, to abolish legalisation requirements as a measure intended to avoid all excessive administrative complications and to build confidence among the authorities of the Contracting States. In this regard, the Convention’s Explanatory Report states that particularly in relation to Public Documents channelled through the Central Authorities, the requirement of legalisation is illogical assuming the relationship of trust among the Contracting States, which is the basis of the whole Convention.609

In the light of the high number of Public Documents included in a typical adoption procedure, including documents containing the consent by Central Authorities, medical reports, adoption certificates, and adoptability and travel documents (see Articles 4, 15, 17 and 23 of the Convention), the requirement of legalisation in respect to these documents may lead to unnecessary delays and expenses which run counter to the obligation to act expeditiously in the process of adoption (see Article 35 of the Convention), and the need to avoid unnecessary delay in finding a permanent family for the child.

Between the EU Member States, the Apostille Convention is the only requirement that may be imposed as far as Public Documents within the scope of the Hague 1993 Conventions is concerned. Arguably, the Apostille formality is less burdensome than full legalisation. Nonetheless, the fact that formalities remain while the abolition of formalities is the general practice in the context of the Hague Conventions, constituted a concern for the 2005 Special Commission on the practical application of the Convention.610

(ii) The Hague 1954 Convention on Civil Procedure

Another Hague Convention worth mentioning is that of 1 March 1954 on civil procedure, which entered into force on 12 April 1957 and applies between twenty-one Member States (Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden).

In contrast to other later Conventions, the 1954 Convention does not abolish applicable legalisation formalities in the contracting States; instead, it specifically provides for the legalisation of documents that are forwarded or delivered under the Convention (see Articles 5, 19, 21 and 25 of the Convention).

---


Subsequent to conclusion of the Convention, a number of Member States entered into bilateral agreements with a view to exempting Public Documents within the scope of the Convention from burdensome legalisation requirements. 

(iii) Hague Conventions that exempt documents from legalisation

1) The Hague 1958 Convention on Maintenance Obligations towards Children

The Hague 1958 Convention concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, which entered into force on 1 January 1962, applies between fifteen Member States (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Netherlands, Portugal, Romania, Slovak Republic, Spain and Sweden).

Between the Member States referred to above, the Convention exempts from legalisation (certified copies that satisfy the conditions for establishing their authenticity of) decisions on maintenance obligations towards children that are covered by the scope of the Convention, and (certified copies of) documents that introduced proceedings in case of default judgments and the documents that confirm their service (see Articles 2, 4 and 9 of the Convention).

2) The Hague 1965 Service Convention

The Hague Convention of 15 November 1965 on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which entered into force on 10 February 1969, applies between twenty-five Member States (Austria and Malta are not party to the Convention).

The Convention exempts from legalisation the requests for service of judicial and extrajudicial documents in civil and commercial matters that are made under the Convention and (copies of) the documents to be served, which are to be annexed to the request (see Article 3 of the Convention).


---

611 Austria-Belgium Supplementary Convention on legal assistance and legal co-operation to the Hague Convention of 1 March 1954 on Civil Procedure; Austria-Finland Agreement on the Simplification of legal co-operation under the Hague Convention of 1 March 1954 on Civil Procedure; Austria-France Supplementary Convention on legal assistance and legal co-operation to the Hague Convention of 1 March 1954 on Civil Procedure; Austria-Italy Supplementary Convention to the Hague Convention of 1 March 1954 on Civil Procedure; Austria-Sweden Agreement on the Simplification of legal co-operation under the Hague Convention of 1 March 1954 on Civil Procedure; Austria-Spain Supplementary Convention to the Hague Convention of 1 March 1954 on Civil Procedure
The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which entered into force on 7 October 1972, is in force between twenty-three Member States (Austria, Belgium, Ireland and Malta are not party to the Convention).

The Convention exempts from legalisation letters used by a judicial authority of a State party to the Convention to request the competent authority of another State party to the Convention to obtain evidence or to perform some other judicial act (see Article 3 of the Convention).

4) **The Hague 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters**

The Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which entered into force on 20 August 1979, applies between three Member States (Cyprus, Netherlands and Portugal).

The Convention exempts the following Public Documents from legalisation: (1) complete and authenticated copies of decisions in civil and commercial matters; (2) if a decision was rendered by default, the originals or certified true copies of the documents required to establish that the summons was duly served on the defaulting party; (3) all documents required to establish that a decisions was rendered by a court having jurisdiction, that the decision is no longer subject to ordinary forms of review in the State of origin, and that the decision is enforceable; and (4) translations of the documents referred to, certified as correct either by a diplomatic or consular agent or by a sworn translator or by any other person so authorized in either State (see Article 13 of the Convention).

5) **The Hague 1973 Convention on International Administration of the Estates of Deceased Persons**

The Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons, which entered into force on 1 July 1993, applies between three Member States (Czech Republic, Portugal, and Slovak Republic).

The Convention exempts from legalisation documents which attest the designation and powers of the person or persons entitled to administer an estate (see Article 9 of the Convention).

The Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, which entered into force on 1 August 1976, applies between seventeen Member States (Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovak Republic, Spain, Sweden and United Kingdom).

The Convention exempts from legalisation decisions relating to maintenance obligations; any document necessary to prove that the decision is no longer subject to the ordinary forms of review in the State of origin and, where necessary, that it is enforceable; if the decision was rendered by default, the original or a certified true copy of any document required to prove that the notice of the institution of proceedings, including notice of the substance of claim, has been properly served on the defaulting party according to the law of the State of origin; where appropriate, any document necessary to prove that he obtained legal aid or exemption from costs or expenses in the State of origin; a translation, certified as true, of the above-mentioned documents unless the authority of the State addressed dispenses with such translation (see Article 17 of the Convention).

7) **The Hague 1980 Child Abduction Convention**


The Convention exempts from legalisation documents used by the competent authorities in the process of reinstating the right of custody or the right of access to children which have wrongfully be removed or retained (see Article 23 of the Convention)

8) **The Hague 1980 International Access to Justice Convention**

The Hague Convention of 25 October 1980 on International Access to Justice, which entered into force on 1 May 1988, applies between sixteen Member States (Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden).

The Convention exempts from legalisation legal aid request forms and their supporting documents (see Article 10 of the Convention)


The Convention has been signed by all the EU Member States except Denmark in compliance with the Council Decision of 19 December 2002 authorizing the Member States, in the interest of the EC, to sign the Convention. Therefore, all the Member States except Denmark are expected to become party to the Convention.

The Convention exempts from legalisation all documents forwarded or delivered in the process of its implementation (see Article 43 of the Convention).


The Hague Convention of 13 January 2000 on the International Protection of Adults has not entered into force.

Upon its entry into force, it will exempt from legalisation the following Public Documents: requests for the taking of measures for the protection of the person or property of adults; reports on adults accompanied by reasons for proposed placements; certificates indicating the capacity in which persons are entitled to act and the powers conferred; and any other Public Documents forwarded or delivered under the Convention (see Articles 3, 33, 38 and 41 of the Convention).

**11) The Hague 2005 Convention Choice of Court Agreements**

The Hague Convention of 30 June 2005 on Choice of Court Agreements has not entered into force. Upon its entry into force, it will exempt the following Public Documents from legalisation: (1) a complete and certified copy of the judgment; (2) a certified copy of the exclusive choice of court agreement; (3) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party; (4) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin; (5) in case of a judicial settlement, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin; (6) certified translations, if the documents referred to above are not in an official language of the requested State; and (7) any other Public Documents forwarded or delivered under the Convention (see Articles 12,13 and 17 of the Convention).
(f) The implementation of the Hague 1961 Convention by the Member States

(i) Introduction

The Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, which entered into force on 24 January 1965, has applied between all 27 EU Member States since 29 December 2006. At present, the Convention has a total of 90 Contracting States.

Notwithstanding the legal and practical concerns that will be reported in the rest of this report in relation to the operation of the Hague Convention, in practice the Convention has generally contributed to realising the vision of the Hague Conference on private international law: “To work for a world in which individuals, families, as well as companies and other entities whose lives and activities transcend the boundaries between different legal systems, enjoy a high degree of legal security.”

It is appropriate to repeat the statement of the Permanent Bureau of the Hague Conference on private international law issued 25 October 2006 after the accessions of Korea, Denmark, Moldova and Georgia to the Convention:

“The Hague Apostille Convention facilitates the circulation of Public Documents executed in one State Party to the Convention and to be produced in another State Party to the Convention. It does so by replacing the cumbersome and often costly formalities of a full legalisation process with the mere issuance of an Apostille. Forty-five years after its adoption, the Apostille Convention remains an essential and remarkably modern instrument of judicial and administrative cooperation. The recently launched e-APP (electronic Apostille Pilot Program) will no doubt contribute to strengthening further the important benefits of this Convention.”

The Conference rightly points out the remarkable aptness of the Apostille formality introduced by the Convention to follow suit of the progressive digitalisation of the modern world.

Notwithstanding the legal pressure on EU Member States to mutually recognise and give effect to each other’s Public Documents, the Apostille Convention remains an attractive instrument that instills administrators of Public Documents originating in 89 other jurisdictions with trust in the authenticity of their origin. This is invaluable to users of Public Documents who need to prove the authenticity of their documents abroad.

(ii) Background of the Convention

It has been considered before that the full faith and credit rendered automatically to domestic Public Documents based on the traditional rule of acta probant sese ipsa (‘documents prove themselves’) that applies in most countries for reasons of convenience and that is explained by confidence in the integrity of domestic public institutions, has never been extended equally to foreign Public Documents.

Domestic Public Documents are generally admitted in judicial and administrative proceedings without any process of proof of their authenticity, subject only to the possibility of the challenge of their authenticity through separate procedures.

In practice, courts usually take judicial notice of any signature and/or seal domestic Public Documents bear, and administrative authorities tend to assess on sight the authenticity of documents. No additional proof will normally be necessary before the judicial or administrative authority will accept the documents in question as prima facie authentic.

The liberal approach taken towards domestic documents is not generally reflected in the legal practice of the Member States as regards foreign documents. States have historically insisted on the legalisation of foreign Public Documents for reasons relating to state sovereignty and legal certainty.

Even if a state was principally disposed to recognise in its territory the legal status and effect of foreign Public Documents, it would still insist on the completion of legalisation formalities for reasons of legal certainty, absent sufficient trust in the foreign public authorities and familiarity with foreign signs of the authenticity of Public Documents, such as signatures, seals and stamps.

Furthermore, legalisation was deemed a necessary evil to prevent placing an unduly heavy burden on domestic courts and administrative bodies by requiring them to consider, evaluate and decide (in practice frequently on sight) the authenticity of foreign documents bearing unfamiliar signs of authenticity.

Notwithstanding the general requirement of legalisation, which absent any suitable alternative procedure was generally accepted under international law based on a consistent practice of states, the legalisation procedure itself – and the so-called legalisation chain it involved – constituted an inconvenience from which international relations suffered.

Moreover, since the fulfilment of legalisation provided forceful proof of the documents’ authenticity, the formality did serve in practice to facilitate the acceptance of Public Documents in foreign jurisdictions.
(iii) **Objective of the Convention**

The main objective of the Hague 1961 Convention is to facilitate the circulation between states of Public Documents by retaining the value of the legalisation formality that applied previously (*proof of the document's origin*) through simplified means (*the Apostille formality*) while providing for certain safeguards to install the necessary trust between states in the simplified procedure.

(iv) **Review of the Convention**

1) **Simplified means**

   The Convention addresses the drawbacks of the legalisation procedure by abolishing it completely between Contracting States (see Article 3(1) of the Convention). Nonetheless, the Convention aims at retaining the value of the legalisation procedure as regards the proof of authenticity.

   Therefore, the Convention introduced a new simplified formality, the so-called ‘Apostille formality’. The Convention reduces all of the formalities of legalisation to the simple delivery of a certificate, entitled "Apostille", in a prescribed form by the Competent Authorities of the state where the Public Document originates.

2) **The only formality**

   In situations within the scope of the Convention, the Apostille formality is the only formality that may be required. In other words, in circumstances falling within the scope of the Convention, Contracting States may not insist on the fulfilment of any additional formality.

   The determination of the appropriate formality appears sometimes to be difficult for the public authorities of the Member States that administer different Public Documents from a variety of different jurisdictions. In Spain, the lower courts sometimes need to be put right in this regard.

   For example, in a case involving a public deed drawn up by an American public notary, the lower courts required the signature of the public notary to be legalised although it had already been certified by means of an Apostille.

   The Spanish Supreme Court ultimately held that as regards the document in question, a notarial certificate, the Apostille Convention was applicable and that under this Convention the Apostille formality
was the appropriate and sole formality that could be insisted upon for the purpose of establishing the authenticity of the public notary’s signature.\(^{614}\)

3) An optional formality

The Contracting Parties are free not to insist on the fulfilment of the Apostille formality. This is suggested by the formulation of Article 3 - “The only formality that may be required (…)” - and is confirmed by the Explanatory Report\(^{615}\).

4) Circumstances under which no formality may be required

Contracting States will in certain circumstances be required not to insist on the fulfilment of the Apostille formality. Article 3(2) of the Convention indicates that the Apostille formality may not be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation (see in this regard in particular Part (…)).

5) Compliance

Contracting States are to ensure that necessary steps are taken to prevent the performance of legalisation by its diplomatic or consular agents in cases where the Convention provides for exemption. This undertaking of the Convention to ensure the full abolishment of chain legalisation procedures in practice is restated in Article 9 of the Convention.

Article 9 aims at situations in which private persons and institutions not falling under the direct supervision of the state continue to require full legalisation of foreign documents notwithstanding the presentation of documents certified in accordance with the Convention. The Contracting States are therefore encouraged to ensure that legalisation requirements are not only abolished in theory, but are also not further insisted upon in practice.

6) Safeguards

The Convention provides for the mandatory exemption of the signature, seal and stamp on the Apostille certificate from any certification requirements (see Article 5 of the Convention). This implies that the rule *acta publica probant sese* that normally applies in respect of domestic Public Documents, necessarily

\(^{614}\) Case ES No 5 Supreme Court of 21 July 2004

\(^{615}\) Y Loussouarn *Explanatory Report on the 1961 Hague Apostille Convention* 182
also applies to the Apostille itself. Any other solution was considered to produce the awkward result that the Apostille, essentially being a foreign Public Document, would itself be subject to legalisation formalities or even verification by another authority.

Absent any protective measures or supervisory mechanism, this ‘superimposed’ trust in the authenticity of the foreign Apostille certificate was considered unrealistic and impracticable: unrealistic due to the fact that there existed no objective ground for this trust since the Apostille was as vulnerable to fraud and abuse as any other Public Document; impracticable, because any doubts as regards the authenticity of an Apostille in a given case would have to be verified by making complicated inquiries and investigations abroad.

\textit{a) The Apostille register}

To accommodate the need for a safeguard measure to warrant the trust in the reliability of the Apostille system, the Convention provides for a supervisory system of public numbering and registering by which each Competent Authority is obliged to keep a register or card index in which all the Apostille certificates that are issued are to be recorded for purposes of consultation and verification.

Any interested person should therefore be able to check the authenticity of any specific Apostille issued in any country simply by consulting the register of that state (see Article 7 of the Convention). Theoretically, the register is to have the effect of rendering fraud and forgery so difficult that the Apostille, and the document it certifies will be as reliable as to its origin as documents that undergo the legalisation procedure.

\textit{7) Prerogatives of the contracting states}

Many important issues related to the practical implementation of the Convention and the potential consequences of its implementation have found no place in the Convention, although the practical importance of such questions was duly realised. However, the drafters of the Convention considered it necessary not to intervene with matters that were considered the prerogative of the Contracting States in that they fell within the scope of national administrative organisations. Accordingly, they were left to be regulated by each state individually.

As a consequence, several important issues concerning the operation in practice of the Convention were left to be dealt with by the Contracting States, for example: the internal organisation of competent authorities and the distribution of their responsibilities; the information provision to the public on the meaning and use of the Apostille formality; and the evidential value of the Apostille certificate.
Another question that was not addressed in the Convention was whether any liability for Competent Authorities can arise from the operation of the Convention. Absent an express answer in the Convention we appear to be referred back to the domestic laws of the Contracting States (including the rules on private international law). We will see below, civil cases concerning the liability of Competent Authorities for damages resulting from negligence are not only theoretical.

We will further see that the difficult tasks of Competent Authorities in ascertaining in a dependable way the authenticity of signatures and the capacity of documents’ signatories combined with the undue effect rendered to Apostille certification in practice are likely to give rise to more frequent cases in which the liability of Competent Authorities is at stake.
(v) The scope of the Convention

1) Public documents

The Convention applies to virtually all Public Documents originating from states party to the Convention. Documents executed by private persons (including commercial concerns) are not within the scope of the Convention. Article 1 of the Convention defines ‘Public Documents’ as follows:

“The present Convention shall apply to Public Documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State. For the purposes of the present Convention, the following are deemed to be Public Documents:

a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice"); b) administrative documents; c) notarial acts; d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply: a) to documents executed by diplomatic or consular agents; b) to administrative documents dealing directly with commercial or customs operations.”

The first category relates to judicial documents. It includes all documents executed by competent authorities and officials that are functionally connected with the courts or tribunals of a State. Subparagraph 1(2)(a) has a wide scope, applying not only to documents emanating from judicial courts and tribunals, but also to administrative and constitutional tribunals, and ecclesiastical courts.

The second category relates to administrative documents. This category covers documents executed by competent authorities and officials in the exercise of public powers.

The third category relates to notarial acts. This category includes all documents executed by notaries in the exercise of attributed public powers that cannot be classified as judicial documents, administrative documents, or official certificates.

The fourth category relates to official certificates placed on documents signed in a private capacity. Article 1(d) of the Convention does not refer to the actual documents signed by persons acting in their private capacity, but solely to the official certificates which accompany them. These certificates can be executed
by a judicial or administrative official or a notary, as far as they are executed in the exercise of attributed public powers.

**a) Diplomas issued by private institutions**

It can be concluded that, for example, diplomas issued by private institutions are not within the scope of the Convention. However, as indicated above, such diplomas – which are considered as documents signed by persons acting in their private capacity - may bear an official certificate issued by a notary, solicitor, agency or any other person or authority competent under the law of the State of origin of the document to authenticate the document’s signature. The certificate issued by the authority is a Public Document within the scope of the Convention and can be apostillised (see Article 1(d) of the Convention).

In contrast, diplomas executed by state (authorised) institutions are considered Public Documents within the meaning of Article 1(b) of the Convention. This is confirmed in the case law of the Member States. For example, the Greek courts interpret Article 1 of the Convention in the sense that diploma certificates executed by foreign “Higher Education Institutions” can be certified by means of an Apostille.616

**2) Excluded documents**

**a) Documents executed by diplomatic agents or consular officers**

Article 1(3) lists the documents that are excluded from the scope of the Convention. First, documents executed by diplomatic agents or consular officers are excluded because of the problems that would be raised by applying the Apostille system to the situation in which a diplomat or consul executes documents in his or her country of office as a notary of his or her own country which would in respect of these particular types of document constitute a setback to a generally smoothly operating specific system, whilst the aim of the Convention is to simplify procedures, not to further complicate them.

The Convention’s Explanatory Report explains that such a situation would arise when a French diplomat, serving in Italy, uses his or her notarial powers under French law to verify the seal and/or signature borne by a French document, and it is subsequently sought to produce that document, accompanied by its verification executed by the French diplomat, before some Italian authority.617

The verification of the purported signature and/or seal could be carried out by the Italian Foreign Ministry, which would be familiar with the seals and signature of foreign missions in Italy. To substitute that reasonably straightforward process with one requiring the temporary return of the French diplomat's

616 Case GR No 3 Council of State 1991 1342
617 Y Loussouarn Explanatory Report on the 1961 Hague Apostille Convention 175
document to France so that an Apostille might be attached would actually have complicated the present procedure applicable to such documents in direct contradiction of the Convention's aims.

b) Administrative documents dealing directly with commercial or customs operations

Second, administrative documents dealing directly with commercial or customs operations are excluded from the scope of the Convention.

The exclusion of this type of documents is justified as far as the situation concerns documents that already enjoy more favourable treatment and for which the introduction of the Apostille formality would thus constitute a setback which is incompatible with the aims of the Convention. It is further justified for documents for which the Apostille formality is not appropriate due to their particular nature.

The qualifiers ‘administrative’ and ‘directly’ are aimed at further restricting the scope of the exclusion. The term ‘administrative’ restricts the exclusion so that commercial documents such as contracts and powers of attorney certified by public authorities are subject to the rules of the Convention. The term ‘directly’ restricts the exclusion further to administrative documents that are intended for commercial or customs operations. Therefore, documents that are only occasionally used for commercial or custom operations, such as certificates executed by patent offices, are not excluded.

3) The scope of the Convention as applied in the Member States

The practice of the Member States in relation to the interpretation of the scope of the Convention, concerns both its geographical scope and its material scope of application.

a) Geographical scope

The former concerns possible situations in which the Convention is applied in relation to documents emanating from countries that are not a party to the Convention, or situations in which it was not applied in relation to states that are. No situations were identified that support the conclusion that the geographical scope of the Convention was inappropriately limited or extended.

Nonetheless, some reports indicate problems related to the complexity of determining the appropriate legal regime for specific cases, i.e. problems determining the appropriate formality in relation to a specific document coming from or going to a specific country. The reports in question indicated that the complex legal framework causes errors in practice to the detriment of users of Public Documents.
The multiplication of relevant legal sources at the domestic, European and international level that determine the applicable legalisation formalities was indicated as the main cause of this. Moreover, relevant legal sources are often established subsequently, which sometimes leads to overlap in their material and geographical scope of application. This further complicates the process of determining the appropriate formality in a specific case.

b) Material scope

The material scope of the Convention relates to the issue of the types of document to which the Convention is applied. Several problems of interpretation concerning the material scope of the Convention have occurred over the years.

One of the problems concerns the distinction between private and public when we consider possible sources of documents. It is clear from our discussion above that the Convention applies only to documents issued by public authorities and that, for example, diplomas issued by private educational entities are therefore not Public Documents within the meaning of the Convention and may accordingly not be certified directly through the Apostille formality.

i) Certificates of origin issued by Chambers of Commerce

The same issue has arisen in relation to certificates of origin issued by the Member States’ Chambers of Commerce. In Belgium, Chambers of Commerce are private organisations, although they sometimes execute documents by delegation of the Federal Public Service Economic Affairs. The national rapporteur for Belgium indicated that it is unclear whether such documents can be directly certified by means of an Apostille or whether they should first be certified by a competent public authority.

ii) Translations

In Austria, translations prepared and certified by official translators are not within the scope of the Convention. Consequently, the official translator’s signature cannot be certified by means of an Apostille.

Official translations must therefore be legalised through the normal legalisation procedure involving the prior intermediate legalisation by the President of the competent Landesgericht (regional court) and the super-legalisation by the Ministry of Foreign Affairs, and concluded by the legalisation of the representation of the country of destination in Austria.

iii) Powers of attorney
A similar discussion as described above in relation to diplomas has occurred in the Member States regarding powers of attorney. Generally, the courts of the Member States have held that powers of attorney signed by private persons are not Public Documents in the meaning of the Convention (Czech Republic618, Germany619, Greece620, Hungary621, Latvia622 and Spain623).

Consequently the authenticity of the signatures on such documents and the capacity of the signatories cannot be certified by means of an Apostille. On the other hand, the Member States have generally presumed the authenticity of such powers of attorney on the basis of the certification of their signatures’ authenticity by a notary, which itself was considered suitable for certification by means of an Apostille.

(vi) **The Apostille formality**

The most important innovation of the Convention was the introduction of a new uniform and simplified legalisation formality for the Contracting States (see Article 4 of the Convention).

The Convention provides for a common certificate to be used for the purpose of certifying the authenticity of the signatures, seals and stamps on domestic by the Competent Authorities, and indicates that the Apostille should be drawn up in a form that accords with the model certificate that is annexed to the Convention which clarifies that the Apostille certificate should be square with sides at least 9 cm long.

The Apostille certificate is issued upon the request of the signer or of any bearer of the document (see Article 5(1) of the Convention).

