

Initial appraisal of a European Commission Impact Assessment

European Commission proposal on simplifying the acceptance of certain public documents in the EU

Impact Assessment (SWD (2013) 144, SWD (2013) 145 (summary)) for a Commission Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) 1024/2012 (COM (2013) 228).

• Background

This note seeks to provide an initial analysis of the European Commission's Impact Assessment (IA) accompanying the above proposal, which was submitted in April 2013.

This proposal covers documents which are issued by the authorities of a Member State and have to be presented to the authorities of another Member State. Once it enters into force:

- some public documents would be exempt from legalisation or a similar formality called Apostille. For decades, legalisation has been the traditional method of certifying the authenticity of foreign public documents, involving diplomatic or consular services. The Apostille is a certificate in a prescribed form issued by an authority of the State from which the public document originates. It was introduced by an international convention in 1961, abolishing the requirement of legalisation for certain public documents¹. Under the current proposal, in case of reasonable doubt about the authenticity of the document, authorities would have the possibility to resort to the Internal Market Information System, 'a web-based application which allows national, regional and local authorities to communicate quickly and easily with their counterparts abroad' (Annexes to IA, p. 64);
- certified copies and certified translations of the same public documents need not in principle be requested;
- citizens and businesses could use multilingual standard EU forms for births, deaths, marriages, registered partnerships and the legal status and representation² of a business.

The EP Resolution of 25 November 2009 on the multi-annual programme for 2010-2014 in the area of freedom, security and justice (Stockholm programme) considered that 'the priorities in the field of civil justice must first and foremost meet the needs expressed by individual citizens and business, whilst constantly simplifying the machinery of justice and creating simpler, clearer and more accessible procedures in order to guarantee the proper enforcement of

¹ Please also see the definitions of these terms in Article 3 of the proposal and on pages 4-5 of the IA.

² Meaning who is authorised to represent a business.

fundamental rights and consumer protection'. To this end, it called for 'proposals for... the abolition of requirements for legalisation of documents.' (P7_TA(2009)0090)³

- **Identification of the issue at stake**

The IA clearly identifies the problem in need of possible EU action. Citizens and businesses waste time and money to prove the authenticity of public documents issued in another Member State. This is a burden also for public administrations. These problems are partly due to outdated and disproportionate administrative formalities. The IA presents useful evidence about the problem, providing concrete examples of difficulties encountered by citizens and business. At the same time, it correctly frames the problem within the wider context of the free movement of citizens and business within the EU. The IA notes that 12 million EU citizens, or 2.5 per cent of the EU population, reside in a Member State other than their one of origin (2011 data).

The problem definition provides a list of 'typical examples of most frequently used public documents related to EU rights of EU citizens and businesses, which are subject to the identified administrative formalities'. Besides civil status documents, these include residence, citizenship and nationality documents, documents about the legal status and representation of businesses, documents relating to real estate, intellectual property rights and documents proving the absence of a criminal record. This list corresponds to the definition of public documents in Article 3 of the proposal, which will determine what is exempt from the administrative formalities under review. Although the list is quite comprehensive, there is no discussion as to whether additional or fewer documents should be in the scope of the proposal. At first sight, additional public documents could relate, for example, to court proceedings, inheritance, military service or other notarial issues.

- **Objectives of the legislative proposal**

Promoting the free movement of citizens and businesses, which features also in the title of the proposal, is the stated general objective.

The general objective breaks down into some more specific objectives: (i) to reduce the difficulties caused by public documents from other Member States; (ii) to simplify the fragmented legal framework in this domain; (iii) to better detect fraud and forgery of public documents and (iv) to eliminate the risk of discrimination. Whereas the first two specific objectives are quite straight-forward and linked with the problem at hand, the latter two require some more explanation. Objective (iii) seems to relate mainly to the possibility to forge documents certified by an Apostille. As far as objective (iv) is concerned, the IA clarifies elsewhere that this is an area of indirect discrimination, rather than direct discrimination, since the 'requirement of a Member State to authenticate public documents originating in other Member States... is intrinsically liable to affect non-nationals more than nationals in relation to the exercise of fundamental rights and freedoms guaranteed by EU law' (IA, pp. 22-23).