1) **The standard terms of the Apostille**

a) **Reference to the Convention**

Firstly, the title of the Apostille certificate should make an express reference to the Convention in French, i.e. “Apostille (Convention de La Haye du 5 octobre 1961)”, in order to identify itself as an Apostille within the meaning of the Convention (see Article 4 of the Convention).

b) **Identification of the origin of the certified Public Document**

---

618 Case CZE No 1 Supreme Court of the Czech Republic of 25 June 2003.
619 Case GER No 7 Bayrisches Oberstes Landesgericht of 19 November 1992
620 Case GR No 2 Athens Court of Appeals 2002 9162
621 Case HU No 3 Supreme Court of 1 March 2004.
622 Case LV No 1 Senate of the Supreme Court 2004 SPC 61; Case LV No 3 Senate of the Supreme Court 2004 SKC 537; and LV No 4 Chief State Notary 2005.
623 Case ES NEW Audiencia Territorial del Madrid of 23 May 1983
Secondly, in relation to the underlying Public Document, the Apostille certificate must specify: (1) the country of origin of the document; (2) the identity of the signatory of the Public Document; (3) the capacity of the signatory; and (4) the identity of the seal or stamp that the Public Document bears (see Article 4 of the Convention in conjunction with the model Apostille annexed to the Convention).

c) Identification of the origin of the Apostille

Lastly, for the purpose of making the Apostille certificate itself identifiable, the Apostille must specify: (1) the place where, (2) the date when, and (3) the public authority by which the document was drawn up. The Apostille must further indicate (4) the number under which it is registered in the Apostille Register. Lastly, (5) the Apostille must be signed and stamped by the Competent Authority.

**Annex to the Convention**

**Model of certificate**

The certificate will be in the form of a square with sides at least 9 centimetres long.

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: .................
   This public document
2. has been signed by ....................
3. acting in the capacity of ....................
4. bears the seal/stamp of ....................

Certified

5. at ................ 6. the ................
7. by ............................
8. No ................
The Special Commission of the Hague Conference on Private International Law on the Practical Operation of the Hague Legalisation Convention (2003) stated, as follows, in its conclusions and recommendations that: “Apostilles issued by competent authorities should conform as closely as possible to the model certificate. However, variations in the form of an Apostille among issuing authorities should not be a basis for rejection as long as the Apostille is clearly identifiable as an Apostille issued under the convention” (see paragraph 13 of the conclusions and recommendations).624

The Special Commission stressed that Apostilles may not be refused in a State of production (country where the document is to be used) on the grounds that they do not comply with that State’s national formalities and modes of issuance” (paragraph 18 of the recommendations and conclusions).

2) The language used on the Apostille

a) The title of the Apostille

The language to be used for the title of the Apostille certificate must be French (see Article 4 of the Convention).

**b) The standard terms of the Apostille**

The Convention allows for the use of different languages for the standard terms of the Apostille certificate. The first option for the Competent Authority is to use only French (or arguably English) in conformity with the model certificate annexed to the Convention. The second option for the authority is to use only its own official language. Lastly, the authority may choose to use two languages for the standard terms, for example the official language and French or English (see Article 4(2) of the Convention).

**c) The information on the Apostille certificate**

The information to be filled in by the Competent Authority on the Apostille certificate may either be recorded either in French (and arguably English) or the official language of the authority (see Article 4(20 of the Convention).

**3) The attachment of the Apostille certificate to the Public Document**

Article 4 of the Convention states that the Apostille certificate is to be placed on the document itself or on an attached slip of paper called an “allonge” (see Article 4(1) of the Convention).


These means may include rubber stamp, glue, ribbons, wax seals, impressed seals, self-adhesive stickers, etc; When the Apostille is attached to the Public Document as a separate document (referred to in the treaty as an “allonge”) these means may include glue, grommets, staples, etc.

The Special Commission noted that all these means are acceptable under the Convention, and that, therefore, these variations cannot be a basis for rejection of Apostilles (see paragraph 16 of the conclusions and recommendations).

As regards Apostilles to be issued for a multi-page document, the Special Commission recommended that the Apostille be affixed to the signature page(s) of the document. When using an “allonge”, the Apostille may be affixed to the front or the back of the document” (see paragraph 17 of the conclusions and recommendations).
4) The form in which Public Documents can be apostillised

The provisions of the Convention do not specify whether Competent Authorities can only accept original Public Documents or whether they may also issue certified copies of Public Documents.


Individual States, however, may decline to issue an Apostille to the certified copy of a document on the grounds of public policy (see paragraph 13 of the conclusions and recommendations).

5) The charges for the Apostille formality

The Convention is silent on the point of the charge which the competent authority may exact for the Apostille. The Explanatory Report indicates that the cost of the formality introduced by the Convention should be reasonable.

The meaning of ‘reasonable’ is of course subject to diverging explanations. However, ‘reasonable’ can be interpreted as requiring that the charges should not put a stop to the use of the Apostille system in practice, nor be used for other means than to cover the cost of operation of the formality.


The Special Commission suggested that one way of dealing with this could be to charge a single fee for a cluster of related documents rather than an individual fee for each document in a particular case.

(vii) The Apostille formality as implemented by the Member States

1) Note on the surveys conducted in the course of the study

One of the questions of the surveys conducted during the study sought to ascertain whether the Apostille formality was considered to be too difficult. Most citizens (62.50%) did not find the Apostille formality too
difficult to fulfil. This was confirmed by the respondent companies where 66.67% did not find the formality too difficult to fulfil.

2) The request for an Apostille

In all Member States reported, Apostilles can be requested in person at the Competent Authority. In a large majority of states the Apostille can also be requested by means of registered mail (exceptions in this respect are: Malta and Portugal, where Apostilles can only be requested in person; Greece, where Apostille certification for judicial documents and notarial acts can only be requested in person; and Hungary, where request for Apostille certification made to the Ministry of Foreign Affairs can only be made in person).

3) Verification methods

The method used for the verification of the signature, seal and/or stamp on Public Documents and the capacity of Public Documents’ signatories generally consists of the manual comparison of the particulars of the Public Document in question with details as recorded in a register which is maintained in paper form and in certain cases in electronic form (for example in Germany, Latvia, and the UK).

4) The form of the Apostille

The form of the Apostille that is used by the Competent Authorities in practice, follows closely, with some variation in formatting and colour, the model annexed to the Convention.

In particular, the numbering on Apostille certificates drawn up by the Competent Authorities in the Member States is used in a uniform manner.

This practice clearly is helpful for the purpose of identification of the Apostille certificate, since its particulars may be stated only in the language of the Competent Authority that issued the certificate in question.

5) The Competent Authority’s signature and stamp

Some issues have been reported in relation to the fact that sometimes Apostilles are signed and stamped by persons other than the persons designated as competent authority for a particular country. In practice,
this has led to situations in which Public Documents certified by means of an Apostille were (initially) not accepted. 625

6) The issuance of the Apostille

The way in which the Apostille is attached to the documents it certifies differs from one Member State to the other.

Four methods can generally be distinguished: (1) placed directly on the front of the Public Document by means of a (rubber) stamp and subsequently signed and stamped; (2) placed directly on the document by means of a label and subsequently signed and stamped; (3) printed on an allonge and attached to the Public Document (stapled and sometimes glued) and subsequently signed and stamped; and (4) stamped on the last page of the Public Document by means of a (rubber) stamp and subsequently signed and stamped.

The use of these methods tends to depend on the Public Document at hand; if the document has sufficient space the Apostille is often placed on the document directly by means of a label or (rubber) stamp. Where the document offers insufficient space, the Apostille is attached to the document by means of the allonge.

The most secure way of attaching the Apostille is arguably used in the UK where the Apostille is glued securely to the document after which an embossed seal of the Secretary of State is affixed so that its impression is apparent both on the Apostille and the document itself.

7) The issuance of an Apostille for a multi-paged document

When the document that is presented consist of multiple pages, the method for issuing the Apostille used generally is to stamp or attach the Apostille on the (last) page bearing the signature of the author of the Public Document in question.

In a number of Member States (Estonia, Latvia, Slovenia, and Sweden) the pages of the document are further sewn together. In other Member States (Ireland, Finland, and France) a stamp is put on all pages of the document. Germany arguably has the most secure system in attaching the Apostille to the last page of the Public Document, stapling or sewing all pages together, and putting a stamp on each page of the document.

625 Case ES No 2 Supreme Court of 31 October 1998
8) The languages used on the Apostille

The title of the Apostille certificates issued by the Member States’ Competent Authorities is generally “Apostille” followed by the title reference of the Convention in French (“Apostille (Convention de La Haye du 5 octobre 1961)”) as provided for in Article 4(2) of the Convention.

A large number of the Member States further use English as the only or at least second language on their Apostille (recorded are: Cyprus, Czech Republic, Estonia, Germany, Ireland, Latvia, Malta, Slovak Republic, Sweden and of course the UK).

Most countries use two languages on the Apostille (English usually being the second language). France, Luxembourg, Spain, and Slovenia use only their own language on the Apostille.

9) The system used for the issuance of Apostille certificates

The information to be filled in on the Apostille (numbered 1-10) is completed either electronically (Belgium, Estonia, Germany (although Competent Authorities also use manually filled in forms), Hungary, Latvia, Malta, Netherlands, UK) and then printed as one certificate, or is completed manually on a prefabricated or stamped Apostille (Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Luxembourg, Portugal, Slovak Republic, Slovenia, Spain and Sweden).

10) Measures taken in order to avoid fraud

The main measures taken by Competent Authorities to avoid fraud consist of the systematic verification of the particulars of the Public Document, i.e. signature, capacity, and where appropriate the identity of the seal and/or stamp of the author of the Public Document in question, with details as recorded in a register which is usually maintained in paper form and, in certain cases, electronically (for example in Germany, Latvia, and the UK).

The Competent Authorities further maintain Apostille Registers in which they record the particulars of the Apostille certificates they issue (the Apostille registers are considered in more detail below).

11) Plans to modernise the system used to issue Apostille certificates

The system used in the Member States by the Competent Authority for the issuance, registration and verification of Apostille certificates is not subject to major plans for modernisation. The UK rapporteur indicates in this regard that, “the existing hardware and software is updated and replaced as necessary”.
Nonetheless, three areas were highlighted in the reports where modernisation is likely to take place. The first and most supported modernisation of the system concerns the E-Apostille Pilot Programme launched by the Hague Conference in April 2006.

Several Member States are inclined to participate in the development and introduction of the E-Apostille subject to funding and/or wider participation of countries (Czech Republic, Finland, Latvia, Slovak Republic, and UK).

Secondly, the general tendency is to move from manual/mechanical systems to fully electronic systems for the production and registration of Apostille certificates (e.g. Luxembourg).

The last area in which modernisation measures were reported relates to the system used for checking the credentials of authors of Public Documents. Ireland, for example, is considering the introduction of specific software to verify more effectively the precedents of notaries that execute Public Documents.

12) The length of the Apostille formality

The length of the procedure for obtaining an Apostille certificate differs between the Member States and depends both on how (in person or by mail) the Apostille is requested and the Competent Authority involved.

a) Requests for Apostille certification made in person

Apostilles requested in person are generally issued the same day (Estonia, Slovak Republic, Slovenia, Sweden and UK), in a number of countries even within minutes (Belgium, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Malta, Netherlands). In a some Member States (Luxembourg and Spain) the Apostille certificate will not be issued the same day but can take a couple of days.

b) Requests for Apostille certification made by mail

The process for obtaining Apostilles by mail generally takes longer, although usually the requested Apostille will be issued within less than 14 days of the request (Belgium, 10 days; Czech Republic, 3 days; Germany, up to 14 days; Ireland, up to 3 days; Latvia, 10 days; Luxembourg, up to 4 days; Slovak Republic, up to 10 days; Spain, up to 3 days; Sweden, 1 day; and UK, 10 days).
As indicated, the delays also vary between the Competent Authorities. In a number of Member States (Slovenia – District Court, and Hungary – Ministry of Foreign Affairs) the procedure may take slightly longer with specific Competent Authorities.

Some Member States offer fast procedures upon request: the Competent Authority in the UK offers a document exchange service which is completed by the end of the following day, and the Competent Authorities in Latvia and Spain offer the possibility of making urgent requests which are completed respectively the same day and within 2 days.

The survey conducted by the Institute generally confirms the information above: in 50% of the instances reported the Apostille was obtained in 1-3 days; in 35% 3-10 days; in 5% 10-15 days; and in 10%, more than 15 days.

13) Charges for the Apostille formality

The fees payable for the Apostille formality are generally determined by Government act. In some Countries the fee brings in revenue (Belgium (set to change), Germany, Malta, Slovak Republic, and Sweden). In the main there is a fee that is payable for the Apostille service provided by the Competent Authorities (exceptions: France, Greece, Italy, Portugal, and Spain where the formality is free in most cases).

The fee payable differs between the Member States. Most Member States offer the service for less than 20€ (Austria - €16.20; Belgium - €10; Cyprus - €3.50; Czech Republic – €3.50; Estonia - €7.70; Finland - €9; Latvia - €7 up to €14 for urgent requests; Luxembourg - €1; Malta - €12 up to €17; Netherlands - €16; Slovak Republic - €7; Slovenia - €1; and Spain – in some cases €4 if not free).

The Competent Authorities in Ireland (€20 up to €50), Sweden (€32) and the UK (€28) charge a higher fee on average. Germany’s authorities operate a somewhat unusual system that distinguishes between the value represented by the document (documents issued by courts – €10 up to €130), and further between documents used for personal (generally €12), or business purposes (generally €15).

14) Point for reflection in the EC context: the Apostille formality as applied in the US

Documents destined for use in a country which participates in the Apostille Convention must be certified by one of the designated officials in the jurisdiction in which the document has been executed. Such certification negates the requirement that the document be certified by the U.S. Department of State Authentications Office or through legalisation by the embassy or consulate.
Documents signed by a federal official with the official seal of that agency, American Consular Officer, Military Notary, or Foreign Consul must be furnished with an Apostille by the U.S. Department of State. Specifically regarding birth, death, marriage and divorce certificates, before an Apostille can be attached to a copy of such record, the applicant must obtain a certified copy of the document issued by the custodian of the record, i.e. the civil registrar or vital statistics office.

The form of the Apostille and the system of its implementation vary according to the competent authority. The State Department notes that it may consist of something akin to a stamp or sticker, or it may be a separate allonge. If the document is multi-paged, the Apostille should be affixed to the signature page(s) of the document. Several means are implemented to avoid fraud such as use of special anti-fraud watermarked paper, stick on seals, and/or web signatures, as well as the use of a fraud-resistant staple or grommet system.

(viii) The competent authorities under the Hague 1961 Convention

The Convention stipulates that each Contracting State is to designate “by reference to their official function” the authorities that are competent to issue Apostille certificates (see Article 6 of the Convention). The Explanatory Report emphasises that the competent authority must be named by reference to its official function (i.e. the official title of the chosen person is used, rather than the name of the individual in question)\(^\text{626}\)

1) The duties of Competent Authorities

The Convention determines in some detail the duties of Competent Authorities, in particular in relation to the process of implementing the Apostille formality (see Article 4 of the Convention), the process of registering issued Apostilles (see Article 7(1) of the Convention), and the process of verifying the authenticity of Apostilles (see Article 7(2) of the Convention).

2) The designation of Competent Authorities

The Convention leaves it to each Contracting State to decide for itself the authorities which it intends to entrust with the task of issuing the Apostille certificate. The Contracting States are installed with trust that they will designate appropriate and trustworthy authorities to fulfil the Convention’s requirements.

Nonetheless, the terms ("(...) its official function (...)", and examples ("(...) Président du Tribunal de grande instance (...)"") that are used in the Explanatory Report suggest that the competent authority appointed must at least be a state organ or a public body.

This suggestion is logical with a view to the important responsibility of the Competent Authority in certifying domestic Public Document for their use abroad. Competent Authorities that command general respect help to install in the Apostille system a degree of trust and confidence which was considered fundamental to its successful functioning.  

3) The division of competences between Competent Authorities

The question whether the Competent Authorities designated by the Contracting States should be competent to issue Apostille certificates for any type of Public Document and/or executed in any part of the country, or whether the competences should be divided between different authorities with their own specific competences as regards categories of Public Documents and/or documents executed in their local jurisdiction, was also left to the Contracting States.

4) The anticipated risks of the Convention’s approach

Due to the fact that the organisation of the Convention’s system of Competent Authorities was left to the Contracting States, there is an apparent risk of diversity in administrative organisation between states and, as a result, a lack of legal certainty for citizens and companies requiring their Public Documents to be certified. Depending on how a Contracting State has organised the system of Competent Authorities, legal certainty issues may arise, such as the question of which authority is competent in a given case, and for which type of documents.

(ix) The organisation of the competent authorities by the Member States

1) Diverging administrative organisation

The ways in which the Member States have organised their system of Competent Authorities as required by Article 6 of the Convention diverges.

In general, we can distinguish countries that have chosen a centralised system with one Competent Authority (Belgium, Cyprus, Ireland, Latvia, Luxembourg, Malta, Poland, and UK), and countries that have

---

627 Id.
chosen a *decentralised system* with more than one Competent Authority (Austria, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Netherlands, Portugal, Slovak Republic, Slovenia, Spain, and Sweden).

2) **The jurisdiction of the Competent Authorities**

The group of Member States with more than one authority can be further divided into countries that have designated Competent Authorities based on *territorial jurisdiction* (Netherlands, Finland, and France), *specific document types* (Czech Republic, Estonia, and Hungary), or *both based on territorial jurisdiction and specific document types* (Austria, Germany, Greece, Italy, Slovak Republic, Slovenia, and Spain).

3) **Effects of the Contracting States’ prerogative in designating the Competent Authorities under the Convention**

The effect of the Contracting States’ autonomy as regards the organisation of the Competent Authorities under the Convention is the existence in practice of as many Apostille Registers as there are Competent Authorities (more than 350).

This means that within the EU alone, there are more than 350 separate Apostille Registers or card indexes. Notwithstanding the fact that there may be instances where the registers or card indexes are improperly or not maintained, the task of locating and contacting the authority that drew up an Apostille certificate will in practice be quite burdensome.

The existence of many different Competent Authorities therefore potentially undermines the Convention’s verification procedure that functions on the basis of the assumption that authorities will contact each other to verify the authenticity of Apostille certificates.

As we have seen above, in practice there is no or hardly any communication between authorities in the Member State of destination and the Competent Authorities that certified the documents by means of Apostilles. The existence of a complex system of Competent Authorities under the Convention must be considered as a possible cause.

a) **Legal uncertainty for users of Public Documents**

It was quite a challenge for the author of this report – who could boast the assistance of 25 National Rapporteurs – to identify the Competent Authorities for each of the Member States, including their contact details.
The Hague Conference itself appears to face the same problem which is reflected in the incomplete information that is contained on the Conference’s website in the Apostille Section’s Competent Authority database.\(^{628}\)

The incompleteness of the information is caused by the fact that it is continuously subject to change. For example, the German rapporteur indicates that due to the low number of Apostilles requested at the Ministries (Ministry of Justice Saarland issued not a single Apostille in 20 years, which in itself is a strange affair worth further attention), the Governments of the Lander are contemplating to shift certain competences fully to the regional courts.

The same process of decentralising the system has taken place in Sweden where the competence has recently been attributed to 130 notaries. Alternatively, the incomplete information may be due to a lack of communication between the Competent Authorities and the Permanent Bureau of the Hague Conference.

It is self-evident that if the process of identification of the Competent Authorities is difficult for entities such as the Permanent Bureau and the author of this report, the users of Public Documents, who are the consumers of the Apostille formality, cannot be considered well-informed as to where to take their documents in a particular situation.

**b) Difficulties with the recognition of Apostille certificates issued in states with numerous competent authorities**


These difficulties concern, for example, problems in identifying and verifying the competence of individual issuing authorities and differences in Apostilles issued within the same State. In this regard, the Special Commission’s recommendations were limited to the making relevant information available to the Permanent Bureau to be put on the Hague Conference’s website and to further promoting knowledge about the practical operation of the Convention.

**4) Liability of Competent Authorities arising from the operation of the Convention**

---

The Convention determines in some detail the duties of Competent Authorities, in particular in relation to the process of executing Apostilles, the process of registering issued Apostilles, and the process of verifying the authenticity of Apostilles. Conversely, the Convention does not shed light on the question of whether liability might arise for domestic Competent Authorities from the operation of the Convention.

With the exception of the UK, the issue of liability of Competent Authorities from the operation of the Convention has not been reported in the Member States. However, as we will see below in relation to the Competent Authority for the issuing of Apostilles in the UK, this does not mean that the issue is in itself insignificant. Claims seeking to establish the liability of Competent Authorities from the operation of the Convention may and do in fact arise.

i) Example: Liability for the British competent authority (?

In the UK, a case concerning the liability of the British Competent Authority (Foreign and Commonwealth Office) is currently before the courts.629 With a view to the importance of the issue, which is not addressed in the Convention, the case is described below in some detail.

The relevant facts of the case are as follows: as part of an alleged fraudulent scheme, a false power of attorney in Spanish which carried the forged signature of the owner of certain properties in Spain was notarised in London by a notary public who is authorised to act in Scotland but not in England.

Subsequently, the signature of the notary public was certified by means of an Apostille issued by the Foreign and Commonwealth Office. In Spain, the false power of attorney was used to fraudulently transfer the ownership of the three properties away from the owner to third parties.

The aggrieved owner made an attempt to recover the lost properties through court actions which were partly successful. However, the most valuable property could not be recovered because the Spanish court (Barcelona) held that the buyer of the property had acted in good faith and held to that effect that the notarised power of attorney was on its face genuine and authenticated by the British government’s Apostilles.

The aggrieved person has brought a claim against the Foreign and Commonwealth Office claiming damages of £13.000.000 for negligently issuing several Apostilles for documents executed in England by a Scottish notary public who was not competent to carry out his public tasks in England.

---

629 Case UK No 1 High Court of 13 December 2005; The arguments in substantive for the case were heard on 5 February 2007
The plaintiff argues that it should have been apparent to the Foreign and Commonwealth Office that the notary public who certified the forged signature on the power of attorney was not authorised to act as a notary in England and that if this had been spotted, the Apostille should and would not have been issued.

The plaintiff further states that without the Apostille, the power of attorney could not have been acted on in Spain and the fraudulent scheme could not have been carried through.

For the purpose of the interlocutory case, the Foreign and Commonwealth Office accepted, in addition to the duties under the Convention, that the notary public who certified the signature on the power of attorney had no power to carry out his notarial duties in England and Wales.

The notary public was registered in Scotland and not in England. The Foreign and Commonwealth Office accordingly accepted that the Apostille was incorrect in certifying that the underlying document was signed “acting in the capacity of Notary Public” in that the notary public could not carry out his notarial functions in England and Wales which he purported to do as appears from his signing and was clear from the documents.

The Foreign and Commonwealth Office, nonetheless, stated that it might argue at trial that the Scottish notary could actually discharge his functions in England and that it may also be the case that it is unusual for documents presented for legalisation under the convention to identify where the notary is discharging his functions.

In its interlocutory judgment, the court observed that the plaintiff apparently failed to recover his properties through the Spanish court actions because of the presence of the Apostilles issued by the Foreign and Commonwealth Office which enabled somebody dealing with a person putting forward those documents to believe that they were genuinely executed documents.

In the court’s view the significance of an Apostille is to provide a straightforward way of dispensing with the formal methods of “legalisation” for foreign Public Documents. It therefore reduces the burdens on the Foreign and Commonwealth Office and provides a method whereby the Foreign and Commonwealth Office certifies the authenticity of the documents and the notary status as set out in the Convention. On the basis of information provided by the Foreign and Commonwealth Office, the court conceded that on average Foreign and Commonwealth Office officials administer between 50 and 100 documents daily.

The court reasoned that the purpose of Foreign and Commonwealth Office’s actions as Competent Authority is to provide a certificate that all requirements set out in the Convention are satisfied. The court further evaluated the purpose of an Apostille certificate.
In its view, the first purpose is of an international character in that it provides for a more easily regulated system between the signatory countries as to the recognition of foreign documents. That, the court considered, is beneficial to those states because it reduces strains that were put on their staff.

Second, the court held, is that the Convention established a policy that the documents authenticated by means of an Apostille could be relied upon in respect of which certificates were given. Consequently, by means of an Apostille, a Competent Authority gives certificates as to the authenticity of both signature and capacity.

In addition, the court considered relevant the question of what people intend to do with an Apostille issued for documents by the Foreign and Commonwealth Office. The court’s answer is that they utilise the Apostille fixed to the document to demonstrate their authenticity by reference to (1) the notarisation of the notary and (2) the certificate as to the status of the notary by the Foreign and Commonwealth Office.

The court found that if the Foreign and Commonwealth Office, in carrying out its functions under the Convention, negligently certifies either the signature or the capacity of the alleged signatory, it is arguably liable for the consequences which occur when the Apostille is put to the use it was intended for and the court also considered it arguable that the provision of the Apostille in a negligent way caused the loss in the case in question.

The court distinguished the duties owed by the notary public and the Foreign and Commonwealth Office which it considers separate and independent of each other and it did not accept the argument of Foreign and Commonwealth Office that if the signature on the power of attorney could not, with taking reasonable steps, be shown to be a forgery (thereby exonerating the notary public) the Foreign and Commonwealth Office is exonerated of any liability for any consequences of breaches of its non-negligent certificate as to the discharge of the duties by the notary.

Further, the court stated that the fact that the notarial document could have been executed in Scotland - as argued by Foreign and Commonwealth Office - is irrelevant, since in reality it was not. Had it been executed in Scotland there would have been no breach of duty because the certificate given would have correctly identified the capacity of the notary public.

Finally, the court emphasised the fact that the plaintiff failed to recover the lost properties because the Spanish court held that the notarial documents that were used in the transfer of the properties were “on their face genuine and authenticated by the British government’s Apostilles”.

Therefore, the court concludes that the failings in the Apostilles which were intended to be used with the notarial documents had a direct causal link with the loss incurred or at least arguably did so.
As regards the implementation of the Convention in the case in question, the court stated that if the Scottish notary public was registered at all with a specimen signature with the Foreign and Commonwealth Office, he would have been registered on the index kept for the Law Society of Scotland.

If his signature was actually authenticated or checked, this could have only been done against such an index. If the signature was not checked because it was known to the Foreign and Commonwealth Office official, there was a failure on the part of this official to note that a Scottish notary was purporting to notarise a document in England.

The court concluded that, assuming that a Scottish notary is not competent to carry out his tasks in England, the Foreign and Commonwealth Office provided an incorrect certificate because the Scottish notary was not carrying out his functions as a notary, as he cannot do so in England.
(x) The Apostille register

1) The reason for maintaining Apostille registers

By its very nature, the Apostille is as vulnerable to fraud and abuse as any other document: it can be forged, detached from the underlying document and attached to another, etc. Forgeries of Apostille certificates are not more difficult in practice than for any other documents.

It could be said that the wide availability of the model certificate and the relative high number of Competent Authorities that have power over the means necessary to draw up Apostilles makes forgeries even quite undemanding in practice.

In this respect, it is important that we re-call that based on Article 5 of the Convention, the signature, seal and stamp on the Apostille certificate are to be exempt from legalisation. This express stipulation prevents the awkward situation that the Apostille, essentially being a Public Document itself, would be subject to legalisation or even verification formalities.

2) The Conventions’ verification procedure

Exempting Apostille certificates from legalisation formalities places the Apostille’s reliability and trust in the Apostille as proof of a foreign Public Document’s authenticity at risk. For the system to be sufficiently protective, it remained to establish some supervision making it possible to detect false information or false signatures which might be placed upon the certificate and, in particular, to facilitate proof of non-authenticity of the certificate.

Consequently, the drafters of the Convention introduced a procedure into the system of the Convention which implied the obligation for Competent Authorities to maintain registers of the Apostilles they issue and to verify the authenticity of Apostille upon request.

The procedure is aimed at discouraging and preventing abuse by enabling authorities that receive an apostilised foreign Public Document to ascertain the Apostille’s authenticity.

In relation to the Convention’s verification procedure, the Convention’s Explanatory Report states that: “(…) since the certificates have to be publicly numbered and registered, forgeries will have become so difficult that the certified document will be as reliable as to its origin as documents currently legalised.”
It must be considered here, however, that this assumption only holds true if the Convention’s procedure for verifying the Apostilles authenticity is actually used regularly and consistently in practice. In this regard, the practice in the Member States appears to be the opposite.

The Special Commission of the Hague Conference on Private International Law on the Practical Operation of the Hague Legalisation Convention (2003) has underlined the important role that the Apostille register – which up to now has not often been called upon to verify the relevant information contained in a specific Apostille – could play in resolving any doubt in relation to an Apostille. The Special Commission noted that maintenance of electronic registers could facilitate the process of verification (see paragraph 15 of the conclusions and recommendations).

3) The information recorded on the register

The Convention requires each Competent Authority to keep a register or card index in which the Apostille certificates it issues are recorded. The record should specify: (1) the number and (2) date of the certificate, (3) the name of the person signing the Public Document and (4) the capacity in which he acted, or in the case of unsigned documents (5) the name of the authority which has affixed the seal or stamp (see Article 7 of the Convention).

The Special Commission of the Hague Conference on Private International Law on the Practical Operation of the Hague Legalisation Convention (2003) approved the use of electronic registries in its conclusions and recommendations stating that, “the Special Commission emphasized that the use of information technology (IT) could have a positive impact on the operation of the Convention, in particular through lowering costs and increasing the efficiency of the creation and registration of Apostilles.”

4) The use of the register

The Convention requires the Competent Authorities to verify, upon request from any interested person, the authenticity of any Apostille certificate they issued by comparing the particulars of the Apostille certificate with those contained on the record they keep in their register or card index (see Article 7 of the Convention).

(xi) The Apostille registers as maintained in the Member States

1) The use of electronic registers
The Apostille Register or card index is kept in all Member States in accordance with Article 7 of the Convention and is used to record the particulars of the Apostilles that are issued. Some Member States, although not a majority, maintain electronic registers (Belgium, Estonia, Hungary, Latvia, Malta, Slovenia, and the UK).

2) The availability but infrequent use of the registers

The records kept by the Member States’ Competent Authorities are generally available for consultation. In practice, however, the registers or card indexes of the Competent Authorities in the Member States are never or very rarely consulted.

This fact puts pressure on the assumption in the Convention’s explanatory report that Apostilles are as reliable as to their origin as documents currently legalised. As indicated, the availability of registers is in itself no justification for this assumption. Only the regular use in practice of the verification procedure established by the Convention warrants an objectively justified trust in the reliability of Apostille certificates.

Furthermore, the report for France indicates that when the Convention’s verification procedure is actually used in practice, it uncovers attempts at fraudulent schemes involving the abuse of the Apostille formality.

In theory, therefore, the Convention system provides for an effective verification procedure safeguarding the reliability of Apostilles. However, the practice in the Member States shows that the available procedure is not used. Consequently, the present trust in the reliability of Apostilles cannot be deemed objectively justified.

3) What prevents the use in practice of the Convention’s verification procedure

There are a number of indications that the procedure currently in place for the verification of the authenticity of Apostilles does not function properly: (1) the registers are maintained in the paper (exceptions: Belgium, Estonia, Hungary, Latvia, Malta, Slovenia, and the UK); (2) the registers are maintained locally, i.e. by each competent authority individually; (3) the communication with Competent Authorities is difficult due to language issues; (4) the ways in which registers can be consulted are limited (e.g. no internet or e-mail consultation is available; exceptions: Belgium and UK); and (5) there is restricted access to registers (Latvia appears to restrict consultation of the register to those persons to whom the document concerns, the institution that issued the document, and law enforcement institutions, if they have submitted a special request to Ministry of Foreign Affairs).
The success of the supervisory system of the Convention depends on the fact that proof to disprove the assumption of the Apostille’s authenticity can be obtained in a simple manner by consulting the register of the issuing Competent Authority.

Considering both the existence of as many registers as there are Competent Authorities, communication problems that persist (language problems) and the limited number of ways to consult registers (often not possible by e-mail or internet), the system does not allow one to simply obtain such proof.
(xii) The authenticity and validity of the Apostille certificate

1) The exemption of the Apostille from legalisation

Essentially, the Apostille certificate is a Public Document itself. As any other (public) document, it is therefore susceptible to fraud. Subject to its explicit exemption from legalisation, foreign authorities could therefore theoretically require its prior legalisation before accepting it.

However, the drafters of the Convention considered that subjecting Apostilles to legalisation formalities would entirely run counter the main objective of the Convention, which is to facilitate the international use of Public Documents by abolishing the requirement of legalisation.

In this regard, the Explanatory Report indicates that, “It would have been ridiculous to subject the certificate itself to a requirement of additional proof such as legalisation or even verification by another authority. It was clear that one had to apply the maxim acta publica probant sese ipsa.”

Consequently, the Convention unambiguously exempts the signature, seal and stamp on the Apostille certificate from all certification (see Article 5 of the Convention).

2) The authenticity of the Apostille

The burden of proving a foreign Apostille certificate’s authenticity can generate problems for a party relying on its use. This problem is relevant for any type of Public Document, including the Apostille certificate.

Elsewhere we have considered that in almost all of the Member States, foreign Public Documents do not generally benefit from the same presumption of authenticity as domestic Public Documents. This means that proof of authenticity will normally be required. We further concluded that legalisation is generally considered to be an appropriate means of evidence to prove a foreign Public Document’s authenticity.

As far as the Burden of Proof of a foreign Public Document’s authenticity is concerned, the starting point must therefore be that the party that produces a foreign Public Document generally has the burden of proving its authenticity.  

In a majority of Member States, legalisation generally 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.

630 See for example GER No 6 Bundesverwaltungsgericht of 20 April 1994
(Austria, Cyprys, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovak Republic, Slovenia, and Spain).

As we have seen above, the Apostille certificate itself (i.e. its signature, seal and stamp) is exempt from any form of certification (see Article 5 of the Convention). In other words, an Apostille certificate is self-proving.

By proscribing legalisation, the Convention therefore 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 in situations where this may be necessary.

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 or she is unable to resolve his doubts in relation to its authenticity.

With a view to this potential adverse effect, the Convention explicitly provides for alternative means to verify an Apostille’s authenticity in cases of doubt: when the authenticity of an Apostille is in question, the use of the Apostille Register maintained by the authorities competent for the issuing of Apostilles enables the detection of false information or false signatures which might be placed upon the Apostille certificate and, in particular, to facilitate the proof of its non-authenticity (see Article 7 of the Convention).

It is not clear, however, whether administrative cooperation with the authorities of the state of an Apostille’s origin is compulsory in the Member 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.

3) The validity of the Apostille

The question of validity of Apostille certificates is not explicitly addressed in the Convention. The Convention merely indicates, as follows, that: “When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears” (emphasis added).

On the basis of the provisions of the Convention, it can be concluded that in order to fulfil its function, an Apostille certificate must be properly filled in (see Articles 4 and 5 of the Convention) by the competent authority (see Article 3 in conjunction with Article 6 of the Convention) in the prescribed form (see Article 4 of the Convention and the annexed model certificate).
4) Effects of non-compliance with the Apostille formality

The Convention does not specify the effect of non-compliance with the Apostille formality. However, where the Convention is theoretically applicable between two states, situations may arise in which a Public Document that should have been certified by means of an Apostille is produced without an Apostille instead.

The Convention does not oblige Contracting States to refuse to accept Public Documents from another Contracting State that were not certified by means of an Apostille. This would be contrary to the objective of the Convention which is to stimulate the free movement of Public Documents between states.

There is no reason to assume that the Convention prevents the Contracting States from accepting foreign Public Documents without any intermediary formality and in particular the Apostille formality. This conclusion is supported on three accounts by the text of the Convention itself.

Firstly, as indicated above, under the Convention, the Apostille formality is optional, i.e. Contracting States are free to exempt foreign documents from legalisation, or abolish or simplify the formality by law, regulation, or state practice to this effect (see Article 3 of the Convention).

Secondly, the Convention stipulates that if Contracting States had previously exempted documents from legalisation, or abolished or simplified the formality, the states are subsequently barred from reintroducing formalities in the form of the Apostille formality as this would be contrary to the Convention’s general objective (see Article 3(2) of the Convention).

Lastly, the Convention merely overrides provisions of a treaty, convention or agreement between two or more Contracting States which subject the certification of a signature, seal or stamp to formalities that are more rigorous than the Apostille formality (see Article 8 of the Convention).

(xiii) The Apostille certificate in the Member States’ legal practice

1) The exemption of the Apostille from legalisation

No cases were reported in the reports on the legal practice in the Member States which indicated that Apostille certificates are subjected to any legalisation requirements before being accepted.

On the other hand, in Spain a case was reported in which the court held that, with a view to time efficiency, in case of doubt, an Apostille certificate’s authenticity may also be verified through the conventional legalisation procedure that is applicable outside the scope of the Convention,
notwithstanding the availability of the verification procedure under the Convention (see Article 7 of the Convention).  

2) The authenticity of the Apostille

As indicated above, as far as the Burden of Proof of a foreign Public Document’s authenticity is concerned, the starting point is generally that the party that produces a foreign Public Document generally has the burden of proving its authenticity.

It was also considered that in situations where legalisation formalities have been abolished, the Burden of Proof may cause problems for a party that wishes to rely on a foreign document, but has no appropriate means of proving the foreign document’s authenticity.

Conversely, as regards foreign Apostille certificates, the rule in the Member States appears to be that a foreign Apostille certificate that appears on its face to be authentic is presumed to be authentic until the contrary is proven (Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Slovak Republic, Slovenia and Spain).

In case of doubt, however, the public authorities in the Member States are generally allowed to make further inquiries and verify the Apostille certificate’s authenticity; a rule which applies generally to foreign Public Documents and may be considered to apply equally to foreign Apostille certificates (Austria, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Lithuania, Malta, Poland, Netherlands, Slovak Republic, Slovenia).

The national reports have not clarified the question of whether recourse to the verification procedure provided for in the Convention (i.e. the consultation of the Apostille Register in the country of an Apostille

---

631 Case ES No NEW Juzgado de Instrucción de Madrid of 20 May 1983
632 See for example GER No 6 Bundesverwaltungsgericht of 20 April 1994
633 Gomard Civilprocessen (5th ed, 2000) 495 ff
634 § 276 Code of Civil Procedure
635 § 276 Civil Procedure Act
636 § 276 Administrative Procedure Law
637 Article 562 Code of Organisation and Civil Procedure
638 § 311(2) Zivilprozessordnung
639 Article 164 and 195(7) Civil Procedure Act
640 Article 164 and 195(6) Civil Procedure Act
641 Article 232 CPC and Article 6 Civil Code; Articles 7, 77 and 78 APA
642 Article 164 and 195(6) Civil Procedure Act
643 Article 2700 Civil Code and Articles 221 ff. Italian Code of Civil Procedure
644 Article 171 ZUP
certificate’s origin) is considered a compulsory method for the verification of a foreign Apostille certificate’s authenticity by public authorities in case of doubt.

In this regard, however, we can point out that the Apostille registers or card indexes of the Competent Authorities in the Member States are never or only very rarely consulted by foreign authorities. 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.

3) The validity of the Apostille

The issue of the validity of Apostille certificates issued abroad has not caused much controversy in the Member States. In practice, the question of whether a foreign document that purports to be an Apostille certificate was actually executed by an authority competent to do so appears to cause the most problems.

For example, in Spain, the validity of the Apostille certificate may be challenged. If the challenge concerns the competence of the person signing the Apostille, this requires proof of the fact that the person signing the Apostille did not have the power to execute the Apostille under the law of the Competent Authority. However, the Burden of Proof in this respect is on the person challenging the Apostille.652

On the other hand, as far as Spain is concerned, the validity of an Apostille is not necessarily affected if the signatory of the Apostille certificate was not the authority designated as competent under the Convention.

In relation to an Apostille certificate issued by a German authority, the Spanish Supreme Court held that the fact that the person signing the Apostille was the Vice-President of the court instead of the President of the Court, who is indicated as the Competent Authority for the purpose of the Convention, does not affect the validity of the Apostille, since in that case it was not proved that under German law the Vice-President of the court does not have the competence to sign the Apostille certificate in the absence of the President of the court.

The court further made reference to Spanish law under which the Vice-President of the court is competent to carry out the task of signing Apostille certificates when the position of President of the court is vacant, or when the President is absent or otherwise indisposed.653

652 Case ES No 2 Supreme Court of 31 October 1998
653 Case ES No 2 Supreme Court of 31 October 1998
German courts deem invalid an Apostille certificate if it was not signed directly by or on behalf of the Competent Authority under the Convention of the Contracting State in which it was issued. In relation to notarial documents that originated in the US and were certified by an Apostille signed by a court clerk, the Oberlandesgericht of Bayern concluded that the validity of the Apostille depends on it being signed by or on behalf of the designated Competent Authority of the state of the Apostille’s origin, in that case the Secretary of State. \(^{654}\)

4) Effects of non-compliance with the Apostille formality

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 (Austria\(^{655}\), Germany\(^{656}\), Greece\(^{657}\), Hungary, Poland, Netherlands\(^{658}\), and Sweden\(^{659}\)). 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.

For example, Dutch case law suggests that Dutch courts have held that the non-compliance with the Apostille formality in situations in which it is theoretically applicable does not necessarily prevent a Dutch public authority from accepting a foreign document if the authority has no doubts regarding the document’s authenticity. \(^{660}\)

In a case concerning the recognition in the Netherlands of a Spanish decision granting a divorce between a Spanish man and a Dutch woman, the Dutch court considered that the fulfilment of the Apostille formality cannot be considered a precondition for accepting the validity of a foreign Public Document.

The court held that, based on Article 3(1) of the Convention read in conjunction with Article 2, the Apostille certificate is the only and maximum formality, the fulfilment of which may be required between the Contracting States in order to ascertain the authenticity of a foreign Public Document originating in a Contracting State. \(^{661}\)

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

\(^{654}\) Case DE No NEW10 Oberlandesgericht Bayern of 19 November 1992 (make copy for the file from volume V 349 Sumanpouw)

\(^{655}\) § 311(1) Zivilprozessordnung

\(^{656}\) GER No 9 Court of Appeal in Labour Issues of 19 January 1989

\(^{657}\) Piareus Court of First Instance 80/1972

\(^{658}\) Article 152 Civil Procedure Code

\(^{659}\) Chapter 35 Section 1(1) Code of Judicial Procedure

\(^{660}\) Case NL No NEW Rechtbank Zwolle of 16 October 1989

\(^{661}\) Case NL No NEW Rechtbank Zwolle of 16 October 1989
authenticity (Czech Republic\textsuperscript{662}, Denmark, Estonia\textsuperscript{663}, France, Italy, Latvia\textsuperscript{664}, Lithuania, Malta\textsuperscript{665}, Poland, Slovak Republic\textsuperscript{666}, Slovenia\textsuperscript{667}, and Spain\textsuperscript{668}). In these Member States the non-compliance with the Apostille formality generally prevents the acceptance of the foreign document.

In the Slovak Republic, legalisation formalities, including the Apostille formality, are mandatory requirements, the fulfilment of which is necessary before foreign documents can be accepted as authentic. Nonetheless, if a situation occurs in which the Apostille formality has not been complied with, the courts' reaction is generally to request the person who has produced the document to address the formal irregularity by securing an Apostille after which the document is finally accepted.\textsuperscript{669}

The situation is similar in Spain where the Apostille and legalisation formalities in general, are considered as mandatory requirements which must be satisfied before a foreign Public Document will be considered authentic and is accepted.

In the absence of an adequate justification for the non-compliance with the applicable legalisation formality, Spanish authorities will generally not assume the foreign document's authenticity and will therefore not accept the document in the proceedings in question.\textsuperscript{670}

In France, the compliance with the Apostille formality is considered a condition that is to be fulfilled before a foreign Public Document can be accepted by French public authorities. If a legalisation formality is applicable it must be fulfilled before French public authorities can accept the document in question.\textsuperscript{671}

For instance, if legalisation (including Apostille) of a document is required but not carried out, the party against whom execution of a foreign judgment is sought is allowed to have the exequatur proceedings stayed.\textsuperscript{672} Furthermore, a court can stay exequatur proceedings on its own motion if a foreign judgment was not legalised.\textsuperscript{673} Nonetheless, French authorities appear to have some discretion.

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

\begin{footnotesize}
\begin{enumerate}
\item Section 52 Private International Law Act; Section 53 Code of Administrative Procedure
\item § 24 Administrative Procedure; § 28 Consular Act; § 272 Code of Civil Procedure
\item Article 10 Draft Document Legalisation Law; Article 11 Draft Document Legalisation Law
\item Article 630 Code of Organisation and Civil Procedure
\item Section 134 Civil Procedure Code
\item Article 225 ZPP; Article177 ZUP
\item Article 323.2.I of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil; Case ES No 3 Supreme Court of 13 September 2005
\item Case SK No 1 District Court Presov of 19 April 2006
\item Case ES No 3 Supreme Court of 13 September 2005
\item Case FR (not reported in case notes) Cour de Cassation 14 February 2006
\item Case FR (not reported in case notes) Cour de Cassation of 8 November 1853
\item Case FR (not reported in case notes) Court of Paris of 29 June 1966
\end{enumerate}
\end{footnotesize}
necessary; for example, an explicit confirmation by the embassy abroad (Cyprus, Finland\textsuperscript{674}, Lithuania\textsuperscript{675}, Sweden\textsuperscript{676}). Conversely, the non-compliance with the Apostille formality does not automatically prevent the acceptance of the foreign document.

At common law, the general rule is that registers or certified extracts kept outside England and Wales are accepted as authentic when it sufficiently appears that they have been kept under the sanction of a public authority and are recognised by the tribunals of their own country as authentic records.\textsuperscript{677} The certification by means of an Apostille may assist in providing the necessary proof in this regard, 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.

**xiv** The effect of the Apostille certificate

The Convention attributes certain effects to the certification of a Public Document by means of an Apostille. Literally the Convention states: “when properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears” (see Article 5 of the Convention).

Prior to the adoption of the 1961 Convention, there were certain countries (Denmark, Germany, Great Britain, Ireland, Norway, Sweden and Switzerland) where legalisation had or could have a more far-reaching effect than merely proving the authenticity of signature, capacity, and seal or stamp. In those countries, the process of legalisation by diplomatic or consular agents involved also the certification of (1) the competence of the public officer or authority signing the document under the \textit{lex magistratus}; and in some cases even (2) the formal validity of the official document under the \textit{lex loci actus}.

Having regard to the different meaning of legalisation between states, the drafters of the Convention decided to exclude the wider effects of legalisation, i.e. certification of competence and formal validity, from the scope of the Convention. Accordingly, the Apostille certificate does not prove the competence of the public authority who signed the underlying public acting in a particular capacity, nor the fact that the underlying document was drawn up in accordance with the formal requirements that apply in respect of the particular document.

Both the question of competence and the question of formal validity remain principally unresolved under the Convention and must therefore be answered in accordance with the law deemed applicable by the

\textsuperscript{674} The National Rapporteur indicates that in specific situations, such as public registration, legalisation of a foreign document is generally considered to be adequate proof of the document’s authenticity, see Section 10 of the Population Information Act (507/1993).

\textsuperscript{675} Article 203 Code of Civil Procedure

\textsuperscript{676} Chapter 35 Section 1(1) Code of Judicial Procedure

\textsuperscript{677} Section 7(2) Civil Evidence Act 1995; Phipson on Evidence 32-67
judicial or administrative authority to which a Public Document certified by means of an Apostille is presented.

The effect of an Apostille certificate as to evidence can be considered in two ways: firstly, in terms of proof, i.e. for which elements of proof can an Apostille certificate confidently be admitted into evidence? Secondly, in terms of evidential value, i.e. how strong is the proof for which the Apostille is admissible into evidence?

1) The proof provided by the Apostille certificate

   a) Proof of the particulars on the Apostille certificate

First, the Apostille certificate constitutes certifies (1) the identity of the (public official at the) Competent Authority that executed the Apostille certificate itself; (2) the signature and stamp of the Competent Authority; (3) the place of execution of the Apostille certificate; and (4) the date of execution of the Apostille certificate; and (5) the number under which the Apostille certificate was registered in the Apostille register.

Taken together, these elements of proof are aimed at enabling the official or person who receives a document with an attached Apostille certificate to be confident in the authenticity and origin of the Apostille certificate.

b) Proof of certain particulars on the underlying Public Document

Second, in relation to the underlying Public Document the Apostille certificate certifies (1) the country of the document’s origin; (2) the identity of the signatory of the document; (3) the capacity of the signatory; and (4) the identity of the seal or stamp on the document (if any).

These elements of proof are aimed at enabling the official or person who receives a document with an attached Apostille certificate to be sure about the authenticity of certain important aspects of a foreign Public Document, such as mentioned, as well as the document’s country of origin, the identity of the signatory of the document, the capacity of the document’s signatory, and the seal or stamp on the document. Taken together, these elements of proof enable such people to be reasonably confident about the authenticity and origin of the Public Document itself.

c) Proof of the capacity in which the person signing the document has acted
The Apostille formality replaced the legalisation formality “by which the diplomatic or consular agents of the country in which the document has to be produced certify (…) the capacity in which the person signing the document has acted (…).” (see Article 2 of the Convention).

The expression “capacity in which the person signing the document has acted” as used in the Convention is easily misconstrued as referring to the competence of the person to perform the act that is contained in the document. As will be explained below, this interpretation is incorrect and can lead and has led in practice to unwarranted effects granted to the Apostille certification.

i) **Capacity does not mean competence**

The meaning of the term must not mistakenly be taken to refer to the powers of public authority or competence of the person signing the document to perform the legal act contained in the document or the competence to execute the Public Document in question - compare: “compétence” (French), “Befugnis” (German), “bevoegdheid” (Dutch), “competenza” (Italian).

The Convention’s Explanatory Report states to this end: “Obviously (…) the expression capacity cannot be understood in the sense of competence, from which it is quite distinct moreover in legal terminology” (emphasis added).

ii) **Capacity refers to the identity of the document’s signatory**

The term “capacity” as used in the English version of the Convention is translated in other language versions as a legal term that refers to the identity in terms of the official status or credentials of the person signing the Public Document - compare for example: “qualité” (French), “Eigenschaft” (German), “hoedanigheid” (Dutch), or “titolo” (Italian).