Operationally, the proposal aims to: cut costs and delays due to the mentioned procedures; 'reduce the need for translation of public documents' and 'promote an efficient and secure

³ Additional background information may be found in the briefing of the Library of the European Parliament 'Free movement of public documents', published in June 2013.

cooperation exchange among Member States authorities'. One may notice that the objective mentions translation per se, instead of certified translation, which was singled out explicitly as a problem.

- **Range of the options considered**

The IA provides a useful analysis of some options which take into account the consultation of stakeholders. However, there are three main shortcomings: a certain bias in the analysis, from the start in favour of the eventually chosen option; the inclusion of an option which looks scarcely realistic; and the avoidance of a discussion about the documents that should be the object of multilingual standards forms.

Firstly, even before reading the analysis, one is under the clear impression that the Commission's preferred option will be a 'legislative measure promoting the free movement of citizens and businesses by simplifying administrative formalities related to the use and acceptance of certain public documents in the EU, complemented by improved administrative cooperation between the Member States and issuance of multilingual standard forms'. Unlike other options, this solution has embedded both one of the stated objectives ('promoting the free movement of citizens and businesses') and the multilingual standards forms whose absence had been quoted as a problem. This option would also incorporate into EU law the principles of the 1987 Brussels Convention, which is the subject of another option.

By comparison, the other options read:

- Retention of the status quo (base-line scenario);
- A non-legislative measure promoting best practices between the Member States in order to facilitate cross-border circulation of public documents;
- Ratification of the 1987 Brussels Convention by all Member States;
- Full harmonisation of public documents and rules governing their circulation within the EU.

Secondly, according to Commission's IA Guidelines, options should be realistic. One learns in the IA that full harmonisation would mean, for example, that only one type of document compiled in all official languages would exist in all Member States, also in purely national situations. Legalisation, Apostille, certified translations and certified copies would be completely abolished. National rules to authenticate public documents, including those issued in third countries, would be harmonised. The analysis understandably concludes that this is an 'extreme' option, which 'would have excessive intrusive impact on the national legal system and administrative practices', as well as excessive costs (IA, p. 40). Therefore, one wonders why it was analysed in the first place, instead of being simply mentioned and discarded up-front, as the IA does in other cases.

Thirdly, the IA breaks down the preferred option, considering different possibilities to improve administrative cooperation and issue multilingual standard forms. As regards the first, the IA compares and contrasts cooperation based on the Internal Market Information System (IMI) with the creation of a network of civil registers. As far as the second is concerned, the IA considers mainly the nature of the forms, which could be either compulsory or optional and gives its preference for optional forms. What the IA does not do is analyse in depth which documents should be the subject of multilingual standard forms and why they should be. This is in line with the lack of analysis on the definition of public document (see 'Identification of the

issue at stake' above). The IA states that the Commission's preferred option would entail 'the issuance of multilingual standard forms at EU level for public documents most pertinent to cross-border use' (IA, p. 30). Then, it simply informs the reader that the 'proposed instrument would establish EU multilingual standard forms for birth, death, marriage/registered partnership as well as for legal status and representation of a company or other undertaking' (IA, p. 30). Why these forms were selected does not seem to be explained in the IA.

Furthermore, 'a legislative initiative limited to a specific category of public documents (e.g. civil status documents)' is discarded, as its limited scope 'would contribute to an increased fragmentation of the current legal framework' (IA, p. 32). This is not really expanded upon in the IA. However, one may wonder whether the same reasoning would not apply to the Commission's preferred option, which has only one form outside the scope of civil status documents (i.e. legal status and representation of a business).

- **Scope of the Impact Assessment**

The IA assesses all options for their impacts, coherently elaborating on economic and social aspects. The analysis provides some estimates of the likely costs and benefits, but does not differentiate their evolution in the short and long terms.

- **Subsidiarity / proportionality**

According to the Commission, the EU is better placed than Member States to take action in this field, mainly because the identified problems have a purely cross-border dimension and Member States have been unable or would be unable to solve them. The IA also notes that the measure would not go beyond what is necessary to achieve the stated objectives, mainly because it would not strive at full harmonisation and would not interfere in purely domestic scenarios and with applicable sectoral EU law (IA, p. 26).