This understanding of the term is confirmed when we consider briefly the background of the Convention. Prior to the adoption of the establishment of the Convention, only a few states used the legalisation formality for the certification of the competence of a document’s signatory under the law by which his or her powers of public authority were attributed (lex magistratus), for example Denmark, Germany, Great Britain, Ireland, Norway, Sweden and Switzerland.

In the majority of states, however, legalisation did not confirm the competence of a document’s signatory at all – or the document’s formal validity for that matter. When legalising a foreign document the diplomatic agents and consular officers of those states merely verified the authenticity of a document’s signature and the credentials of the document’s signatory.

---

678 Y Loussouarn Explanatory Report on the 1961 Hague Apostille Convention
With a view to such differences in the scope of the effect of legalisation, the drafters of the Convention decided to exclude what they considered – in accordance with the comparative report of Droz - the “wider effects” as accorded in some states to legalisation, i.e. competence and formal validity, from the scope of the Convention.

It is against this background that the meaning of the expression “capacity in which the person signing the document has acted” is to be understood. In summary, the expression should thus be taken to mean: “the identity of the person signing the document”.

Consequently, the attachment of an Apostille certificate proves the identity of the person signing the underlying document, but does not warrant the assumption that the signatory of the document underlying the Apostille had the necessary powers to perform the act contained in the Public Document.

Accordingly, the Apostille certificate does not prove the competence of the public authority who signed the underlying public acting in a particular capacity, nor the fact that the underlying document was drawn up in accordance with the formal requirements that apply in respect of the particular document.

Accordingly, a person or public authority who receives a foreign document attached with an Apostille can not confidently assume as a result of the Apostille certification that the foreign document in question was executed by an authority competent to complete the act contained in the document, nor that the document produced is formally valid. The Apostille certificate was not designed to warrant competence and formal validity.

a. Example

The difference between the capacity and the competence of a public authority, as far as the Convention is concerned, can be illustrated with reference to the English case discussed before in which the British Competent Authority (FCO) was sued for certifying the signature and capacity of a Scottish notary public who was competent in Scotland, but not in England where he had actually executed the document.

The court held in its (interlocutory) judgment that the FCO had unjustifiably issued an Apostille certificate since the Scottish notary public lacked the competence to act as a notary in England. No doubt existed in the case whether the signature as it appeared on the document was genuine or whether the signatory of the document was actually an authorised notary public.

In order to comply with the requirements under the Convention, Competent Authorities must verify, before issuing an Apostille, whether the signature as it appears on a document is genuine and whether the signatory acted in his official capacity. Accordingly, the Competent Authority must ensure that it is adequately equipped to carry out its tasks under the Convention. In general the Competent Authorities
keep an up-to-date register of specimen of signatures and information on the identity and credentials of the signatories.

Arguably, therefore, the reasoning of the court leading to its conclusion is incorrect. Questions of competence and formal validity are outside the scope of the Convention. Consequently, the FCO cannot be taken to warrant either the competence of the notary public or the formal validity of the document he executed when issuing an Apostille.

iii) The evidential value of the Apostille certificate

The drafters of the Convention considered three options for the determination of the evidential value of the Apostille certificate in respect of the attestations it contains. Arguably, the least attractive option was eventually adopted: the Convention contains no express provision on the evidential value of the Apostille certificate. Accordingly, the evidential value of an Apostille certificate issued abroad must be determined in accordance with law of the country where the Apostille is produced as proof, including, where appropriate, its conflict rules.

a. Option 1: Substantive provision on evidential value

The first option was to determine the evidential value of the Apostille certificate expressly in the Convention. The rule contained in the Convention would stipulate that the certificate is to be deemed authentic, subject potentially to a procedure in proof of forgery of the document or simply until the contrary is proved. This option enjoyed support with a view to the legal certainty it provides. Nonetheless, it was eventually discarded because certain Member Countries of the Hague Conference were unfamiliar with procedures in proof of forgery of documents.

b. Option 2: Uniform conflicts rule on evidential value

The second option that was considered was to harmonise the existing conflicts rules of the Contracting States in order to ensure decisional harmony as regards the applicable law to determine the evidential value. The rule in the Convention would stipulate, for example, that the evidential value of the Apostille certificate would be governed by the law of the country where the document was executed. However, this option was also considered too ambitious, as the differences between the conflicts of laws systems of the Member Countries were too great to bridge by means of one simple harmonised rule.

c. Option 3: No rule on evidential value

The last option was not to expressly provide for a rule in the Convention on the evidential value of the Apostille and to leave the matter to be determined in accordance with the law deemed applicable in the country where the Apostille is produced.
As already indicated above, this last solution was ultimately adopted: the Convention contains no express provision that determines the (law applicable to the) evidential value of the Apostille certificate.

Consequently, the evidential value of an Apostille certificate issued abroad is to be determined in accordance with law of the country where the Apostille is produced as proof, including, where appropriate, the conflict rules of the country in question.

2) The proof provided by the Apostille certificate

a) Proof of the authenticity of the underlying document

The authenticity of a document’s signature must be distinguished from the authenticity of the document itself. This is especially true in cases where the document that is certified by means of an Apostille consists of several pages and only the last page of the document is signed.

Even in cases in which a Public Document that consists of several pages that have all been signed, the Apostille certification will only concern the signature on the last page of the document. The issuance of multiple Apostilles would be required to certify the authenticity of the signatures on the individual pages of the document.

Naturally, the idea behind the Apostille formality (i.e. certification of the underlying document’s signature) is to instill the authority that receives the document and the attached Apostille with trust as regards the Public Document’s authenticity. Nonetheless, it is important to appreciate that full and unconditional trust in this regard is not warranted under the Convention.

b) Proof of the legal status of the underlying document

The Apostille does not have the effect of elevating the status of a document that is not a Public Document under the law of its country of origin. If, in a given case a document is apostilised, the state where the document is produced therefore retains the right of showing that the document in question is not in fact a Public Document within the meaning of the country from whence it comes.

The certificate does not have the quality of transforming the nature of the document and making it a Public Document if it is in reality a document signed in a private capacity. The state where the document is produced thus retains the right of showing that it is not in fact a Public Document within the meaning of the law of the country from whence it comes.

c) The probative weight of the underlying document
Besides not providing for the probatory force of the Apostille itself, the Convention also does not specify the probatory force to be accorded to the Public Document certified by means of an Apostille with regard to the authenticity of the act of public authority it contains. The evidential value of the Public Document is to be determined in accordance with the law indicated by the conflict of laws rule of the Contracting State of the document’s destination.

(xv) The effect of an Apostille certificate in the Member States legal practice

Generally, it was indicated in the national reports, that the effect of Apostille certificates is comparable to that of a Public Document. Some interesting Spanish cases can nonetheless be reported here.

In Spanish proceedings, an Apostille certificate may produce secondary effects in establishing presumptions as regards the authenticity of the signature that was certified by means of a certificate that was subsequently certified by means of an Apostille.

An example is a case in which the signatures on a power of attorney were certified by an American notary public whose signature was subsequently certified by the clerk of a State Supreme Court whose signature was ultimately certified by means of an Apostille by the Competent Authority.679

In other words, the Spanish court assumed the authenticity of the notary public’s signature on the basis of the fact that the signature of the public authority certifying the public notary’s signature (the State Supreme Court Clerk) was certified by means of an Apostille.

The evidential value attributed by the Court to the Apostille, although a result of logical reasoning that takes into account the chain of subsequent certifications, appears to effectively extend to the substance of the document certified by means of the Apostille in question: the Spanish court assumes that the contents of the document certified by means of the Apostille are accurate. This effect of the Apostille was not foreseen by the Convention.

In another Spanish decision, the court in question considered the effect of an Apostille certificate to be limited in terms of proof to those elements the Convention explicitly provides for. The court further considered that it would be dangerous and excessive to think that a document that is certified by means of an Apostille requires no examination whatsoever as regards the authenticity of the signature, seal and/or stamp on the Public Document and the capacity in which the signatory of the Public Document acted.680

679 Case No 4 Audiencia Provincial de Asturias of 17 February 2000
680 Case ES No NEW Juzgado de Instrucción de Madrid of 20 May 1983
(xvi) **Point for reflection in the EC context: self-authentication (US)**

Under the Supremacy Clause of the Federal Constitution (Section 2 of Article IV), the terms of the Apostille Convention are considered the supreme law of the land to which all state law provisions must conform.

The clause reads: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This clause has therefore led to the revision of several states’ practices. For instance, the Attorney General of California has issued several opinions regarding the interaction of the Apostille Convention with state law.

In one such opinion, the Attorney General was asked to comment generally on whether the provisions of the Hague Convention superseded the California Civil Code. In answering affirmatively, the Attorney General cited the Supremacy Clause and denounced the state practice of refusing to recognize an Apostille as a means of certification of a foreign notary’s signature.

Furthermore, in an opinion delivered in 1988, the Attorney General was confronted with the compatibility of a California law which required certification of a document to be in English before it could be recorded in that state.

The Attorney General concluded that such a law was incompatible with the Apostille Convention and that a document in English accompanied by a non-English Apostille may be recorded in California without an English translation of the Apostille. However, it was specified that this situation is to be differentiated from that in which the underlying document is not written in English. In such cases, California is entitled to require an English translation based on its own law. The Apostille Convention only mandates that the Apostille be recognised regardless of the language in which it is written. The Attorney General once again based his conclusion on the Supremacy Clause.

Similarly, the Attorney General of the state of Maryland was asked to deliver an opinion regarding the practice in Maryland of refusing to accept Apostilled foreign birth certificates as proof of age for driving license or identity card applications. The Attorney General stated that the presence of a properly executed Apostille is conclusive with respect to authenticity of the foreign birth certificate and the state

---

681 Opinion No 81-1213 of 19 March 1982  
682 Opinion No 88-802 of 21 December 1988  
683 89 Op Att’y Gen 60 of 22 March 2004
Motor Vehicle Administration (MVA) may not reject such a certificate based on concerns relating to its authenticity.

The MVA may, however, reject such a certificate if it has a rational basis for doing so, other than one relating to authenticity. This is because the Hague Convention does not govern the legal effect of the Public Documents within its scope, but rather only relates to recognition of authenticity.

Maryland’s policy requires that applicants for a driving license or identity card, who are born in another country and who are not already licensed to drive, provide certain forms of identification, of which a foreign birth certificate is not one. Therefore, refusing to accept the Apostilled birth certificate based on this policy does not offend the Apostille Convention. It would, however, be contrary to the Convention to refuse the document based on a belief that it is not authentic.

4.04 Difficulties associated directly or indirectly with legalisation

(a) Introduction

In its research, the Institute has identified a number of difficulties directly or indirectly associated with the legalisation formalities. Consequently, the National Rapporteurs were asked to review whether these difficulties applied in their Member State and to provide the Institute with other examples of difficulties that had not yet been identified. Below, we discuss both general difficulties and difficulties specific to the operation of the Hague 1961 Convention, national legalisation procedures, and those relating to specific documents.

(b) General difficulties

(i) Legal diversity

Legal diversity is derived from the many potential legal sources of documents, i.e. European, international, or national. This may create confusion amongst the users of Public Documents, but also amongst public authorities as to whether the correct formalities have been applied. The fact that this has been a problem was specifically confirmed by France, Germany, Hungary and Portugal.

Effective use of documents across borders is also hindered by the diversity of applicable private international law rules among the States which determine the substantive effect of a Public Document. These rules are often conflicting as between the State of origin and the State of receipt. Similarly, there
may be conflicts regarding the procedural effect of a Public Document in terms of evidentiary value and recognition or enforcement.

For Hungary, the problem of legal diversity is associated with the different relationships with foreign countries, i.e. those countries with whom Hungary shares a bi- or multilateral agreement, EC countries, those with whom they share a reciprocal agreement, and those countries with whom they share no relationship. Anyone wishing to use a foreign document abroad will have to first establish what sort of relationship their home country has with the country of destination so that he or she may be aware of what will be required of them.

(ii) Heterogeneity of Public Documents

The meaning of the term ‘Public Document’ covers a multitude of different documents with diverse legal functions across the Member States. This often creates problems concerning an authority’s recognition of a document based on the fact that in that particular Member State, the document either does not exist, or no equivalent document can be identified. Member States that specifically cited this as a problem were the Czech Republic, Greece, Hungary and Ireland.

For instance, in Ireland a driver may lawfully drive a car for a number of years having only a provisional license awarded to him or her upon completion of a written exam but without having passed a driver competency exam. The Irish rapporteur is unaware of any equivalent license in the other Member States.

The Irish rapporteur also provided us with examples of foreign documents for which there are no equivalents in Irish law: the national identity card and the certificate de coutume/certificate of nulla osta which confirms that a party is free to marry.

The Hungarian Rapporteur noted that perhaps the heterogeneity of documents is a natural consequence of the heterogeneity of legal relationships in such a complex world and commented that perhaps this is more a problem of bureaucracy in general rather than legalisation.

(iii) Heterogeneity of public authorities

Another difficulty derives from the large variety of public authorities that execute these different Public Documents. This may result in a situation where the domestic public authority is unknown in the state of destination of the document. This difficulty was explicitly cited by France and Portugal in their reports. The French rapporteur expressed the fact that there are ambiguities regarding the respective competence of the Ministry of Justice and the Ministry of Foreign Affairs.
(iv) **Heterogeneity of competent authorities**

States independently designate those authorities competent to handle legalisation or any equivalent formalities. This may lead to users of documents being unaware of which authorities are competent in a given case. Germany, Ireland, and Portugal each cited this as a difficulty within their Member States. Germany cited this as a problem specifically with regard to diplomas.

In Ireland, this is not as great a problem as it would have been years ago before the internet improved the citizen’s ability to access information regarding formalities and the relevant authorities. The rapporteur cited the Irish Citizen’s Information website ([www.citizensinformation.ie](http://www.citizensinformation.ie)) as an example of such a resource and suggested the creation of a comparable EC website providing information regarding each of the Member States similar to the European Judicial Atlas.

(v) **Diversity of public administration systems**

The systems of public administration differ from one state to another. This implies that domestic documents may be unknown abroad, or may have a different value or effect. It may further imply that the equivalent foreign public authority to a domestic public authority is not known. Furthermore, structural and cultural differences may exist in practice leading to differing standards regarding evidentiary value or reliability of Public Documents. Those countries that explicitly cited such diversity as a problem were Germany, Greece, Ireland and Poland.

Regarding Ireland, the rapporteur pointed out that learner drivers are not obliged to undergo any specified tuition or driver training and so the licensing requirements are clearly less onerous than those applicable in some other Member States. Therefore, it is arguable that an Irish license has a lesser evidentiary value in terms of proof of competence and experience.

(vi) **Diversity of public registration systems**

Because public registration systems differ from one state to another, it is possible for registrations and extracts to be unknown abroad or have different value or effect. Similarly, differences in standards and quality may exist in practice resulting in differing levels of reliability. Greece and Ireland specifically pointed to this as a problem in their Member States. For instance, the Irish rapporteur stated that there is no Irish equivalent to the German system of registration and de-registration of residence in its different regions.
(vii) Diversity of authentication and substantive verification systems

The systems for ensuring and proving the authenticity and reliability of Public Documents differ from one state to another; for example, adversarial systems take a different approach compared to non-adversarial systems. As a result, the evidentiary value of Public Documents differs from state to state. Greece specifically cited this as a problem within the country.

(viii) Diversity of languages

Germany, Hungary, Portugal, and Poland each specifically cited difficulties relating to languages such as an authority’s inability to understand documents in foreign language. This misunderstanding may result in the authority being unable to ascertain or rely on the document’s contents. Language diversity also makes communication between authorities difficult, as well as between authorities and users of documents. Also, it may be difficult in practice for users to obtain translations of the documents in question. The Hungarian Report noted the costs of translations and stated that obtaining translations from a service which holds the monopoly in that industry can be very costly and often time-consuming if the individual in need of the translation is from a small village.

(ix) Unclear which documents are required abroad

The Irish rapporteur specifically cited this difficulty and referred to the general flexibility of Irish law and practice. The rapporteur reported that such flexibility can lead to uncertainty in terms of production of documents. Because it is often a matter of discretion for the relevant official, a Member State national may be asked to produce a document which another Member State national was not asked to produce. For instance, an applicant for a driving license may be asked to produce any of a range of documents to prove his or her identity.

The Hungarian Report also indicated that although in some cases public knowledge regarding required documents is quite good, in several other cases not only is this information lacking, but it is also difficult to obtain, especially if the country is ill-equipped technology-wise. The Hungarian Report also reiterated the fact that information is not easily accessible by private clients especially in rural areas where there are no internet capabilities.

The Dutch National Report indicated that competent authorities have frequently noticed that Dutch nationals having to submit Dutch documents in another Member State are not adequately informed as to what documents they need, so they often return to the Dutch authorities several times before the legalisation can be effected.
The Swedish Report also confirms that it is up to the individuals themselves to discover what the foreign authority requires and this involves a lot of uncertainty that may result in unnecessary costs.

(x) Incorrect implementation of formalities

Correct implementation requires coordination in order to ensure compliance. However, ensuring uniform implementation that is also consistent with the appropriate legal and practical requirements is difficult. As indicated in the National Report for Ireland, the District Court Rules implementing Regulation (EC) No. 1348/2000 may go beyond the scope of the EC Regulation. There is no such difficulty with the Circuit Court Rules. These rules are issued by two separate rules committees and it is arguable that a greater level of coordination between the two committees might have avoided this difficulty. However, in practice, an Irish court required to interpret the District Court Rules would do so taking the requirements of the EC Regulation into account.

The Finnish rapporteur indicated that there are problems regarding application of Regulations as well. The rapporteur said that Regulation 44/2001 is applied varyingly in that often the certificates required by the Regulation are not always attached to the documents.

The Hungarian Report noted that there is often a lack of legal knowledge by rural public administrative bodies regarding formalities and so they are often incorrectly implemented.

(xi) Lack of information

Users of Public Documents experience difficulties due to a lack of information, or lack of access to information concerning: (1) which documents are required abroad; (2) the relevant authorities at home and abroad; and (3) the exact legal and practical requirements they have to fulfil in order to use their documents abroad. This difficulty was specifically cited by Germany, Ireland, Portugal, and Latvia.

(xii) Lack of eGovernment

The domestic systems of the Member States as regards legalisation or equivalent formalities remain predominantly paper-based. This also relates to the fact that the public administration and registration is often also still paper-driven. The need for a foreign Public Document may arise anytime and anywhere; the possibilities of eGovernment are at present not sufficiently developed to accommodate modern times.

The Irish rapporteur indicated that “while there is certainly further scope for development of ‘eGovernment’ in Ireland, Irish public administration has made considerable use of the possibilities offered by electronic communication and storage of information. For example, tax returns may be filed
electronically in Ireland and most other tax-related applications can now be processed electronically (see www.revenue.ie). The Companies Registration Office also allows for online filing (see www.CRO.ie). In other cases, where online processing is not a possibility, the relevant administrative forms are often available online.”

In conjunction with this topic, the Hungarian Rapporteur noted that it is not so much a problem of lack of eGovernment, but rather lack of technical (computer-oriented) skills on the part of the users that presents an obstacle. This difficulty was also cited by Finland, France, and Greece.

(xiii) Lack of trust in foreign public authorities

Both France and the Netherlands indicated that this is specifically a problem as regards Public Documents from third countries. The Dutch rapporteur stated that often, in practice, legalisation rules are only applied to documents coming from certain third countries.

(xiv) Lack of trust in the reliability of foreign public registers

Hungary cited in particular a problem with Germany where on several occasions Hungarian social security documents were ignored by the German police who then charged and prosecuted Hungarian workers with social security deception, despite the fact that the Hungarian workers were in possession of the requisite certificates.

(c) Difficulties concerning the Hague 1961 Convention

(i) General

1) Requirement of an Apostille while EC law or international treaty excludes formalities

It appears that some EU Member States insist on the Apostille formality as regards certain documents/countries while EC or other Treaty requirements explicitly abolish the formality. The National Report for the Czech Republic indicated that sometimes such difficulties arise regarding outgoing documents and a requirement that they receive an Apostille before recognition. The Hungarian Report notes that even though integration moves further, it will still be the case that small local administrative officials will be unaware that an Apostille is not required but demand one nonetheless.
2) **Unfamiliarity of the administering public authorities with the existence and effect of the Apostille Convention**

Difficulties may arise in terms of officials in the national public authorities being unaware of both the existence and requirements of the Apostille Convention. The National Report for Estonia cited this as a problem of notary offices in Estonia. Similarly, the Greek Report stated that in some cases, the authority’s unfamiliarity with the Convention may lead to long delays while the authority determines the applicable formalities. The Hungarian Report also cited complaints relating to certain registries’ unawareness of the Convention and consequent requirement that certain documents be legalised despite its applicability.

3) **Conflicts between formalities enforced and legal and practical requirements**

Some national public authorities consider the issuance of an Apostille unnecessary due to the existence of EC or other Treaty requirements abolishing any formality vis-à-vis another state, while apostillisation is still required in practice in the state of destination.

4) **National legislation does not adequately provide for all aspects of the Convention**

Sometimes national legislation only provides coherent rules concerning only part of the Convention, such as rules relating to incoming, but not outgoing documents. Ireland and Portugal specifically cited this as a difficulty experienced in their Member States.

5) **Applicant insists on Apostille even though not required under the Convention**

The Slovak Report provided a common example whereby an applicant insists on the attachment of an Apostille on a “Slovak” Public Document even though this document belongs to the category of documents which are excused from the requirement under the Convention.

(ii) **The Apostille**

1) **Fraud-resistance**
Often the Apostille is not viewed as a secure, fraud-resistant document either by the national authorities or by the individual users of Public Documents.

The Cyprus National Report indicated that even though the register is freely accessible to discover the origin of an Apostille, it does not guarantee that the Apostille itself is not false. Greece also cited the Apostille’s fraud-resistance as a concern in that country.

2) Acceptance

The form used by the different competent authorities for the Apostille is not always accepted by the (authorities of the) receiving country. This sometimes requires the document to be drawn up in a particular form.

The French rapporteur stated that in France, challenging foreign Public Documents is quite common, especially with regard to documents from third countries. The difficulty with acceptance of the Apostille was also cited by the German, Greek, and Slovak National Reports.

3) Languages used

As discussed above under the General Difficulties section, the lack of uniform language standards may present problems with acceptance as well as communication between the parties involved.

The Greek rapporteur indicated that many countries (Greece also being one of them) complete the Apostille/allonge forms in their official languages alone; this sometimes leads to a request by the authority before which the Apostillised document is produced for a translation of the Apostille/allonge. Translations are costly and they may lead to lengthy delays.

The Cyprus National Report cited the problem of certain countries only issuing Apostilles in their language. This necessitates a translation by the Press and Information Office of the Republic of Cyprus and leads to delays. Problems regarding languages used were also cited by Finland, Germany, Portugal and the Slovak Republic.

(iii) Documents for which an Apostille is issued

1) Practice of issuing Apostilles for documents which are not signed by officials
The United Kingdom has indicated that in practice, Apostilles are issued for documents that cannot for the purpose of the 1961 Convention, be considered as Public Documents. For instance, Article 1(d) of the Convention allows the issuance of an Apostille for an official certification of documents signed by persons in their private capacity. Official in this sense should be taken as to concern the specifically attributed and warranted power of public authority of the person certifying the document. It follows from this that the question whether a solicitor can certify a private document, and the same is in principle true for a notary for that matter, is to be answered in accordance with the statutory mandate of the certifying person in question (the competent authority for the UK takes a more liberal approach, although it seems in conformity with the explanation given by the Hague Conference’s Permanent Bureau).

2) Material scope of the Apostille Convention is not interpreted uniformly

The United Kingdom has also pointed out that the material scope of the Convention is not interpreted uniformly. Some countries issue Apostilles for documents which would not be apostillised by other countries, as it is unclear whether the underlying document can be considered a Public Document in the sense of the Convention.

The British rapporteur referenced the case of non-accredited schools in the context of online universities and stated that the UK Foreign and Commonwealth Office has a policy of issuing Apostilles relating to academic documents only if they were issued by academic institutions accredited in the United Kingdom and regardless of whether the document qualifies as ‘public’ under the Hague Convention.

3) Refusal to attach an Apostille to documents within the scope of the Convention

The Slovak rapporteur provided the example of a foreign authority refusing to apply an Apostille to the relevant document based on its belief that Member States should mutually trust one another despite the existence of the Convention which allows one to insist on the fulfilment of such a formality.

4) Increasing volume of documents

The number of documents used cross-border in the EU is high and can only be expected to increase further in tandem with the increase of inter-state movement. The suitability of the Apostille formality must be critically assessed in light of the increasing demands. Furthermore, for large volume documents competent authorities may be required to repeat the formality many times, depending on their practice.
(iv) **Competent authorities**

1) **Understaffed and/or unqualified authorities**

National public authorities that are understaffed and unqualified will often lead to delays as well as refusals to accept foreign Public Documents and the attribution of differing levels of value to those documents. The United Kingdom and Greece, and Hungary have expressed this as a relevant problem in their Member States. Germany has also cited the “insufficient training of staff and/or inefficient organisation of administrative structures” as a problem in that Member State.

2) **Unclear how the lists of public officials and the specimens of signatures and seals are kept up-to-date**

The competent authorities recognise and confirm by means of specimens held on file, the seal and signature of the public official who allegedly executed the Public Document. The question is whether there are sufficient measures in place to ensure that the competent authorities’ system of specimens is kept up-to-date to prevent situations in which Apostilles are issued for documents from public officials who no longer have the appropriate credentials. France, Greece, Hungary and the United Kingdom each cited this as a difficulty.

3) **Competent authorities are not easily accessible**

The competent authorities for the Apostille Convention are designated by states independently. This means in practice that it differs per Member State which is the competent authority to turn to and where the authority is located. Furthermore, people in countries where only one central authority is available experience inconveniences due to long travel distances and limited opening hours. This was cited as a problem by Hungary in the National Report.

   a) **Note on the surveys conducted in the course of the study**

The fact that often in order to obtain an Apostille, an individual must travel to the country from which the document originated was cited as a source of practical difficulties.

4) **Difficult to identify competent authorities in foreign states**

The Finnish rapporteur remarked that although in principle there is a list of competent authorities under the Apostille Convention available at the hcch web site, in practice it is sometimes difficult to identify the
exact competent authority regarding a specific issue. Spain’s report also made reference to a complaint that it was often difficult to determine whether the issuing authority was indeed the competent authority.

(v) The Apostille formality

1) Too slow and cumbersome for today’s business needs

Largely due to many of the aforementioned difficulties, such as translation issues, communication problems, and lack of awareness of the required formalities, obtaining an Apostille may prove to be a lengthy process. Cyprus, Hungary, and Luxembourg expressly indicated that this is the case in their Member States. Spain also indicated that sometimes the process of obtaining an Apostille may take longer than the national legalisation procedure.

2) Expensive couriers are often needed to deliver and collect documents

The United Kingdom indicated that obtaining an Apostille may prove a difficult process for an individual user of Public Documents in terms of delivery and collection of documents due to the somewhat extensive costs associated with the necessary couriers.

3) Costly

The Netherlands, Poland and the United Kingdom cited the Apostille procedure as being too expensive. The apparent difference in administrative charges imposed by competent authorities could be an indication for some countries that formalities are used for profit-making by the Government.

4) Apostilles are not placed on documents in a uniform and secure way

The Spanish rapporteur highlighted the fact that although the Convention provides a model format, its signatories have adopted various formats which may entail problems relating to recognition of the Apostille.

a) Note on the surveys conducted in the course of the study

Some respondents to the surveys conducted in the course of the study cited the physical nature of the Apostille itself in that it failed to remain attached to the document.
5) **Human factor-related errors**

Arguably the Apostille procedure involves too many interventions which increase the risks of human errors. Cases have been reported where Apostilles were attached to the wrong document or where the capacity of the public official was wrongly described on the Apostille. Germany cited this as a difficulty within the Member State.

6) **Security regarding signatures**

The methods used for authenticating a signing public official’s capacity may often be considered inadequate and/or insecure by a receiving Member State. The Greek rapporteur confirmed that this is a difficulty experienced by Greece.

7) **Formal requirements for issuing Apostilles are followed to different levels of precision**

The Irish rapporteur explained: “some foreign states are more particular than others regarding the formalities. This is not so much a case of the Irish authority following different levels of precision, as it is a case of foreign authorities having differing requirements to which the Irish authorities must respond”. Germany also indicated that this is a concern for them as well.

The Slovak Report commented that sometimes the receiving country requires the Apostille to be affixed to the document a certain kind of way. For instance, a full set of corporate Apostille documents sent to Kazakhstan must be bundled and sealed with confirmation of the number of included pages.

**(vi) The Apostille register**

1) **Lack of adequate records of the issuance of Apostilles**

Doubts exist as to whether competent authorities keep adequate records of the Apostilles they issue. Adequate in this sense encompasses both 1) existence and reliability of the register, and 2) usability in accordance with its function and purpose.

The Hungarian Rapporteur commented that accessing the Apostille Register is quite difficult and that although the Ministry of Justice offers several services to citizens which are easily located, it was impossible for the Rapporteur to locate the Register in this instance.
(vii) The use and effect of Apostilles

1) Lack of understanding of the legal purpose and effect of an Apostille

It is often the case that either the competent authorities, the individual users of Public Documents, or even national judicial authorities are unaware of legal purpose and effect of an Apostille which may prevent the Convention from being applied correctly.

The Polish rapporteur indicated a lack of common position regarding the evidentiary force of foreign documents in administrative proceedings and believes that in general, more emphasis should be placed on research and education in the field of legalisation.

2) Formal requirements of Apostille are scrutinised with differing levels of meticulousness

Certain Member States are very strict as regards the formal requirements in relation to the issuance of an Apostille. These formal requirements relate both to the form/format of the Apostille and to the authority competent to issue it. Again, as indicated by the Spanish rapporteur above, some Contracting States have chosen to use a form other than that provided for in the Convention which may affect the level of scrutiny applied to the Apostille by the receiving State.

The Irish rapporteur indicated that the competent authority has encountered such a problem; for example, some foreign states are more particular about compliance with formalities than others.

(d) Difficulties concerning legalisation under domestic law

1) Delay of obtaining legalisation

Several Member States indicated that the legalisation process in their countries could be a lengthy process. For example, the Cyprus National Report indicated that the national legalisation procedure involves a chain of certifications that can delay the cross-border use of Public Documents. With regard to outgoing documents, in cases where the receiving country has no consulate or similar entity within Cyprus, the process is even more time-consuming as not only must a chain of certifications occur, but the document must be sent to a neighbouring country where a consular agent of the receiving country resides.

The Danish National Report confirms that where marriage or baptismal certificates are required abroad, the Danish three-step legalisation procedure is especially cumbersome and causes great inconvenience.
to the parties. Similarly, a wide range of Arabic states require legalisation of export documents e.g. commercial invoices and certificates of origin. This is done at the particular country’s Embassy or Consulate in Denmark, if they have representation there. Yet, the closing of the Libyan representation in Copenhagen has led to the impossibility of making such legalisations.

The Irish report similarly indicates that some applications can be extremely time-consuming, especially in the case of foreign adoptions which requires stamping and signing each page in a “huge” pile of documents for each application.

Likewise, the National Reports from Hungary, Malta and Luxembourg indicate that national legalisation procedures can often be time-consuming.

2) **Costly**

Those Member States that have indicated that their national legalisation procedures are time-consuming, have also pointed out that such delays can be very costly as well.

3) **Unnecessarily onerous and complex procedure**

The Danish and Cypriot examples above regarding delay can also be cited as examples of onerous and complex legalisation procedures in the Member States. Similarly, the Slovenian rapporteur commented that often the legalisation process in Slovenia is too bureaucratic, requiring the applicant to complete too many forms and certificates.

4) **Language/translation issues**

As in the case of the Apostille Convention, there are often language/translation issues present in the national legalisation procedures.

The National Report from Cyprus confirms such findings, as does the Greek report which complains of the somewhat frequent problem of having to obtain translations before sending documents across the border.

5) **Lack of uniform requirements concerning incoming documents**
The Danish rapporteur confirms that the practical drawback of the national legalisation procedure relates to lack of legal certainty, as there no comprehensive standards regarding the legalisation of incoming documents in Denmark. Most of the time, the Danish authorities have discretion in this area.

Similarly, as discussed above, the flexibility of Irish law means that very often there is uncertainty as to the relevant standards in the situation of legalisation. Irish requirements vary depending on the situation and seem to leave no possibility for preparation in terms of legal certainty.

The Hungarian Rapporteur indicated that different legalisation conditions apply depending on the nature of the procedure in which a foreign Public Document is to be used. These conditions range from a strict requirement of not only legalisation, but also certified translations and consent by the supervising authority (Marriage Register entry) to no legalisation or translation requirements at all (e.g. legal aid procedure).

6) Lack of uniform requirements concerning outgoing documents

As discussed above, there is uncertainty as to which documents are required in the case of outgoing documents and that uncertainty may often lead to unnecessary use of the procedure and consequently, unnecessary costs.

7) Lack of trust regarding certain countries leading to invocation of special procedures

The German National Report indicated that special procedures are invoked with regard to certain countries which the German foreign office considers to lack orderly administration ("problemstaaten" or problematic countries). In such cases, rather than applying the regular legalisation procedures, Vertrauensanwaelte (liaison counsels) are used to verify whether the content of the document is correct. This procedure usually takes between three and six months and is very expensive. For some countries, specifically Iraq and Somalia, this procedure is not even available and hence the only way of having the document verified is through a sworn declaration.

In the Netherlands, legalisation used to be refused for “problem countries”; however, the policy on acceptance of documents from such countries has recently changed and it remains to be seen what practical changes will come about.
PART V. THE COMPATIBILITY OF LEGALISATION WITH EC LAW

5.01 Introduction

(a) The legal framework

The free movement provisions under EC law (Articles 18, 28, 39, 43, 49 and 56 EC) can be interpreted as prohibiting Member States from maintaining or introducing (indirectly) discriminatory measures or unjustified restrictions that constrain the interstate movement of goods, services, capital, employed or self-employed workers or, more generally, Union citizens falling within the scope of those EC provisions.\(^{684}\)

In relation to the free movement of workers, services, or the freedom of establishment, the development of the law of the single market has seen the progressive abandonment of the requirement that a national measure be discriminatory to constitute a restriction. Although it is not always easy to distinguish between indirectly discriminatory and indistinctly applicable measures, the Court does not require discrimination as a condition for triggering the application of Articles 39, 43, and 49 EC.\(^{685}\)

In cases such as *Gebhard*, *Alpine Investments*, *Bosman*, *Carpenter*, and *Commission v United Kingdom*, the European Court of Justice has found that even-handed measures may contravene free movement rules if they are, for example, "liable to hinder or make less attractive the exercise of fundamental freedoms"\(^{686}\), "directly affect market access"\(^{687}\), "are detrimental to the conditions under which a fundamental freedom is exercised"\(^{688}\), "or are liable to deter investors from other Member States (…) and, consequently, affect access to the market".\(^{689}\)

It is clear that the case law of the Court of Justice does not assimilate in all respects the free movement of workers, the freedom of establishment and the freedom to provide services: the Court continues to use

---

\(^{684}\) See in relation the entry and residence of persons Case 48/75 Jean Noël Royer [1976] ECR 00497 23

\(^{685}\) See for example Case C-76/90 Säger v Dennemeyer & Company Limited [1991] E.C.R. I-4221 (services); Case C-79/01 Payroll Data Services (Italy) Srl and Others [2002] ECR I- (capital)

\(^{686}\) Case C-55/94 Gebhard [1995] ECR I-4165 37


\(^{688}\) Case C-60/00 Carpenter [2000] ECR I-6279 39

\(^{689}\) Case C-98/01 Commission v United Kingdom [2003] ECR-I4641 47
various formulas in relation to the different freedoms. Notwithstanding the terminological differences, the formulas used are generally based on a market access rather than a discrimination criterion.

In the past, the Court has gone furthest in relation to free movement of workers but has been more cautious in cases involving freedom of establishment, and relatively restrictive in relation to cases concerning free movement of goods, where the requirement of discrimination still plays a decisive role as the result of the well-known decisions in *Keck* where the Court found that rules concerning selling arrangements only breach Article 28 EC if they discriminate against products imported from other Member States, and *Groenveld* where it held that non-discriminatory measures do not infringe Article 29 EC.

In light of the above, we can point out two ideas underlying the fundamental freedoms. The first is that discrimination on the ground of nationality should not occur in the internal market. This idea, expressed as a “principle of equality”, requires that comparable situations should be treated in the same way.

The second concerns the openness of a national market or a nation in general to outsiders. This idea implies unrestricted (market) access to be granted by the Member States to each other. More generally, both ideas concern the proper operation of the internal (economic) area common to all the Member States.

(b) Outline

In this part, we will evaluate legalisation requirements, which are applied by the Member States in respect of foreign Public Documents before they are accepted as authentic, in the light of the requirements of non-discrimination and market access that underlie the fundamental freedoms in the Treaty. First, the requirement of legalisation will be assessed as a measure that discriminates on grounds of nationality (discrimination) or on grounds that correlate closely with nationality (indirect discrimination).

Subsequently, the legalisation requirements will be assessed as a restrictive measure that is liable to hinder or make less attractive the exercise of fundamental freedoms (restriction). Lastly, we will consider the justification of legalisation requirements as a proportional measure with a legitimate aim (justification).

---

693 Joined Cases C-267/91 and C-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard [1993] ECR I- 6097
694 Joined Cases C-267/91 and C-268/91 Criminal proceedings against Bernard Keck and Daniel Mithouard [1993] ECR I- 6097
695 Case 18/78 P.B. Groenveld BV v Produktchap voor Vee en Vlees [1979] ECR 3409
5.02 Legalisation considered as a discriminatory measure

(a) The prohibition of discrimination in the Treaty

The key expression of the principle of non-discrimination in the Treaty occurs in Article 12 EC which reads: “Within the scope of application of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”. This prohibition has direct effect. The Article is subordinate: it applies “without prejudice” to other Treaty articles (i.e. it does not affect the express exceptions to free movement contained in the Treaty).

In the free movement context, within the scope of the individual free movement provisions, discrimination is (generally) expressly forbidden. Articles 39 (workers), and 43 EC (establishment), prohibit discrimination in their respective areas. Article 43 does not contain an explicit reference to the requirement, but it says that foreign self-employed persons must be able to set up businesses on the same terms as nationals. Article 49 EC (services) does not refer to discrimination either, but Article 54 EC – which is located within the chapter on services – says that any restrictions on services which have not yet been abolished must be non-discriminatory. Lastly, Article 28 EC (goods) does not allow discrimination based on the origin of goods (i.e. their “nationality”).

The discrepancies between the wording of the provisions prohibiting discrimination and the fact that provisions on free movement of persons are easier to link with discrimination on grounds of nationality or intrinsically linked with nationality than things like goods, establishment and services can cause some difficulty when considering whether a national measure qualifies as an indirect discrimination.

This may explain that the Court tends not to refer to discrimination as much in relation to goods, establishment and services as it does in relation to workers. Instead it uses the terminology of restrictions, which suits better the wording of the articles involved.

(b) The scope of application of the Treaty

Article 12 only applies “within the scope of this Treaty”. Therefore, a situation must be covered by another Treaty article before the prohibition contained in the article can be applied to it. If a situation is not covered by one of the free movement articles, then - unless there is another Treaty article covering it – it is not within the scope of the Treaty and accordingly, Article 12 of the Treaty does not apply either.
Conventionally, the concept of “scope of application of the Treaty” has been divided twofold: (1) the material scope of application of the Treaty (i.e. the matters the Treaty applies to); and (2) the personal scope of application of the Treaty (i.e. the persons the Treaty applies to).

It is necessary that a situation comes within the scope of application of the Treaty in relation to both aspects. For instance, for a situation to come within the scope of application of Article 18 EC, it must concern a citizen (personal scope) who exercises his right to move and reside (material scope) throughout the EU (arguably, territorial scope).

The known difficulty of defining clearly the material scope of application of the economic free movement articles, which has been further clarified in the Court’s case law, is also apparent in relation to the EU citizens’ rights of free movement and residence article.

For instance, Article 17(2) EC provides that citizens enjoy the rights and duties conferred by the Treaty. Citizens may, for example, move and reside throughout the EU (see Article 18 EC). This directly effective right implies that if a citizen exercises it, he falls automatically within the scope of the Treaty, which means that the prohibition of discrimination under Article 12 EC may be relied on. This results in a general right to non-discrimination, not limited to economic actions, which applies to all moving and residing citizens.

(c) Defining discrimination: intention and effects

There are two possible (different) perspectives that can be used when considering whether a rule is discriminatory on grounds of nationality; one can look at: (1) the intention of the body that made and enforces the rule; or (2) the effects of the rule. When looking at the former, it must be established whether this body aimed at excluding foreigners and favouring nationals. When using an effects-based approach, it should be considered whether the effect of the measure is that foreigners are excluded and nationals favoured.

In general, the Court's approach is to consider the effects of a rule and whether those effects appear discriminatory. The intention underlying a measure may play a background role; for instance, the exclusionary intentions of a Member State may be evident and this will no doubt influence the Court’s judgment. As a general rule, however, discrimination in free movement law is effects-based. Accordingly, the relevant question to ask is whether the measure under scrutiny tends to favour one nationality over another in terms of its effects.
(d) Defining discrimination: equal treatment

The basis of the requirement of non-discrimination is the idea that like situations should be treated alike (i.e. treated equally). Only relevant differences may be taken into account. In the EC context, the idea is that nationality is not a relevant criterion for decisions; for instance, if two persons (or goods, services, etc.) are alike but for their nationality, there is no justified basis for treating them differently.

Such a difference in treatment can be justified only if it is based on objective considerations which are independent of the nationality of the persons concerned and proportionate to the aim legitimately pursued by the national law.696

(i) Is the criterion for legalisation based on nationality?

We are dealing with a directly (overtly) discriminatory measure where the division by nationality is explicit in it. Such measures can only be justified by an explicit Treaty exception, or by confirmation that nationality is a relevant criterion for the decision being made.

For the application of legalisation requirements, however, the decisive factor is not the nationality of the user of the document or the origin of the good to which the document relates, but the origin (“nationality”) of the Public Document.

Irrespective of the nationality of their user or the origin of a good (or services and capital for that matter), 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 presumption of authenticity.

In other words, the criterion for the different treatment of domestic and foreign Public Documents is not based on a factor that links directly to the nationality of their user or the origin of goods, etc. Consequently, national measures that require the legalisation of foreign Public Documents can not be characterised as directly discriminatory measures.

1) A complicating factor: discrimination as regards the cost of the legalisation formality

Naturally, if a Member State charges a different rate for the same formality depending on the nationality of the applicant, the rule on the basis of which this difference in treatment is based is directly discriminatory

---

696 Case C-258/04 Office national de l’emploi v Ioannis Ioannidis [2005] ECR I-08275
on grounds of nationality. For example, in France, the cost of legalisation varies depending on the nationality of the applicant, besides the nature of the documents.

**(ii) Does the criterion correlate closely with nationality?**

The principle of equal treatment prohibits not only direct (overt) discrimination based on nationality but also all indirect (covert) forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result.\(^697\) Accordingly, indirect discrimination occurs where a measure, on its face, divides by some other criterion, but in fact this criterion correlates very closely with nationality. This implies that an absence of formal discrimination will not excuse an underlying substantive discrimination.

It can be difficult to establish whether the link between the criterion used for the application of a measure and nationality is sufficiently close in order for it to be indirectly discriminatory. The Court has said in *O'Flynn*\(^698\) that this is the case if a measure is intrinsically liable to affect non-nationals more than nationals of the Member State whose measure is at issue and if there is a consequent risk that it will place the former at a particular disadvantage.

The Court has clarified that may be the case in the following circumstances: (1) where a measure affects essentially non-nationals or the great majority of those affected are non-nationals; (2) where the conditions of the measure can more easily be satisfied by nationals than by non-nationals; or (3) where there is a risk that it may operate to the particular detriment of non-nationals.\(^699\)

The term “intrinsically” used by the Court must be interpreted as requiring a logical connection between the factor used for a measure and nationality. “Consequent risk” implies that it is not necessary to establish that a measure under scrutiny does in practice affect a substantially higher proportion of non-nationals. It is sufficient that it is liable to have such an effect.\(^700\)

By way of example, in a recent case *Commission v Austria*,\(^701\) the Court held that an Austrian rule that provided that students who obtained their secondary education diploma in a Member State other than Austria and who wished to pursue their higher or university studies in a given area of Austrian education were required not only to produce that diploma, but also to prove that they fulfil the conditions of access to higher or university studies in the State where they obtained their diploma (in particular success in an entrance examination or obtaining a sufficient grade to be included in the *numerus clauses*), constituted an indirectly discriminatory measure.

---

698 Case C-237/94 O'Flynn v Adjudication Officer [1996] ECR-I 2617
699 Id.
700 Case C-237/94 [n 696] 21; and Case C-373/02 Öztürk [2004] ECR I-3605 57
701 Case C-147/03 Commission v Austria [2006] ECR I-00011 46-47
It was clear that the Austrian rule applied without distinction to all students, i.e. independent of the students’ nationality, and thus did not constitute a directly discriminatory measure. However, the Court deemed the Austrian rule indirectly discriminatory because it placed holders of diplomas awarded in a Member State other than Austria “at a disadvantage, since they cannot gain access to Austrian higher education under the same conditions as holders of the equivalent Austrian diploma” and because “it was liable to have a greater effect on nationals of other Member States than on Austrian nationals”.

In its judgment, the Court did not substantiate its assumption that the Austrian rule was liable to have a greater effect on nationals of other Member States than on Austrian nationals. It assumed that the rule would have a greater effect on non-nationals than on Austrian nationals, because non-nationals are expected to have to rely on foreign diplomas to gain access to Austrian higher or university studies more often than Austrian nationals who often obtain their diploma in Austria. Essentially, the Court’s reasoning is based on the presumption that the country where a person obtains his diploma correlates closely with the country of this person’s nationality.

Another example concerns the case Aldo Celozzi702, in which the Court scrutinised a German administrative practice on the basis of which migrant workers, whose spouses often continue to reside in the Member State of origin, were automatically placed in a tax class which is unfavourable to them, namely that applicable to workers who are married but permanently separated from their spouses, instead of, like national workers, having allocated to him the more favourable tax class which is applicable to married workers living with spouses who are not in paid employment.

The German measure further provided that any correction of the tax class in which migrant workers were automatically placed was dependent, firstly, on an express application by the migrant worker (without being informed by the competent authorities of the possibility of correction or of the requirement to make a specific application) and, secondly, on the production of a certificate from the tax authorities of the Member State of which the worker is a national and a detailed examination of the marital status and financial circumstances of the person concerned. Lastly, the application of German law precluded, in the great majority of cases, a retroactive amendment of the amount of that pay.

In the light of those factors, the Court held that there was no doubt that the measure placed a migrant worker in a legal or factual position which is less favourable than that in which a national worker, in the same circumstances, would find himself. Consequently, the measure amounted to a difference in treatment to the detriment of migrant workers.

---

702 Case C-332/05 Aldo Celozzi v Innungskrankenkasse Baden-Württemberg [2007] ECR I-00000
1) Legalisation as a measure liable to affect non-nationals more than nationals

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

As a rule, 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, for example a person’s birth, education, marriage, etc.

For the foreseeable future, there will continue to be an intrinsic link between those matters and nationality, and therefore it can be said that a logical connection exists between the factor used for the application of legalisation requirements and nationality. Consequently, it can be said that legalisation requirements are intrinsically liable to affect non-nationals more than nationals. The Court often operates on the basis of the same assumption.

For example, the correction of the tax class in the case of Aldo Celozzi\(^{703}\) was dependent on the production of a certificate from the tax authorities of the Member State of which the worker is a national and a detailed examination of the marital status and financial circumstances of the person concerned, which also involves documentary evidence to be obtained abroad, while national workers would be allocated automatically the more favourable tax class which is applicable to married workers living with spouses who are not in paid employment, without the requirement to produce any evidence.

Progressive integration within the EU and internationalisation of legal relationships may adjust this basic position over time, since people are increasingly stimulated to travel, study, live and work abroad. Nevertheless, where legalisation formalities apply only to foreign Public Documents, the basic imbalance will remain.

The same is true in relation to goods, services and capital that originate in another Member State and are moved between Member States. For example, goods produced or imported in another Member State will be subject to customs procedures and product regulations there (often in accordance with EC standards) and their compliance with those procedures and regulations will be attested by local administrative authorities, usually by means of Public Documents.

\(^{703}\) Case C-332/05 Aldo Celozzi v Innungskrankenkasse Baden-Württemberg [2007] ECR I-00000
As indicated above, under the Court’s case law it is not necessary to establish that legalisation requirement in relation to foreign documents does in practice affect a substantially higher proportion of non-nationals than nationals, to conclude that there is a consequent risk that it will place the former at a particular disadvantage. It is sufficient that the measure is liable to have such an effect.704

There is no doubt that legalisation requirements, which are intrinsically liable to affect non-nationals more than nationals, place the former in both a legal (there is a negative presumption in relation to the authenticity of foreign Public Documents) and factual (legalisation involves burdensome formalities in terms of costs and time) position which is less favourable than that in which a national, in the same circumstances, would find himself.