At the time of publishing this initial appraisal, only the Senate of Romania had issued a reasoned opinion arguing that the proposal is not in compliance with the principle of subsidiarity, mainly because of legal issues relating to the recognition of registered partnerships.

Without entering into a legal debate on this issue, the IA states: 'It is important to stress that the measure will not... cover the recognition of effects of public documents' (IA, p. 4). This is reiterated in the explanatory memorandum to the proposal, which also states: 'The Union multilingual standard forms to be established by this proposal will not produce legal effects as regards the recognition of their content in the Member States where they will be presented' (Proposal under review, p. 6).

- **Budgetary or public finance implications**

The Commission says that the 'benefits for EU citizens, businesses and national public administration... would not be outweighed by the creation of additional burdens for the Member States' (IA, p. 44). This is an important element to bear in mind.

In line with Commission's IA Guidelines, the IA attempts to estimate the potential administrative burden generated by the preferred option. In particular, the IA estimates that the cost for using the IMI for administrative cooperation would amount to around 633,000 euros (IA, p. 45), presumably per year. This limited cost is the result of the following assumptions:

'Price = Tariff (average hourly labour costs in the EU = 22,6 €) x Time (time spent for the activities required for administrative cooperation = around half an hour)

multiplied by

Quantity = Number of entities (4 authorities involved in different Member States - i.e. each exchange would involve at least 2 public authorities (the involvement of 1-2 further authorities at local level per each Member State can be envisaged) x Frequency (it can be estimated as the number of apostilled documents issued and giving rise to doubts on their authenticity = around 1% of the Apostilles issued annually in the EU, i.e. 14.000).¹ (IA, pp. 44-45)

This calculation is very sensitive to at least three assumptions which at first sight look uncertain: first, that IMI will only be used for Apostilles giving rise to doubts, instead of being used for other purposes, still related to the authenticity of documents. Second, that it will be used only in 1% of Apostilles, as opposed to say 2% or 3% of Apostilles. Third, that administrative cooperation will take approximately 30 minutes since the outset, rather than taking more at the beginning and then decrease as administrations get used to IMI. Should these conditions not be met, the forecasted costs could increase. Moreover, the IA informs that '[f]rom a technical point of view, there are no limits to the expansion of IMI' (Annexes to IA, p. 65). However, one should also consider that even handling 14,000 information exchanges, as the IA assumes, would represent a five-fold increase compared with the latest available figures on information exchanges handled by IMI (in 2011, see Annexes to IA, Figure 1, p. 65). One therefore wonders whether there may be additional costs if such a sudden increase in the information exchanges handled were to materialise.

These considerations apply especially to the IA. The legislative proposal actually foresees more flexibility as regards the exclusive use of IMI to verify the authenticity of documents (see below: 'Coherence between the Commission's legislative proposal and the IA').

• **SME test / Competitiveness**

The IA analyses potential impacts on SMEs, both in the main text and in the annexes. This aspect is central to the proposal. For example, the IA indicates that more than 44 per cent of the almost 21 million SMEs within the EU 'are involved in some form of international contact' and 'nearly 30 per cent of SMEs are engaged in import/export activities' (IA, p. 13). The quoted figures, however, do not differentiate between internationalisation outside the EU, which would not be solved by this proposal, and within the EU, targeted by the proposal. This is usefully done in the narrower field of subcontracting practices, where the Commission states that 'about 26 per cent [of EU SME subcontractors] also have clients in other Member States (i.e. about 383,000 SMEs)' (IA, p. 13). The same source on which these data are based contains useful additional figures, such as:

¹The two most common modes of internationalisation are exports and imports:

- 25 per cent of SMEs within the EU27 export, of which about 50 per cent also go beyond the Internal Market (13%);
- 29 per cent of SMEs within the EU27 import, again 50 per cent import from countries outside the Internal Market (14 per cent).⁴

Providing these data does not change the conclusions drawn about the need to act at European level. Even 13 per cent of EU SMEs is a large enough target for these measures.