Consequently, the measure requiring the legalisation of foreign Public Documents amounts to a difference in treatment to the detriment of non-nationals, or it is at least liable to have such an effect. The measure divides by another criterion other than nationality (i.e. the country of a document’s origin), but tends to favour the nationals of one Member State of the nationals of other Member States. Below, we will determine whether the factor used for the application of legalisation requirements may be justified based on objective differences between domestic and foreign Public Documents.

(iii) Is the criterion for legalisation based on a factor that is objectively justified?

It was argued above that the requirement of legalisation in relation to foreign Public Documents constitutes an indirectly discriminatory measure. Justification in the context of discrimination (i.e. the imposition of legalisation requirements in relation to foreign documents, while documents that purport to be domestic Public Documents are presumed to be authentic) implies that some degree of differential treatment may be accepted, if it is proportionate to the objective differences between domestic and foreign Public Documents.705

In Dafeki706, a case that did not concern the authenticity, but the accuracy of Public Documents, the Court held that based on the considerable differences that exist between the national legal orders as regards the conditions and procedures for taking decisions of public authority, and the fact that, for the time being, the Member States have neither harmonised the matter nor established a system of mutual recognition of such decisions, administrative and judicial authorities of a Member State are not required under EC law to treat as equivalent such decisions by the competent authorities of their own state and those made by the competent authorities of another Member State.

704 Case C-237/94 [n 696] 21; and Case C-373/02 Öztürk [n 700] 57
705 See in the context of free movement of goods, Case 4/75 Rewe-Zentralfinanz [1975] ECR 843 8; and Case 34/79 Henn and Darby [1979] ECR 3795 21
If we apply this reasoning to the subject of authenticity, we logically arrive at the following premise: *if* considerable differences exist between the national legal orders as regards the conditions and procedures for the execution of Public Documents and the certification of their authenticity, and the fact that, for the time being, the Member States have not harmonised the matter, administrative and judicial authorities of a Member State are not required under EC law to treat as equivalent Public Documents by the competent authorities of their own state and those made by the competent authorities of another Member State.

1) **Are there considerable differences between the national legal orders as regards the conditions and procedures for the execution and certification of Public Documents?**

The substance of this question is not within the scope of the study and would require a comparative analysis of the legal practice in the Member States in relation to the conditions and procedures for the execution and certification of Public Documents.

However, no *considerable* differences appear to exist between the Member States in relation to the conditions and procedures for the execution and certification of Public Documents, apart from differences in language, form, substance and the internal distribution of competences for the execution of Public Documents.

By contrast, in *Dafeki*, considerable differences existed between the Member States as regards the provisions governing the maintenance and rectification of registers of civil status and, in particular, the rules of substantive authentication of matters concerned with civil status.

The possibility of successfully challenging the accuracy of a certificate of civil status depends to a large extent on the procedure followed and on the conditions which have to be satisfied in order for a birth certificate to be altered.

These procedures varied considerably from one Member State to another, since the respective systems have been strongly influenced by an extremely wide variety of cultural phenomena and by various external events, such as wars and transfers of territory.

For instance, alteration of a date of birth by judgment of a single judge, for which the evidence of two witnesses suffices, was not uncommon in Greece, while this would be impossible in Germany. This made it difficult to start from the premise that the factual and legal situations are identical or equivalent.
Furthermore, it was clear that there were no common measures at EC level concerning the law applicable to civil status or questions related to the probative value of documents relative to civil status.

The same considerations arguably do not apply in relation to the issue of authenticity for a number of reasons. Firstly, the certification of Public Documents is a process that can differ in detail, but is rather uniform in general terms between the Member States. For instance, the certification of authenticity usually 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.

In all of the Member States, Public Documents have particular formal characteristics that allow a well-trained or experienced public official to make a decision about their authenticity. Such characteristics generally include the public authority’s signature (in all Member States), a stamp or seal, date, name and official numbering.

Secondly, in contrast to the issue of accuracy of Public Documents (e.g. the alteration of the substance of a birth certificate), authenticity is not a substantive matter. Instead, what we are concerned with is a procedural issue related to the origin and integrity of a Public Document. The practice in most Member States is that the authenticity of domestic Public Documents is only subject to marginal scrutiny, which 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.

Considerable differences exist between the Member States in terms of the verification of the accuracy of amendments to civil status registers. Such differences do not exist between the Member States as far as the verification of authenticity of Public Documents is concerned.

Lastly, in a number of key areas, the Member States have harmonised (at the EC and international level) many issues related to the authenticity (and accuracy) of types of Public Documents that are relevant for the exercise of EC rights.

These areas usually coincide with areas that provide for a system of mutual recognition of decisions that are contained in Public Documents, for example in the areas of mutual recognition of decisions in civil, commercial, family and criminal matters, mutual recognition of professional qualifications, mutual assistance in tax matters, etc.,.

a) Unfamiliarity with foreign Public Documents and authorities and lack of administrative cooperation between domestic and foreign authorities

There are two further arguments that are advanced as a justification for treating domestic and foreign Public Documents differently and thus for imposing legalisation requirements in relation to the latter.
i) Unfamiliarity with foreign Public Documents and authorities

The first is that domestic authorities are generally not familiar with the formal requirements applicable to foreign Public Documents, the authorities competent for their execution and their signatures, seals and stamps, due to differences between legal systems and systems of public administration. Eventually, this leads to mistrust and the necessity of reassurance, which is provided by legalisation.

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. This approach is justified with the argument that the authorities of one country are familiar both with the formal characteristics of domestic documents and with the authorities competent for their execution.

By contrast, in almost all of the Member States, foreign Public Documents do not benefit from the same presumption of authenticity as domestic Public Documents. Domestic authorities are generally not familiar with the formal requirements applicable to foreign Public Documents and the authorities competent for their execution, due to differences between legal systems and systems of public administration.

This means that some proof of authenticity will normally be required. In the Member States, the fulfilment of legalisation formalities is often the only way to establish a foreign Public Document's authenticity. In a majority of Member States, (only) 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.

ii) Lack of administrative cooperation between domestic and foreign authorities

The second argument that is advanced as a justification for treating domestic and foreign Public Documents differently is that the process of verifying the authenticity of foreign Public Documents can be particularly complex and slow due to a lack administrative cooperation between domestic and foreign public authorities and difficulties related to language diversity and the limited means for communication and information exchange.

In cases of doubt with respect to 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.

The authenticity of domestic Public Documents can be verified speedily through well-established ways of administrative cooperation by authorities who speak the same language. Furthermore, in a large number of Member States, the party or public authority challenging the authenticity of a domestic Public Document will have the burden of disproving the document's authenticity.
By contrast, the process of verifying the authenticity of foreign Public Documents is usually complex and slow due to a lack of established ways of administrative cooperation between domestic and foreign public authorities and further difficulties related to language diversity and the limited means for communication and information exchange.

Besides, the recourse to administrative cooperation with foreign authorities is not a requirement for domestic authorities, because the Burden of Proof of a foreign Public Document’s authenticity is on the party that wishes to rely on it. This means that a domestic authority will normally only consider directly contacting the authorities that purportedly executed a particular document if proof of its authenticity (e.g. through legalisation formalities) was provided in the first place.

Both arguments are not persuasive, however. First, the arguments are no indication 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.

Secondly, both arguments are not tenable in the EC context, at least in a general and abstract way. In the EC context, the national judicial and administrative authorities of the Member States are at the same time “EC authorities” (see Article 10 EC).

In that capacity, the competent authorities of the Member States have the task of ensuring that EC law is properly implemented and that EC rights are effectively protected. In carrying out these tasks, the national authorities are to be guided by the EC principle of mutual trust. This principle forms the basis of the principle of mutual recognition that applies in many areas of EC law (e.g. cross-border free movement and access to justice).

(iv) A further complicating factor: the discrimination between Member States

The prohibition of discrimination requires the equality of treatment by the Member States of its own nationals and those of other Member States. The Court has held in Walrave\textsuperscript{707} that the rule 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. In relation to legalisation requirements we must therefore look not only at situations where national measures that discriminate between nationals and non-nationals, but also at situations where national measures discriminate between non-nationals, or have this effect.

\textsuperscript{707} Case 36/74 Walrave and Koch v Union Cycliste Internationale [1974] ECR 1405 28
A review of the legal framework for the requirement of legalisation for foreign Public Documents reveals that the Member States do not only discriminate between domestic and foreign Public Documents, but also between the documents of different 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 of Belgium is relevant for most other Member States (for more details the reader is referred to the comparative table on bi- and multilateral agreements between the Member States). The comparative table of agreements, which was prepared during the study, does not expose clear patterns between certain Member States or certain regions.

It is suggested that the exemption of Public Documents from the requirement of legalisation is an issue that is rooted in the development of bi- and multilateral relations between the Member States initially outside the scope of EC law.

The comparative table does not warrant any conclusions that certain regions or Member States are seen by others as problematic in terms of the reliability or authenticity of documents and that therefore no agreements exist with those Member States, which provide for the exemptions from legalisation.

For example, the table shows that Estonia, Finland, Malta and Lithuania have not concluded many agreements which address the issue of legalisation. This fact is more a matter of coincidence rather than a sign that the other Member States do not generally trust the authenticity of Public Documents originating in those countries.

The observation made above that can be repeated here is that no considerable differences appear to exist between the Member States in relation to the conditions and procedures for the execution and certification of Public Documents, apart from differences in language, form, substance and the internal distribution of competences for the execution of Public Documents.

The certification of Public Documents is a process that can differ in detail, but is rather uniform in general terms between the Member States. For instance, the certification of authenticity usually 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.
(e) Conclusion

In this part, we first established that 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 the origin of a good (or services and capital for that matter), 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 presumption of authenticity.

Subsequently, we concluded that the measure is indirectly discriminatory, since its application gives rise to a difference in treatment to the detriment of non-nationals, or is at least liable to have such an effect. In other words, the requirement of legalisation divides by a criterion other than nationality (i.e. the country of a document’s origin), but tends to favour the nationals of one Member State over the nationals of other Member States.

Lastly, we concluded that the factor used for the application of legalisation requirements cannot be justified on the basis of objective differences between domestic and foreign 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. No considerable differences appear to exist between the Member States in relation to the conditions and procedures for the execution and certification of Public Documents, apart from differences in language, form, substance and the internal distribution of competences for the execution of Public Documents that justify the general and abstract discrimination between foreign and domestic Public Document in terms of their authenticity.

Furthermore, we identified that such general and abstract discrimination is irreconcilable with the principle of mutual trust by which the authorities in the Member States should be guided. However, it was also pointed out that mutual trust is not a given between the authorities of different countries. In the EC context, the requirement of mutual trust can only be justified through the establishment of appropriate flanking measures in all relevant areas of EC law, which should be aimed at making authorities of the Member States more familiar with the form and substance of each other’s Public Documents and at facilitating mutual cooperation and assistance between the authorities in the Member States with a view to ensuring the authenticity of those documents.
In the following sections, we will consider whether the requirement of legalisation can be characterised as a “restriction” as interpreted by the Court. In doing that we will make a distinction between the legal *presumption* that underlies the requirement of legalisation and the *formality* that it involves.

This distinction also applies when considering the requirement of legalisation as an indirect discrimination. We will nonetheless only make this distinction below, because the relevant case law that exists in this regard concerns restrictions.

Subsequently, once we evaluate whether the requirement of legalisation constitutes a restriction in addition to being characterised as an indirectly discriminatory measure, we will consider whether the requirements can nonetheless be justified as a proportional measure in the general interest.

5.03 **Legalisation considered as a restriction**

(a) **Introduction**

The Court has confirmed the applicability of the principle of non-discrimination discussed above in relation to all fundamental freedoms, including in the context of goods, establishment, or services. The requirements of free movement of these things demand the absence of discrimination on the basis of nationality.

Nonetheless, applying the concept of indirect discrimination in the context of goods, establishment, or services may be more difficult than it is in relation to workers. In the first place, the link with “nationality” of measures in those areas is less strong than it is in relation to persons. In addition, the wording of the relevant articles for goods, establishment, and services suggests a more narrow interpretation than we discussed above in relation to the definition of indirect discrimination.

Article 39 (workers) orders the “abolition of any discrimination based on nationality”, while Article 43, for instance, requires that foreigners be able to establish “under the conditions” applied to nationals, and Article 54 requires that restrictions on services be applied “without distinction”. Both articles embody clearly the idea of the abolition of *direct* discrimination, but appear to sit less comfortably with *indirect* discrimination, because indirectly discriminatory measures are characterised by the fact that they apply the same terms and conditions to all nationalities, and treat them without distinction. The same is true for goods and capital: Article 28 speaks of “import restrictions” and Article 56 of “restrictions on the movement of capital”.
Accordingly, the Court tends not to refer to discrimination as much in relation to establishment and services as it does in relation to workers (Article 39 EC). Instead it uses the terminology of restrictions that more appropriately suits the wording of the articles involved.

As a more general development apparent in the case law of the Court, we considered in the introduction of this part that the development of single market law has seen the progressive abandonment of the requirement that a national measure be discriminatory to constitute a restriction on free movement of persons, services, or capital.\(^\text{708}\)

Although it is not always easy to distinguish between indirectly discriminatory and indistinctly applicable measures, the Court does not require discrimination as a condition for triggering the application of Articles 39, 43, and 49 EC. Overall, the formulas used by the Court reflect the use of a market access criterion.

**(i) Four conditions**

For the purpose of analysing legalisation requirements as a restriction, we will apply the general approach formulated by the Court in *Gebhard\(^\text{709}\)*, which concerned establishment. However, it is suggested that this formula, which originated in *Kraus\(^\text{710}\)*, can in principle be applied to situations falling under any of the economic free movement articles (it even seems applicable to the non-economic Article 18 EC).

The use of one approach is chosen for practical reasons related to the broad scope of the study and with a view to the general tendency towards convergence in the Court's own case law, which is apparent, for example, from the court's approach towards possible grounds for justification and its test of proportionality.

1) **Non-discriminatory, justified by imperative requirements in the general interest, suitable for securing the attainment of the objective pursued and proportional**

In *Gebhard\(^\text{711}\)* the Court considered that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be (1) applied in a non-discriminatory manner; (2) justified by imperative requirements in the general interest; (3) suitable for securing the attainment of the objective they pursue; and (4) they must not go beyond what is necessary in order to attain it.

\(^{708}\) Case C-76/90 *Säger v Dennemeyer & Company Limited* [1991] E.C.R. I-4221

\(^{709}\) Case C-55/94 [n 686] 37

\(^{710}\) Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 32

\(^{711}\) Case C-55/94 [n 686] 3
Consequently, first we will establish whether the requirement of legalisation qualifies as a restrictive measure that requires justification (i.e. is the requirement of legalisation liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty?).

Subsequently, on the condition that this can be positively established, the requirement’s compatibility with EC free movement law must be analysed on the basis of four cumulative conditions that have been formulated by the Court: (1) is the requirement of legalisation applied in a non-discriminatory way; (2) does the requirement of legalisation pursue a justified aim?; (3) is the requirement of legalisation a measure that is suitable for securing the attainment of the objective which it pursues?; and (4) does the requirement of legalisation not go beyond what is necessary in order to attain objective it pursues?

The last two questions concerning suitability and necessity will be considered together in the context of one question that will ask whether the requirement of legalisation is a proportional.

(b) Is the requirement of legalisation liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty?

Previously, when we considered legalisation as a potentially discriminatory measure, we found that there is no doubt that legalisation requirements, which affect non-nationals more than nationals, place the former in both a legal (there is a negative presumption in relation to the authenticity of foreign Public Documents) and factual (legalisation involves burdensome formalities in terms of costs and time) position which is less favourable than that in which a national in the same circumstances would find himself.

We concluded that the requirement of legalisation constitutes an indirectly discriminatory measure, because it amounts to a difference in treatment to the detriment of non-nationals when compared to nationals, or is at least liable to have such an effect.

However, we must consider here whether the effect of the requirement of legalisation in relation to foreign Public Documents is that its application in practice might actually restrict free movement or whether it is liable to hinder or make less attractive the exercise of fundamental freedoms.

As indicated above, the Court has used different definitions of what constitutes a restriction to free movement. Besides the definition we chose to use here (i.e. is the measure in question liable to hinder or make less attractive the exercise of fundamental freedoms), we referenced definitions such as whether the measures “directly affect market access” 712, “are detrimental to the conditions under which a

fundamental freedom is exercised” 713, “or are liable to deter investors from other Member States (...) and, consequently, affect access to the market”. 714

If we restrict ourselves to the question of whether a measure is liable to hinder or make less attractive the exercise of fundamental freedoms, the terms of the definition used by the Court suggest that there is generally not a high level of hindrance required to categorise a measure as a restriction. Theoretically, a slight deterrent is sufficient.

On the other hand, in Cinéthèque715, a case concerning free movement of persons, the Court found that a national measure whose impact on free movement of persons is too tenuous, remote, and uncertain is outside of the scope of EC scrutiny. The more tenuous the restriction on free movement, the more lenient the standard of proportionality. In order to be caught, a measure must, therefore, pose a direct or substantial obstacle to free movement.

(i) The legalisation requirement considered as a measure that is liable to hinder or make less attractive the exercise of fundamental freedoms

In essence, legalisation is a formality aimed at verifying the authenticity of a foreign Public Document in terms of its origin and integrity. Apart from the question whether the requirement of legalisation is liable to hinder or make less attractive the exercise of fundamental freedoms with a view to the formality it involves, which is discussed below, it is suggested to look closer at the presumption that underlies the requirement of legalisation.

ECJ case law we have located shows signs that national rules based on general and abstract negative presumptions regarding the authenticity of a Public Document executed in another Member State could be characterised as a restriction.

In a recent case, Commission v France716, concerning the freedom to provide services, the Court held that legal presumptions constitute procedural measures, which may govern actions at law intended to safeguard the rights that individuals derive from the direct effect of EC law, which do not serve to guarantee those rights but, on the contrary, to place a restriction on such rights. 717

713 Case C-60/00 Carpenter [2000] ECR I-6279 39
714 Case C-98/01 Commission v United Kingdom [2003] ECR-I-4641 47
715 Joined cases 60/84 and 61/84 Cinéthèque SA and others v Fédération nationale des cinémas français [1985] ECR 2605 21
716 Case C-255/04 Commission of the European Communities v French Republic [2006] ECR I-5251 40
717 See also Case C-312/93 Peterbroeck [1996] ECR I-4599 12
The Court found that presumptions may constitute restrictions even if they do not deprive, in the true meaning of the word, a person of the opportunity to pursue his activities in another Member State, since they place him at a disadvantage that may impede his activities.

The case involved a presumption under French law of salaried status in relation to persons employed under contract activities in a self-employed capacity, which applied irrespective of the nationality of the service provider. The presumption of salaried status led to contracts being accorded the status of employment contract involving additional costs because of the obligation, in the particular Member State where the activity is pursued, to pay contributions as affiliates of the social security scheme for employed persons.

The Court found that in order to avoid a contract being accorded the status of employment contract, a foreign person is therefore required to prove that he does not work as an employee but, on the contrary, is self-employed.

Accordingly, the Court concluded that this condition constitutes a restriction within the meaning of Article 49 EC, irrespective of the question of whether it is more or less difficult to rebut, because the presumption in question is likely both to discourage people from providing services in that Member State and discourage contractors in that Member State from engaging people from other Member States.  

In *Dafeki*719, the Court scrutinised a rule of national law that established a general and abstract presumption that, in the event of inconsistency between several Public Documents of differing dates, it is the document closest in time to the event to be proved which prevails in the absence of other sufficient evidence. The Court clearly gives a level-headed analysis of the facts in the individual case precedence over conclusions based on general and abstract presumptions. The Court concluded that a general and abstract presumption cannot justify a refusal to take into account a means of evidence proving the contrary executed by a court in another Member State.

As regards *domestic* Public Documents, it is generally provided by statute in most countries that, based on mutual trust between authorities and for reasons of convenience, they be accepted without any process of proof of their authenticity, subject only to the possibility of the verification or challenge of their authenticity through separate procedures in cases of doubt. In other words, the authorities in the Member States presume that a document, which purports to be a domestic Public Document, is authentic without requiring additional proof.

---

718 Case C-255/04 [n 716] 38
719 Case C-336/94 *Etalia Dafeki v Landesversicherungsanstalt Wurttemberg* [1997] ECR I-6761 19
Both common and civil law states provide for this facilitation of the proof of authenticity of domestic Public Documents. When documents of domestic origin are permitted for presentation in court or to administrative authorities, the law of the state in question usually permits the court to take judicial notice of any signature, stamp and/or seal they bear, and it is the practice of administrative authorities to assess on sight the authenticity of the documents. In both cases, no additional proof will be necessary before the judicial or administrative authority will accept the documents in question as prima facie authentic.

By contrast, in a majority of Member States, foreign Public Documents do not benefit from the same presumption as do domestic Public Documents. Without proof of authenticity (usually some form of legalisation), foreign Public Documents are regularly not accepted at all.

It cannot be concluded on this basis, that a rule which requires the legalisation of foreign Public Documents before their authenticity is accepted, is based on a presumption that foreign Public Documents are not authentic. Nonetheless, in practice, the rule does have this effect if it is applied in a general and abstract way in relation to all foreign Public Documents. In those circumstances, one can say that effectively the rule does constitute a negative presumption of authenticity in relation to foreign Public Documents.

Consequently, the negative presumption, which exists de facto in relation to the authenticity of foreign Public Documents arguably constitutes, in the terms used by the Court, a procedural measure which may govern actions at law intended to safeguard the rights which individuals derive from the direct effect of EC law, which do not serve to guarantee those rights but, on the contrary, to place a restriction on such rights.

(ii) The legalisation formality considered as a measure that is liable to hinder or make less attractive the exercise of fundamental freedoms

We now turn the question whether the requirement of legalisation is liable to hinder or make less attractive the exercise of fundamental freedoms with a view to the formality it involves.

In the case law of the Court there is no confirmation that the requirement of legalisation applied to foreign Public Documents constitutes a restriction. However, there are important indications that it does.

Firstly, the formalities that have to be fulfilled in the process of having a document legalised create extra (transaction) costs and cause additional delay.
Secondly, the requirement of legalisation does not operate in purely internal circumstances; it applies only if a Public Document is to be used internationally. Accordingly, the legalisation requirements constitute measures that place a specific burden on cross-border transactions or situations that involve the use of Public Documents.

Thirdly, it has been confirmed elsewhere in this report that Public Documents fulfil an essential role in the context of cross-border free movement and access to justice for EU citizens and companies. This was confirmed by the Court in *Dafeki*, a case on free movement of workers. The Court held that “(…) exercise of the rights arising from freedom of movement for workers is not possible without production of documents (…), which are generally issued by the worker’s State of origin.” The observation of the Court in *Dafeki* has significance for any situation in which the Member States require proof of the existence of EC rights before they can be effectively exercised.

Consequently, any difficulty or extra burden in the process of using a domestic Public Document in another Member State due to the requirement of its legalisation will constitute a direct and substantial obstacle to free movement.

On the basis of the survey conducted for the purpose of the study, it can in any event be concluded that 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. The respondent citizens and companies were asked to consider legalisation requirements as a deterrent (i.e. whether in their opinion legalisation formalities hinder free movement or make it less attractive).

The majority of the respondent citizens (70.24%) said that they felt that the requirement of legalisation in the process of using documents abroad discourages people to pursue activities abroad. Among the company respondents there was, however, an even split over this question.

(c) Is the requirement of legalisation applied in a non-discriminatory manner?

Following the *Gebhard* reasoning, the question whether legalisation requirements are applied in a non-discriminatory manner is aimed at filtering out measures that are applied in a directly discriminatory manner on the basis of nationality. Such measures can only be justified via the Treaty exceptions.

We have concluded previously, that the measure requiring the legalisation of foreign Public Documents amounts to a difference in treatment to the detriment of non-nationals, or is at least liable to have such an effect. For the application of legalisation requirements, however, the decisive factor is not the nationality

---

720 Id.
of the user of the document or the origin of the good to which the document relates, but the origin (= "nationality") of the Public Document itself.

Irrespective of the nationality of their user or the origin of a good (or services and capital for that matter), 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 presumption of authenticity.

In other words, the criterion for the different treatment of domestic and foreign Public Documents is not based on a factor that links directly to the nationality of their user or the origin of goods, etc. Consequently, national measures that require the legalisation of foreign Public Documents cannot be characterised as directly discriminatory measures.

(d) Does the requirement of legalisation pursue a justified aim?

Previously, we have established that the requirement of legalisation applied to foreign Public Documents arguably constitutes a restriction of free movement, both in terms of the burdensome formality it involves and its underlying negative presumption of authenticity.

We will now consider whether the requirement of legalisation has a justified aim. To stay within the Gebhard-formula, we will consider whether the requirement is justified by imperative requirements in the general interest.

When we consider whether the requirement of legalisation can be justified, we have to take into account that freedoms may be restricted by national regulations justified on the grounds set out explicitly in the Treaty (see, for example, Article 46(1) in conjunction with Article 55 EC in relation to services) 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.\(^{721}\)

Three questions must therefore be considered: (1) can the requirement of legalisation be justified on the grounds set out explicitly in the Treaty?; (2) can the requirement of legalisation be justified by overriding reasons in the public interest?; and (3) are there EC harmonising measures providing for measures necessary to ensure that the interests involved with legalisation are protected?

\(^{721}\) Case C-262/02 Commission of the European Communities v French Republic [2004] ECR I-6569 23
(i) Can legalisation be justified on the grounds set out explicitly in the Treaty?

As indicated above, there are essentially two classes of justified aim. One is the general “objective justifications”, which may be used to excuse any non-discriminatory measure. We will discuss this group below. Here, we are concerned with the Treaty exceptions. These may allow a different range of justifications for exceptions to the rules of free movement.

The precise formulation of the Treaty exceptions varies from chapter to chapter, but they have much in common, including the principles for their interpretation. The purpose of the “derogation clauses” is not to reserve certain matters to the exclusive jurisdiction of the Member States, but to allow Member States to derogate from the EC free movement provisions to the extent that is justifiable in order to achieve the objectives provided for in those clauses.

In Van Duyn, the Court held that Treaty exceptions (e.g. public policy) are used as a justification for derogating from fundamental freedoms and must accordingly be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without being subject to control by the EC Institutions.

On the other hand, the particular circumstances justifying recourse to a Treaty exception may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

In any event, derogations may not be misapplied so as, in fact, to serve purely economic ends and any person affected by a restrictive measure based on derogation must have access to legal redress.

In relation to goods, the Treaty provides that the provisions on free movement “do not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property” (see Article 30 EC).

The free movement of workers is “subject to limitations justified on grounds of public policy, public security or public health” (see Article 39 EC), as is the freedom of establishment (see Article 46 EC) and the free movement of services (see Article 55 in conjunction with Article 46 EC).

722 Case 41/74 Yvonne van Duyn v Home Office [1974] ECR 1334 18; see also Case 153/78 Commission v Germany [1979] ECR 2555 5
723 Case 36/75 Rutili [1975] ECR 1219 30
724 Case 222/86 Unectef v Heylens and Others [1987] ECR 4097 14-15
None of the express exceptions in the Treaty appear to be available for the purpose of justifying legalisation requirements in relation to foreign Public Documents. The fundamental aim of legalisation formalities is the prevention of fraud. In itself, this aim can be associated with the conventional concept of “public policy”.

However, the Court has always emphasised that the public policy exception is a derogation from the fundamental freedoms, which must be interpreted strictly, and that its scope cannot be determined unilaterally by the Member States. ⑦25

According to settled case law, reliance on the concept of public policy presupposes, in any event, 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. ⑦26

We will subsequently consider whether fraud prevention can be characterised as an overriding reason in the public interest.

(ii) Can legalisation be justified by overriding reasons in the public interest?

Legalisation formalities are generally associated with measures concerned with the prevention of fraud in relation to the cross-border use of Public Documents: legalisation identifies a Public Document’s origin and may assist in the process of establishing its authenticity. The question is, therefore, whether the prevention of fraud constitutes an overriding reason in the public interest that can be used to justify the requirement of legalisation.

Certain indications can be found, both in EC legislation and the case law of the Court that, in principle, the prevention of fraud can be characterised as an overriding reason in the public interest, which may be used to justify restrictive measures.

Two examples can be referred to as far as recent EC legislation is concerned. First, Directive 2006/123/EC contains a general exception to the obligation for the Member States to accept copies of Public Documents, if this exception is justified by an overriding reason relating to the public interest, which includes, besides public order and security, the combating of fraud (see Article 5(4) of the Directive).


⑦26 Case 36/75 [n 725] 28; Case 30/77 [n 725] 35; Joined Cases C-482/01 and C-493/01 [n 725] 66; Case C-503/03 Commission v Spain [2006] ECR I-0000 45
Second, Directive 2004/38/EC allows Member States to adopt necessary measures to protect themselves against certain fraudulent practices (see Article 35) under the conditions that such measures are proportional (see Articles 31 and 31 of the Directive).

In the Court’s case law some indications can be found that restrictive measures for the prevention of fraud may be justified. First, in Wagner727, a case concerning free movement of agricultural goods, the Court held that the existence of a higher risk of fraud in relation to a category of may justify the imposition of different rules to that category from those applicable to comparable products.

Second, in Centros728, a case concerned with the freedom of establishment, the Court held that the fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office “does not preclude that first State from adopting appropriate measures for preventing or penalising fraud, either in relation to the company itself, if need be in co-operation with the Member State in which it was formed, or in relation to its members (...)”.

On the basis of these indications, it can be argued that restrictive measures to prevent fraud, including legalisation, could be justified on the basis an overriding requirement in the general interest.

We will consider below whether EC harmonising measures provide for measures necessary to ensure that the interest of fraud prevention is already protected at the EC level.729 Moreover, we will evaluate whether the requirement of legalisation is a measure that is appropriate to secure the attainment of the objective it pursues and whether it does not go beyond what is necessary in order to attain it.730

(iii) Are there EC harmonising measures to ensure that the interests involved with legalisation are protected?

Only national measures concerning matters that have not been covered by harmonisation at EC level must be assessed against the yardstick of the EC Treaty provisions relating to the free movement.731

It was indicated above, however, that 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 ensure the protection of the interest in issue.

729 See, to that effect, in the context of the free movement of goods, Case C-323/93 Centre d’insémination de la Crespelle [1994] ECR I-5077 31
731 See, for example, in relation to goods: Case 366/04 Georg Schwarz v Bürgermeister der Landeshauptstadt Salzburg [2006] ECR I- 27
A national measure in a sphere which has been the subject of exhaustive harmonisation at EC level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty. If those measures protect the legitimate interests of the Member States at the EC level, they may preclude reliance on the escape clauses.

For instance, in Moormann, the Court held that EC legislation had introduced a harmonized system of health inspections based on full inspection of the goods in the exporting state, which replaced inspection in the state of destination and is intended to allow the free movement of the goods concerned under the same conditions as those of an internal market. Consequently, with regard to trade in goods covered by such harmonising legislation, health inspections carried out systematically on goods when they cross the frontier can no longer be justified on grounds of the protection of health under Article 30 EC.

The Member States may even be prevented from invoking derogations and objective justifications if the harmonisation has not been exhaustive. On the other hand, in De Agostini, the Court indicated that in the case of minimum harmonisation, the Member States are permitted to maintain and (often) introduce more stringent regulatory standards than those prescribed by EC legislation, for the purposes of advancing a particular social or welfare interest, and provided that such additional requirements are compatible with the Treaty.

Furthermore, the Court held in Campus Oil that the possibility cannot be excluded that a Member State may successfully rely on a Treaty exception to justify a restrictive measure, if the protection offered at the EC level through harmonisation measures does not provide an unconditional assurance of a Member State’s interest that is covered by such an exception. Arguably, the same applies in respect of mandatory requirements in the public interest.

In summary, a restrictive national measure in a sphere which has been the subject of (exhaustive) harmonisation at EC level must, therefore, principally be assessed in the light of the provisions of the harmonising measure and not those of the Treaty, although the (potentially restrictive) power conferred on Member States by means of secondary legislation must again be exercised with due regard for the Treaty.

1) EC measures in relation to the legitimate aim of legalisation

---

732 Case C322/01 Deutscher Apothekerverband [2003] ECR I-14877 64
733 Moormann; see also Joined Cases 2 to 4/82 Delhaize [1983] ECR 2973
735 De Agostini paragraph 28
736 Case 72/83 Campus Oil Limited and others v Minister for Industry and Energy [1984] ECR 2727 31
737 Case C322/01 Deutscher Apothekerverband [n 732] ECR I-14877 64
The aim of the requirement of legalisation is the prevention of fraud in situations where Public Documents are used internationally. Above we have identified that the lack of trust in the authenticity of foreign Public Documents is principally based on a lack of familiarity with foreign legal systems, authorities and documents, and further a lack of administrative cooperation between domestic and foreign authorities when doubts arise over the authenticity of a document.

However, 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 by the EC principle of mutual trust\(^\text{738}\), which requires them to accept the documents and recognise the decisions of authorities in other Member States unless there are reasonable doubts based on concrete evidence in relation to the authenticity of the documents or the accuracy of the decisions in a particular case.\(^\text{739}\)

This requirement to accept the documents and recognise the decisions of authorities in other Member States is generally referred to as the principle of mutual recognition, which is an essential feature of the internal market and the area of freedom, security and justice common to the Member States.

Mutual recognition is inevitably based on the premise of mutual trust between the authorities in the Member States. The Member States must have trust in the authenticity of Public Documents that are executed by authorities of other Member States, as well as the accuracy of the decisions of public authorities that are contained in those documents. Without trust there is no basis for recognition.

\(\textbf{a) Mutual trust between authorities is not an intrinsic feature of the relationship between the authorities of different countries}\)

Mutual trust between authorities is not an \textit{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. To the contrary, 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 \textit{unfamiliarity} and a lack of mutual \textit{cooperation and assistance} between them.

The establishment of the degree of mutual trust can therefore be described as a gradual process, which requires the support of flanking measures at the EC level that are aimed at enhancing mutual familiarity, cooperation and assistance between the authorities of the Member States.


\(^\text{739}\) See in relation to the accuracy of decisions, Case C-336/94 \textit{Eftalia Dafeki v Landesversicherungsanstalt Wurttemberg} [1997] ECR I-6761 16-18
Subject to measures at the EC level that are necessary to provide for a solid basis for mutual trust between the authorities of the Member States, there is a good reason for requiring that those authorities mutually recognise each other’s decisions and are mutually willing to rely on each other’s Public Documents, as far as required for the proper functioning of the internal market and the area of freedom security and justice.

It can be argued that 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. The same can be said in relation to the accuracy of the decisions that are contained in Public Documents executed or accepted by the authorities in the Member States.

i) Flanking measures at the EC level to establish mutual trust

Measures required for change towards a basic position of mutual trust between authorities have already been adopted in several areas of EC law, which include the free movement of goods, free movement of workers, free movement of services, freedom of establishment, mutual recognition of professional qualifications, social security, and taxation.

In these areas of EC law, two dominant types of EC flanking measures can be identified: in the first place, there is a clear trend towards harmonising the form (and to a certain extent the substance) of Public Documents; and secondly, we see provisions in most areas of EC law aimed at facilitating mutual cooperation and assistance between the authorities in the different Member States.

The process of harmonisation has not been uniform in all areas of EC law covered by this report; differences exist, which have been identified elsewhere in this report. These differences demonstrate that the establishment of mutual trust is indeed a gradual process, whose progress is not the same in all areas of EC free movement and access to justice law. This reality complicates the provision of a general answer to the question whether EC measures adequately protect the legitimate aim pursued by the requirement of legalisation, which is a measure that applies to all types of Public Documents.

A general statement that can be made at this point is that once the form and substance of Public Documents has been harmonised at the EC level and EC law further provides for mutual cooperation and assistance between public authorities, there appears to be no justification for the requirement that Public Documents originating in another Member State be legalised before their authenticity is accepted. In those circumstances, the authorities in the Member States can and should trust in the authenticity of
documents that purport to be Public Documents executed by competent authorities of other Member States, unless it is shown to be unjustified by concrete evidence in the case.

a. Goods

For the operation of the EC's Customs Union, Public Documents are generally required to prove the origin of goods. To strengthen mutual trust, the implementing provisions of the EC's Customs Code provides for the use of harmonised Public Documents that may be required in the process of the EC's customs procedure for which third country goods are declared. Furthermore, the implementing provisions stipulate the form and contents of EC Certificates of Origin required in third countries in relation to goods originating in the EC.

The documents that may be required in relation to third country goods differ depending on the preferential origin of goods (Movement Certificates EUR.1; EUR-MED Certificates; A.TR. Movement Certificates; and Certificates of Origin Form A) or non-preferential origin of goods (Universal Certificates of Origin) and sometimes depending on the type of goods declared (certificates of origin for certain agricultural products subject to special import arrangements).

As far as the authenticity of Public Documents is concerned, the administrative cooperation between customs authorities is generally far-reaching. The Customs Code provides for administrative cooperation between the competent authorities in the countries of export and import, as well as between the customs authorities of the Member States.

To this end, the countries of export are usually required to send the European Commission the names and addresses of the authorities competent for the execution of the different types of certificates of origin together with specimens of the stamps used by those authorities, as well as the names and addresses of the authorities to which requests for the verification of origin certificates can be sent.

Subsequently, the Commission transmits the information provided by the third countries to the competent authorities of the Member States. The verification of certificates of origin is carried out at random and whenever reasonable doubt arises as to the authenticity of a certificate (or the accuracy of the information it contains).

For the purposes of verification, the competent authorities in the Member State involved will return the certificate of origin to the governmental authority designated by the exporting country, giving, where appropriate, the reasons of form or substance for the enquiry. The authorities also provide any information that has been obtained suggesting that the particulars given on the certificates are inaccurate or that the certificate is not authentic.
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).

If a Member State takes measures to prevent irregular practices (e.g. fraud in relation to the origin of goods) it is subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all EC nationals.

In terms of administrative cooperation, 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, which may be required on condition that it is application to products manufactured in another Member State is not subject to requirements going beyond what is necessary to achieve the objective pursued, having regard, on the one hand, to the public interest in question and, on the other, to the means of proof normally available to an importer.

Recently, the Commission adopted a proposal on mutual recognition in relation to the free movement of goods lawfully marketed in the Member States. In this proposal, the burden of proving that goods were lawfully marketed in another Member State is shifted from the importer of the good to the authorities in the Member State of destination.

In order to describe the current state of and prospective framework for intra-EU free movement of goods and the role of Public Documents in this context, we used the example of motor vehicles. In relation to the free movement of motor vehicles, we discussed two types of documents that have been harmonised at the EC level (EC certificates of conformity and European registration certificates for motor vehicles).

Vehicles that are accompanied by a certificate of conformity must be considered by all Member States as conforming to their own laws. In other words, a Member State may not refuse to register or prohibit the sale, entry into service or use of such vehicles. Furthermore, the registration certificate issued by a Member State must be recognised by the other Member States for the identification of the vehicle in international traffic or for its re-registration in another Member State.

---

740 Proposal for a Regulation of the European Parliament and of the European Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC COM [2007] 36 final
The relevant EC measures generally provide for mutual recognition of proofs of conformity and registration and this system is supported by requiring direct administrative cooperation and information exchange between the competent authorities in the Member States.

b. Entry and residence for Union citizens and their family members

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States specifies the supporting documents that may be required by the Member States prior to recognising the existence of an EC right within the scope of the Directive in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise in practice of the right of entry and residence.

The Directive does not harmonise the form or substance of the Public Documents that may be required by the authorities of the Member States and equally does not provide for administrative cooperation between the competent authorities of the Member States for the purpose of verifying the authenticity of those documents.

c. Workers

In relation to the rights of entry and residence of workers, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States is also relevant.

Again, the Directive specifies the supporting documents that may be required by the Member States prior to recognising the existence of an EC right within the scope of the Directive in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise in practice of the right of entry and residence.

The Directive does not harmonise the form or substance of the Public Documents that may be required by the authorities of the Member States and equally does not provide for administrative cooperation between the competent authorities of the Member States for the purpose of verifying the authenticity of those documents.

In relation to income tax issues of non-resident migrant workers, some means of coordination has been provided at the EC level in the form of Commission Recommendation 94/79/EC, which defines principles and rules which should underlie Member States’ legislation on the tax treatment of non-residents.

Public documents that may be used by a non-resident worker to prove that he derives at least 75% of his income on the territory of a Member State (e.g. copies of tax returns) have not been harmonised at the EC level.
On the other hand, there is provision for extensive administrative cooperation between the competent authorities in the Member States. Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation allows for exchange of information between the tax administration of the taxpayer's country of residence and that of his country of activity.

In relation to issues related to social security of migrant workers and their dependants, so-called E-form certificates have been established on the basis of Regulations 1408/71/EEC and 574/72/EEC, in relation to general information and requests transferred between the competent authorities in the Member States, the posting of workers, sickness benefits, pensions, unemployment, family benefits and non-contributory benefits. These are harmonised Public Documents aimed at facilitating freedom of movement for workers and freedom to provide services.

In addition, Regulation 883/2004/EC (which repealed Regulation 574/72/EEC provides for an extensive degree of cooperation between the competent authorities involved in the coordination of the Member States social security systems. The institutions and persons covered by the Regulation have a duty of mutual information and cooperation with a view to ensuring the Regulation's correct implementation.

**d. Entry and residence for self-employed persons**

In relation to the right of entry and residence of for self-employed persons, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States is also relevant.

Again, the Directive specifies the supporting documents that may be required by the Member States prior to recognising the existence of an EC right within the scope of the Directive in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise in practice of the right of entry and residence.

The Directive does not harmonise the form or substance of the Public Documents that may be required by the authorities of the Member States and equally does not provide for administrative cooperation between the competent authorities of the Member States for the purpose of verifying the authenticity of those documents.

**e. Recognition of professional qualifications**

The mutual recognition by the Member States of professional qualifications is of importance for the effective free movement of workers, the freedom of establishment and the freedom to provide services alike. This report focused on Directive 2005/36 on the recognition of professional qualifications. The Directive specifies, but does not harmonise, the form or substance of the supporting documents that may
be required by the Member States prior to recognising the existence of an EC right within the scope of the Directive.

The Lisbon Recognition Convention (six Member States have not ratified this Convention) provides for the establishment of a harmonised Public Document to be attached to a higher education diploma, the so-called “Diploma Supplement”, which aims at improving international transparency and at facilitating the academic (and professional) recognition of qualifications, including diplomas, degrees, certificates etc.

Directive 2005/36 provides for administrative cooperation between the competent authorities of the Member States when the authenticity of Public Documents is concerned. In the event of justified doubts, a host Member State may, for example, require from the competent authorities of a Member State of origin documentary evidence confirming the authenticity of the attestations and evidence of formal qualifications.

**f. Establishment**

In relation to the freedom of establishment, we have focused in this report on Directive 2006/123/EC on services in the internal market, which concerns requirements at the Member State level which affect the access to, or the exercise of, a service activity.

The Directive provides for the necessary legal basis for the establishment at the EC level of harmonised forms for documents which must be accepted by the Member States as equivalent to certificates, attestations and any other documents required of a provider for the purpose of exercising the freedom of establishment.

The Directive stresses the importance of efficient administrative cooperation between Member States. It requires that Member States give each other mutual assistance, and put in place measures for effective cooperation with one another, in order to ensure the supervision of providers and the services they offer.

**g. Services**

In relation to the free movement of services, we have focused on Directive 2006/123/EC on services in the internal market, which concerns requirements at the Member State level which affect the access to, or the exercise of, a service activity.

The Directive provides for the necessary legal basis for the establishment at the EC level of harmonised forms for documents which must be accepted by the Member States as equivalent to certificates, attestations and any other documents required of a provider for the purpose of exercising the freedom of establishment.
The Directive stresses the importance of efficient administrative cooperation between Member States. It requires that Member States give each other mutual assistance, and put in place measures for effective cooperation with one another, to ensure the supervision of providers and the services they offer.

**h. Refund of VAT to non-established taxable persons**

The Eighth Directive on the harmonisation of the laws of the Member States relating to turnover taxes is to establish detailed rules for reimbursement of VAT paid in a Member State by taxable persons established in another Member State and thus to harmonise the right to refund arising under the Sixth Directive on the harmonisation of the laws of the Member States relating to turnover taxes, provides for the introduction of a harmonised VAT certificate.

With regard to the effect of a VAT certificate, the system of reimbursement established by the Eighth Directive necessarily rests on a mechanism of cooperation and mutual trust between the tax authorities of the Member States. Besides, the authorities also 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.

**i. Effective justice**

In relation to the area referred to elsewhere in this report as the civil justice area, we can refer, by way of example, to the Brussels I Regulation (Regulation No 44/2001) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and its predecessor, the 1968 Brussels Convention. These instruments have created an entirely novel regime for the cross-border recognition and enforcement of Member State judgments within the EC, that regime having the objective of the “free movement of judgments” and being premised in particular on the principle of mutual trust and that of full respect for another Member State’s judgments.

As far as the issue of authenticity of Public Documents is concerned, the Brussels I Regulation only requires that a party seeking recognition of a judgment rendered in another Member State produces a copy of the judgment “which satisfies the conditions necessary to establish its authenticity” (see Article 53(1) of the Regulation). In this regard, the Regulation expressly prohibits Member States from requiring the prior legalisation of a judgment rendered in another Member State before accepting it (see Article 56 of the Regulation). In other words, the Member States have to trust in the authenticity of judgments that clearly purport to originate in another Member State.

---

741 See, for example, Case C-414/92 Solo Kleinmotoren GmbH v Emilio Boch [1994] ECR I-2237 20; and Case C-260/97 Unibank v Christensen [1999] ECR I-3715 14; and Regulation No 44/2001 Recital (6)

742 See, for example, Case C-159/02 Turner v Grovit [2004] ECR I-3565 24, and Regulation No 44/2001 Recital (16)
To strengthen this trust, the Regulation requires that the foreign judgment be accompanied by a specific form, which contains all the information that is required for the verification of the judgment’s authenticity through administrative cooperation with the judicial authority that executed the judgment in the country of its origin (see Article 53(2) of the Regulation).

The Regulation does not address the issue of administrative cooperation between the authorities in the Member States.

Other instruments in the area are based on the same system. These instruments include: (1) Regulation 1896/2006/EC creating a European order for payment procedure; (2) Regulation 805/2004/EC creating a European Enforcement Order for uncontested claims; (3) Regulation 2201/2003/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility; (4) Regulation 1206/2001/EC on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; (5) Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; (6) Regulation 1348/2000/EC on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; and (7) Regulation 1346/2000/EC on insolvency proceedings.

\[ j. \quad \textbf{Access to justice} \]

In relation to issues of access to justice (legal aid), Directive 2003/8/EC provides for harmonised forms for legal aid applications and for the transmission of legal aid applications in the event of cross-border litigation, which building on the 1977 European Agreement on the transmission of applications for legal aid, are to be exempt from the requirement of legalisation.

In terms of administrative cooperation, the system established under the Directive is innovative in the EC context (although the 1977 Convention used the same system) in that is requires the Member States to designate authorities competent to send (transmitting authorities) and receive (receiving authorities) the harmonised legal aid application forms.

The possibility of recourse to the service of the transmitting and receiving authorities appeared to provide a sufficient guarantee of authenticity of the documents produced in the pursuance of the Directive.

\[ b) \quad \textbf{Deficiencies in cooperation mechanisms is no excuse} \]

As indicated, secondary EC law progressively provides for administrative cooperation and mutual assistance between the competent authorities in the Member States. Administrative cooperation between the authorities of the Member States is fundamental both for the inception and sustenance of mutual trust in practice between the authorities of the Member States. In this regard, it must be noted that the fact
that, in practice, the cooperation mechanisms may not function in an efficient and satisfactory manner
does not change this, because the Member States should not be able to rely on deficiencies in systems of
cooperation in order to justify restrictions on fundamental freedoms.743

(e) Is the requirement of legalisation proportional to the
justified aim it pursues?

Proportionality is the most important legal tool for drawing the distinction between lawful and unlawful
restrictions of free movement. Its function is to determine the compatibility with the Treaty of national
measures that interfere with the fundamental freedoms and in this context, to further (market) integration.
Accordingly, the degree of scrutiny employed by the Court of Justice is strict and evaluates the necessity
of national measures.

In assessing the compatibility with EC law of national measures which pursue a legitimate objective but
restrict free movement guaranteed under EC law, the Court performs a weighing exercise. It weighs the
national interest of the Member State in attaining the objective pursued by means of its measure against
the EC interest in ensuring free movement.

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. On the other hand, the application of the principle does not remove all discretion from national
authorities. The model to be applied is one of selective judicial deference to the choice of national
administrations.744

As a rule, it is for the Member States to decide on the degree of protection which they wish to afford to
lawful interests (e.g. the prevention of fraud) and on the way in which that protection is to be achieved
(e.g. the requirement of legalisation).

They may do so, however, only within the limits set by the Treaty and must, in particular, observe the
principle of proportionality, which requires, firstly, that the measures adopted be appropriate to secure the
attainment of the objective they pursue and, secondly, that the measures adopted do not go beyond what
is necessary in order to attain it.745

Below, we will evaluate the proportionality of the requirement of legalisation by answering the two
questions identified above. Those questions correspond with those set out in the introduction of this part

743 Conclusion of Advocate General Kokott in Case C-470/04 N v Inspecteur van de Belastingdienst Oost/kantoor Almelo [2006] ECR I-7409 113-114
744 Model derived from T Tridimas The General Principles of EU Law (2nd edn Oxford University Press 2006) 216
in relation to the formulation in *Gebhard*. Accordingly, the first question is whether the requirement of legalisation is a suitable measure for securing the attainment of the objective which it pursues. If in itself the measure can be deemed suitable, we must consider whether it goes beyond what is necessary in order to attain the objective it pursues.

(i) *Is the requirement of legalisation a suitable measure?*

The first part of any proportionality test is the test of suitability. The question asked is whether legalisation as a measure is actually suitable in achieving its purported objective, i.e. the prevention of fraud? If the objective is the prevention of fraud, and legalisation doesn’t actually work to reduce fraud at all, that is a big problem for its compatibility. In the review of the practice of the Member States in relation to legalisation (including the Apostille formality), it has been questioned whether the procedures and formalities used actually guarantee or even truly contribute to achieving the aim of fraud prevention.

Three reasons can be indicated to conclude that legalisation is not a suitable measure to prevent fraud. 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 is normally relies on specimen signatures, stamps etc. held by the competent authority, which are compared to those on the document that is to be legalised. Besides, the issue that no signature is alike, which makes any comparison difficult, there is the problem that systems and databases are not updated every day.

Lastly, we refer to the issue that, 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. This last issue also bears on the question whether legalisation is really necessary at all.

(ii) *Is the requirement of legalisation a necessary measure?*

1) **The rationale for imposing a restriction that pursues a justified aim**

It must be noted here that 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.\footnote{Case 104/75 Adriaan de Peijper, Managing Director of Centrafarm BV. [1976] ECR 00613 18}

In other words, if the decision to require legalisation is inspired principally because it increases the state
income (which in relation to some Member States is arguably the case) and because it lightens the
administrative burden compared to a situation in which no legalisation is required and the authorities have
to rely on administrative cooperation for the verification of a document’s authenticity (which could also be
argued), the measure cannot be justified with reference to secondary aim of fraud prevention. However,
this question is difficult to answer, because it requires an analysis of the intention of the Member States.

\section*{2) The existence of less restrictive alternatives to the restriction}

In applying the principle of proportionality in relation to restrictions on fundamental freedoms, the Court of
Justice has been guided by the so-called “less alternative restriction test”. This means that national
restrictive measures will be justified only if the interest which they seek to protect cannot be protected as
effectively by measures which restrict less intra-EC free movement. For example, a measure adopted by
a Member State on the basis of Article 30 EC can be justified only if it does not restrict intra-EC trade
more than is absolutely necessary.\footnote{Case 72/83 \[n 736\] 37; In relation to restrictions of free movement of goods, the degree of scrutiny exercised by the Court does not generally differ depending on whether a restriction is imposed in the interests of one of the express derogations provided for in the Treaty or of a mandatory requirement. Where a Member State has a choice between various measures to attain the same objective it is under an obligation to choose the means which least restrict the free movement of goods, see Case 261/81 Walter Rau Lebensmittelwerke v De Smedt PVBA [1982] ECR 3961 12}

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. If that
were so, Member States would have to align their legislation with the Member State which imposed the
least onerous requirements which could initiate a race to the bottom.\footnote{Case C-384/93 Alpine Investments \[1995\] ECR I-1141 55}

Conversely, we must focus our attention primarily on the effects of the restriction under scrutiny, rather
than merely on a comparison between the laws and practices of the Member States.\footnote{Joined cases 60/84 and 61/84 \[n 715\] 19-22} In the process of
assessing the existence of a less restrictive alternative to a specific state measure we must, therefore,
take into account all relevant domestic particularities and circumstances of the member States involved
which may further influence our conclusions.\footnote{Case 97/83 Melkunie \[1984\] ECR 2367 19}

\subsection*{a) The duty to recognise equivalence and to cooperate}

\footnote{Case 104/75 Adriaan de Peijper, Managing Director of Centrafarm BV. [1976] ECR 00613 18}
From the principle of proportionality follow two inter-related factors when reviewing the proportionality of a national measure, which are both relevant when analysing the requirement of legalisation for foreign Public Documents: firstly, the duty of Member States to recognise the existing equivalence between their legal systems; and secondly, the duty for the national authorities to cooperate with the authorities of other Member States.

These requirements force the Member States to recognise, prior to imposing additional restrictions, the measures taken by other Member States in the form of formalities and checks that are equivalent to the domestic ones. For instance, in Commission v France\(^751\), the Court held that the Member States are not allowed to prohibit the marketing of a product originating in another Member State which provides a level of protection equivalent to that which the national rules are intended to ensure.

Next, the duty for the national authorities to cooperate with the authorities of other Member States obliges the competent national authorities to mutually cooperate in order to establish equivalence between checks and formalities to prevent unnecessary duplication.

In Malika Tennah-Durez\(^752\), a case concerning free movement of workers, the Court has held, as a general principle applied in various areas of EC law, that when the competent authority of a Member State entertains serious doubts, which go beyond mere suspicion, about the authenticity (or accuracy) of 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.

In the light of the general obligation for national authorities to cooperate in the process of implementing EC law, the Court indicated that where the authenticity or accuracy of a document that purports to be a Public Document executed in another Member State is involved, the authorities of the Member States are bound by those Public Documents, although in the event of new factors coming to light giving rise to serious doubts as to the authenticity of a Public Document that is produced as a means of evidence, or regarding its compliance with the applicable rules, the Court has deemed it permissible for national authorities to re-open the matter of verification with the authorities of the Member State that executed the document in question.\(^753\)

---

751 Case 188/84 Commission of the European Communities v French Republic [1986] ECR 419 16


753 Case C-110/01 [n 752] 80
These requirements constitute a negative tool of integration: they force the Member States to desist from requiring the fulfilment of domestic checks and formalities that are equivalent to those that have already been carried out by other Member States as far as they are equivalent to the domestic ones.

In other words, the competent authorities must either rely on the documentary evidence of the fulfilment of those checks and formalities executed 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.

i) Limits to the duty to recognise equivalence

a. Conflicting regulatory philosophies

The function of the principle of equivalence is restricted where Member States’ laws are based on conflicting regulatory philosophies. The principle of equivalence is inapplicable if it cannot be proven that a product in free circulation in other Member States is warranted with the same level of protection as domestic products.

Effectively, the principle of equivalence is a requirement of non-discrimination and fundamental differences in the philosophy of control existing in the various Member states may make it impossible to carry out a meaningful comparison of the national requirements with a view to establishing comparability.

ii) Limits to the duty to cooperate

a. Excessive burden or expenditure

Limits to the duty for the authorities to cooperate exist where the burden on the relevant domestic authorities or the expenditure involved in the process of cooperation clearly exceed the limits of what can reasonably be required. On the other hand, as indicated above, restrictions, though beneficial, motivated primarily by a concern to lighten the administration’s burden or reduce public expenditure, cannot be justified, 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.754

3) The general and abstract nature of the restriction

754 Case 104/75 [n 746] 18
One apparent problem with the proportionality of the requirement of legalisation for foreign Public Documents is its general and abstract nature. For example, in Dafeki755, the Court held that a rule 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 by German authorities to take account relevant documents executed by courts in another Member State as evidence.

Accordingly, the Court concluded that the administrative and judicial authorities of a Member State must adopt a less restrictive approach by accepting certificates and analogous documents relative to personal status executed by the competent authorities of the other Member States unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.

(iii) Certain examples

1) documents required for the importation of medicinal products

   a) Restriction

Dutch law made the importation of medicinal products conditional upon the production of certain documents. The required documents could only be obtained from the manufacturer of the products. When this requirement was challenged before the Court, the Dutch government contended that the purpose of the requirements to produce the documents, which concerned the composition and method of preparation of the products, was to protect public health.756

   b) Legitimate aim of the restriction

The Court held that, within the limits imposed by the Treaty, it is for the Member States to decide what degree of protection to grant to the health and life of humans. However, the Court also held that national provisions do not fall within the relevant EC provision allowing for derogation from an EC freedom (Article 30 EC) if the health and life of humans can be protected as effectively by measures which restrict intra-EC trade less.

   c) Proportionality of the restriction

   i) The existence of a less restrictive alternative: cooperation between authorities

The court conceded that the national authorities must be in a position to satisfy themselves that specific bunches of imported medicinal products comply with the particulars generally of the product. However,

---

756 Case 104/75 Adriaan de Peijper, Managing Director of Centrafarm BV [1976 613
the Court determined alternative methods that it deemed just as effective to this end, but which it considered to be less restrictive.

The last alternative mentioned by the Court is especially of interest here: Cooperation between the authorities of the Member States would enable them to obtain, on a reciprocal basis, the documents necessary for checking largely standardised and widely distributed products.\footnote{Case 104/75 [n 746] 27}

2) Import licences required for the import of milk

a) Restriction

UK legislation made the importation of UHT milk subject to an import licence.

b) Legitimate aim of the restriction

The government of the UK argued that licensing was necessary to enable the domestic authorities to identify consignments of imported milk and, upon receiving information from the exporting country, to trace infected consignments and destroy them before reaching the market.\footnote{Case 124/81 Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [1983] ECR 203}

c) Proportionality of the restriction

i) The existence of a less restrictive alternative: cooperation

The Court stated that the issue of an administrative authorisation results in an impediment to intra-EC trade which could be eliminated without prejudice to the effectiveness of protection of animal health and without increasing the administrative or financial burden imposed by the pursuit of that objective.\footnote{Case 124/81 [n 758] 18} That result could be achieved, the Court held, if the UK authorities abandoned the practice of issuing licences and confined themselves to obtaining the information that is of use to them, for example, by means of declarations signed by the importers, accompanied if necessary by the appropriate certificates.\footnote{Id} The Court further held that health protection could be ensured by requiring importers to produce certificates issued by the competent authorities of the exporting Member State.

ii) Presumption of accuracy of documents issued by competent authorities

Where cooperation between national authorities makes it possible to facilitate and simplify frontier checks, the authorities responsible for health inspection must ascertain whether the substantiating
documents issued within the framework of that cooperation raise a presumption that the imported goods comply with the requirements of domestic health legislation thus enabling the checks carried out upon importation to be simplified. In the case at hand, the Court concluded that the conditions were satisfied to allow a presumption of accuracy in favour of the statements contained in such documents.  

### iii) Legitimacy of carrying out controls

The Court added that the necessary cooperation did not preclude the authorities of the importing Member State from carrying out controls by means of samples to ensure observance of the requisite standards.

This consideration is interesting when transposed onto the issue of authenticity of foreign Public Documents, because the Member States could legitimately decide to verify on an *ad hoc* basis the authenticity of documents originating in other member States, instead of imposing the general and abstract procedure of legalisation. Such a measure would be less restrictive.

### 3) Recognition of rectifications of birth certificates carried out by national authorities

This example, derived from the case of *Dafeki*, was referred to already above, but is discussed in more detail here.

The case concerned a Greek national who wished to rely on a document executed by the Greek authorities that rectified her date of birth, for the purpose of proving the existence of a right to German social security benefits guaranteed under EC free movement law. The German social security authorities refused to rely on the Greek rectification document.

#### i) Restriction 1: restriction of the evidential value of foreign Public Documents

Under German law, domestic civil status documents enjoy a presumption of accuracy as to the matters to which they attest, subject, however, to any interested party adducing evidence to the contrary.

The same rules of evidence do not, however, apply to foreign documents, which are subject to free evaluation by the courts. Consequently, the courts are able to disregard the matters certified in them.

The Court concluded that this rule of evidence constituted a restriction of free movement of workers requiring justification, notwithstanding the fact that the rule applied irrespective of the nationality of the

---

761 *Id at 30*
762 *Id at 31*
763 *Case C-336/94 Eftalia Dafeki v. Landesversicherungsanstalt Wurttemberg [1997] ECR I-6761, 12, 16-18*
worker: the German rules of evidence operated in practice to the detriment of workers who are nationals of other Member States, since they have to rely generally on foreign documents as a means of evidence.

4) Legitimate aim of the restriction

The German government justified the restrictive rule of evidence, implicitly, with reference to the need to prevent fraud, in particular in relation to documents originating in other Member States, such as Greece, where rules on authentication are not of an equivalent standard as in Germany.

The German government contended in support of this argument that in certain cases in Greece, alteration of a date of birth by judgment of a single judge based solely on the evidence of two witnesses is not uncommon and that many migrant workers of Greek nationality have availed themselves of the possibility of having their date of birth rectified, and, as a general rule, the alteration operated to the worker's advantage.

5) Proportionality of the restriction

a) Lack of equivalence between domestic and foreign Public Documents and harmonising measures for their mutual recognition

In evaluating the compatibility of the German rule of evidence, the Court held that account must be taken of the considerable differences that exist between the national legal orders as regards the conditions and procedures for rectification of a date of birth.

The possibility of successfully challenging the accuracy of a certificate of civil status, such as that in issue in the main proceedings, depends to a large extent on the procedure followed and on the conditions which have to be satisfied in order for such a birth certificate to be altered, especially in terms of authentication. These procedures and conditions may vary considerably from one Member State to another.

In addition, the Court stressed that the Member States have neither harmonised the mentioned procedures and conditions for rectifying birth certificates, nor have they established by means of harmonisation a system of mutual recognition of decisions to this end, as has been done for judgments in civil and commercial matters.

With a view to the lack of equivalence of the legal systems and the absence of harmonising measures, the Court concluded that the administrative and judicial authorities of a Member State are not required under EC law to treat as equivalent subsequent rectifications of certificates of civil status made by the
competent authorities of their own State and those made by the competent authorities of another Member State.

In other words, the German authorities were not obliged to presume the accuracy of foreign documents regarding the matters to which they attest. The practice of free evaluation of foreign documents by the German courts which are, consequently, able to disregard the matters certified in them, was therefore justified due to insufficient equivalence of the legal systems of the Member States.

i) Restriction 2: Restriction of the admissibility into evidence of foreign Public Documents

Besides the restrictive rules on evidential value of foreign documents, the German rules of evidence further restricted the admissibility into evidence of documents rectifying a date of birth if those documents were executed at a point in time after previous declarations made to the German authorities concerning a date of birth. This restriction applied generally and irrespective of the domestic or foreign origin of the documents involved.

As a consequence of these rules, the Greek document containing a rectification of the Greek worker’s date of birth was inadmissible as proof of the age of the Greek worker because it was executed after the first declaration made by the Greek worker to the competent German authority regarding her age.

6) Legitimate aim of the restriction

The German government justified this restrictive rule of evidence, implicitly, with reference to the need to prevent fraud, in particular in relation to documents originating in other Member States, such as Greece, where the rules on authentication are not of a similar standard as in Germany.

As indicated above, the German government contended in support that in certain cases in Greece alteration of a date of birth by judgment of a single judge based solely on the evidence of two witnesses is not uncommon and that not a few migrant workers of Greek nationality have availed themselves of the possibility of having their date of birth rectified, and, as a general rule, the alteration operated to the worker's advantage.

7) Proportionality of the restriction

a) The existence of a less restrictive alternative: a case by case approach
The Court held that the German rule 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 by German authorities to take into account relevant documents executed by courts in another Member State as evidence. The Court stated that such a rule restricts too far the freedom of movement for workers because the exercise of this freedom is not possible without production of documents relative to personal status, which are generally issued by the worker's State of origin.

Accordingly, the Court concluded that the administrative and judicial authorities of a Member State must adopt a less restrictive approach by accepting certificates and analogous documents relative to personal status executed by the competent authorities of the other Member States unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.

(f) Conclusion

In this section it was first considered whether the requirement of legalisation for foreign Public Documents or the formality it involves qualifies as a restriction, i.e. a measure that is liable to hinder or make less attractive the exercise of fundamental freedoms.

The analysis of the requirement of legalisation as a restriction led to the conclusion that the requirement implies de facto a negative presumption in relation to the authenticity of foreign Public Documents, which, in light of ‘case law of the Court of Justice, constitutes a procedural measure which 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.

Subsequently, it was considered whether the formality involved in the process of legalisation qualifies as a restriction. It was indicated that there are important indications that it does. Firstly, because the formalities that have to be fulfilled in the process of having a document legalised create extra (transaction) costs and cause additional delay.

Secondly, because the requirement of legalisation does not operate 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, it was argued that with a view to the essential role of Public Documents in the context of cross-border free movement and access to 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, reference was made to the survey conducted for the purpose of the study, which showed that 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.

After it was considered that the requirement of legalisation of foreign Public Documents cannot be characterised as a directly discriminatory measure, it was considered whether the requirement can legalisation be justified on the grounds set out explicitly in the Treaty. It was concluded that none of the available Treaty exceptions applies.

It was found, however, that restrictive measures with the aim of fraud prevention, which include legalisation, can possibly be justified on the basis an overriding requirement in the general interest.

On the other hand, a thorough analysis of secondary EC legislation shows that there are EC harmonising measures that arguably ensure that the interests involved with legalisation are protected, by enhancing a real basis for mutual trust between the authorities of the Member States.

To ensure, nonetheless, that a full analysis is made under EC law, it was further examined whether the requirement of legalisation is proportional to the justified aim it pursues in that the requirement of legalisation is a suitable measure for securing the attainment of the objective which it pursues and whether the measure does not go beyond what is necessary in order to attain the objective it pursues.

On the basis of the thorough analysis made, it can be concluded that it is at least doubtful whether the requirement of legalisation is a suitable measure for the prevention of fraud, that it is problematic that the measure is applied in a general and abstract way, and that there are suitable alternatives to the measure, for example a case by case evaluation of the authenticity of foreign documents and the provision for administrative cooperation in cases where justified doubts arise.
PART VI. SUGGESTED MEASURES AT THE EC, INTERNATIONAL AND NATIONAL LEVEL

6.01 Overview of suggested measures

(a) Measures at the EC level

(i) European Central Register

The establishment of a European central register for Public Documents implies that the execution of a Public Document by a domestic public authority is automatically registered using an EU-wide coding-system. Documents executed by a public authority would receive a registered identification code corresponding to the particulars of the document and the contact information of the executing public authority.

For example, the Irish correspondent suggested that documents coming from Ireland receive an identification code commencing with the letters IE. This country-code could then be followed by a code indicating the document-type: MC for marriage certificate or CI for certificate of incorporation. That document code could then be followed with the initials of the officer issuing the certificate, the year of issue and a sequential number. So, for example, the first marriage certificate issued by Joe Bloggs, Official at the GRO in Ireland, in 2007 would have the following code: IEMCJB071.

(ii) European Standard Information Sets

The establishment of standard information sets is a measure which may prove effective in addressing problems related to language diversity. The domestic authorities fill in standard information sets which correspond with parallel language modules. This allows the relevant information to be displayed and checked in multiple languages. The system can operate in combination with a European register and possibly standardised Public Document forms.

(iii) European Standard Forms

The use of standardised forms for the execution of Public Documents required in the process of exercising EC rights makes the documents recognisable and their content uniform and transparent.
(iv) **European Standard of Proof**

An important measure could be the determination at European level of a common Standard of Proof. This measure relates to the fact that Member States interpret differently the secondary EC instruments stipulating that the Member States may require the proof of certain facts. Member States currently impose different standards of proof, i.e. they insist on the production of different types of document for the proof of the same facts.

This may also lead to the suggested action whereby a third country document that has been legalised in one Member State would subsequently be recognised in all the other Member States without requiring further proof as to authenticity. However, problems of fraud and legalisation forum shopping should be taken into account if this were to become standard practice.

(v) **Conversion of the 1987 Convention into a European Regulation**

A very basic measure would be the conversion of the 1987 Brussels Convention into a European Regulation (or its ratification by all Member States). This potential measure will be fully explored just as the other potential measures which have been and will be identified.

Nevertheless, the system of the 1987 Convention (and that of some of the CIEC Conventions) is flawed in several respects. Its substance would therefore be subject to important improvements, for one based on a more realistic differentiation between different types of document.

(vi) **European Communication and Exchange of Information System**

Stimulating mutual trust between domestic authorities by setting up direct communication and information systems between the domestic public authorities in the Member States.

(vii) **Differentiation between Document Types as regards potential Measures**

Maintaining formalities only in areas which are sensitive and vulnerable to fraud, complete abolishing in other areas.

(viii) **Designation of central authorities**

This entails establishing a system whereby each Member State would designate a central authority competent for inquiries regarding document authenticity to cope with the risk of fraud. It would also include the possibility for formal and informal inquiries amongst the authorities involved.
(ix) **Complete or increased abolition of legalisation requirements**

Austria suggests that legalisation requirements should be totally abolished between the Member States of the Union and basis its opinion on the success of instruments dealing with recognition and enforcement in the context of foreign judgments. Austria believes that free movement of documents does not depend on standard forms or central registers.

Greece also suggested a gradual move toward the complete abolition of legalisation requirements, beginning with abolition in specific areas. This would include the EC adoption of a comprehensive regulation covering all the documents currently exempted from legalisation which could be applied in the future to other documents.

Sweden suggested abolition with regard to succession-related Public Documents.

(x) **Further harmonization of legalisation requirements**

The Estonian rapporteur suggested further harmonisation as to the rules regarding legalisation in order to increase legal certainty, especially for the users of Public Documents and in light of the fact that it is often unclear which documents must undergo legalisation.

(b) **Measures at the intergovernmental level**

(i) **Coordination of the International Legal Framework in the EU**

This measure would imply the coordination of the International Agreements which currently exist parallel to each other but which are not in force in all Member States. It is suggested that the establishment of one uniform legal framework for all Member States would contribute to preventing difficulties resulting from legal uncertainty.

In a similar vein, a combination of EU action with an expanded scope regarding bilateral agreements has been suggested. This includes urging those Member States that have not joined the CIEC conventions related to civil status to join and, if that fails, then possibly EC action based on Articles 65 and 300 TEC would be a solution.

(ii) **The Hague 1961 Convention and the eApostille Pilot Programme**

At the start of the project in 2006 the foreseeable advise in relation to the Hague 1961 Convention was the ratification of the Convention by Denmark. This, however, took place in 2006 and as of 1 January
2007, the Convention applies between all the Member States. What remains is the advice for 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.

(iii) Closer co-operation between parties to multi-lateral instruments

The Greek rapporteur suggested that parties to agreements consult with one another to explore ways of modernising the system where it is outdated.

The Portuguese rapporteur indicated that closer co-operation and more communication between authorities is desirable, as well as the provision of EU training on these issues and peer-review.

(iv) Transparency

The Swedish rapporteur noted that although Sweden itself does not have legalisation requirements, as long as such requirements exist in other countries, it would be helpful if the applicable procedures were transparent so that individuals could be aware of the different requirements.

(c) Measures at the national level

(i) Public Information System

Citizens and companies are arguably willing to produce documentary evidence abroad and fulfil necessary prior formalities. The lack of adequate Public Information in relation to the documents required, the applicable formalities, and the competent authorities, seriously undermines any willingness which exists a priori.

(ii) Guidelines and information for public authorities

In order to ensure the consistent implementation in practice of applicable formalities, the domestic continuous coordination of the public authorities should be improved. This also relates to the proper implementation of changing EC, International, and national requirements.

Specifically in the context of foreign diplomas, Germany suggested that current structures responsible for disseminating knowledge should be improved upon, especially considering the high number of authorities involved in that area.
The Latvian rapporteur also noted that there is a great lack of knowledge amongst authorities in this area which should be remedied in order for the existing legalisation procedures to be correctly applied.

(iii) Improved availability and accessibility of Competent Authorities

Users of Public Documents may require the use of their documents abroad anywhere and at any time. The availability and accessibility should be improved. An important tool in this respect will be the enhanced functionality of eGovernment systems which allow for the online fulfilment of formalities.

(iv) Decrease the number of authorities involved in legalisation

The Polish rapporteur indicated that it might be helpful to introduce a system of direct checks whereby the competent agency would specifically indicate where the document must go to be verified, in order to decrease the number of links in the legalisation chain.

This opinion was also shared by Slovenia which suggested that the Ministry of Foreign Affairs be the sole authority responsible for legalisation. The rapporteur indicated that this would be achievable through the provision of a complete list of all officials with the competence to sign Public Documents.

(v) Record of signatures

Belgium suggested the system of its own country in which the Federal Public Service Foreign Affairs has a list of the signatures of all the domestic notaries. This allows for direct legalisation by the Federal Public Service Foreign Affairs without the problem of double internal legalisations. Finland also proposed a similar registry of notaries public in that country.

(vi) Introduction of e-services

Estonia suggests that this would be a desirable addition to national procedures regarding legalisation, but acknowledges that its advanced position with regard to e-services is not the common position amongst Member States.

Greece also suggested that modern methods be adopted to reduce the time-consuming nature of the existing system and the risk of fraud.
(vii) **Introduction of dedicated legislation with regard to national legalisation procedure**

The Dutch rapporteur indicated that the various policies applicable in the Netherlands regarding legalisation are not always consistent in terms of which documents must go through legalisation. The rapporteur noted that this increases legal uncertainty and decreases legal protection, especially in the light of the fact that in the Netherlands there are really only policy rules concerning legalisation and no real law.