- **Relations with third countries**

The IA provides a comprehensive description of the shortcomings of the existing international solutions to the identified problems (IA, pp. 18 to 22).

- **Quality of data, research and analysis**

The IA was carried out in-house by the Commission and is based, inter alia, on earlier external studies. It gives easy-to-understand real-life cases: for example, the administrative complications of a Belgian-Hungarian wedding or the costs of certified translations for companies bidding or establishing themselves in another Member State. Data about typical costs in some Member States are provided.

There is an attempt to provide an order of magnitude for the costs of different documents/procedures, which - according to the Commission's estimates - would range from approximately 200 million euros to 330 million euros per year and break down as follows (IA, pp. 15 to 17 and Annexes to the IA, pp. 73-80).

	Estimated costs per year (million euros)
Apostille	Over 25
Legalisation	2.3 - 4.6
Certified copies	75 - 100
Certified translations	100 - 200
Total	202.3 - 329.6

Certified translations are estimated to cost between 100 to 200 million per year and have hence the lion's share of the costs. The Commission assumes that each year 1.6 million documents, each consisting of approximately three pages, need to be translated in a certified way at a cost of 30 euro per page. This would give 144 million euro, which appears to be rounded up to the above range. This appraisal will refrain from contesting the assumptions behind the first two elements of the multiplication and acknowledge that it would be difficult to come up with reliable figures on the amount and length of public documents to be translated for the whole EU. However, the robustness of the estimate is already weakened by the 30 euro per page figure. The source of this rate is an earlier IA from 2010, which seemingly refers to translations in general, instead of certified translations (IA, footnote 34, p. 17).

Hence, there is a lack of clarity. The IA and the proposal clearly target certified translations as a problem and contrast them with standard translations. So, if certified translations are abolished

⁴ European Commission, Internationalisation of European SMEs, Final report, 2010, p. 5.

for the identified public documents, uncertified translations would often still be needed. However, the estimate of the cost of certified translation seems to be based on the rate for uncertified translations. This begs the question: are the rates for certified translations broadly the same as the rates for uncertified translations? If this is the case, the 100 to 200 million per year figure should be drastically reduced. More correctly, an IA in this field should estimate the marginal additional costs of certified translations as opposed to uncertified ones. This is the approach taken by the European Parliament's Cost of Non-Europe Report on the acceptance of public documents. However, this research paper follows the Commission IA in assuming that certified translations cost 30 euro per page and subtracts from this another assumed cost for standard translations⁵.

- **Stakeholder consultation**

The analysis is supported by the consultation of stakeholders, both in the form of an open public consultation and targeted consultations. The latter sought the input of some stakeholders, such as Member States' public administrations, notaries, SMEs and civil society organisations. However, there does not seem to be any trace in the IA that translators were specifically targeted. This point was also made by the Commission Impact Assessment Board ([IAB opinion](#), point D), but does not seem to have been followed up.

- **Monitoring and evaluation**

The IA presents a short monitoring plan. Some indicators are useful and operational: for example, the number of designated competent authorities which would access IMI for administrative cooperation in this field, or the number of complaints received by citizens and businesses on these matters. Other indicators, such as the changes in intra-EU mobility rates of citizens, are relevant and useful, but they are also general and would be influenced by many other factors.

- **Commission Impact Assessment Board**

In October 2012, the Impact Assessment Board of the Commission reviewed the IA and issued the following favourable Opinion:

http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2013/sec_2013_0227_en.pdf

Despite this positive opinion at first reading, the critical comments made by the Commission's IA Board relate to most steps in the assessment, from the evidence underpinning the problem definition, to the content and practical implementation of the options, to their impacts.

- **Coherence between the Commission's legislative proposal and IA**

The legislative proposal of the Commission follows the recommendation expressed in the IA. It should be noted, however, that Article 7 of the proposal gives recipient authorities a possibility, in case of reasonable doubt about the authenticity of the documents, to **either** use the Internal Market Information System directly **or** contact the central authority of their Member State,

⁵ European Parliament, Cost of Non-Europe Report, Promoting free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU, 2013, pp. 66-67.

which will then contact the issuing Member State. This possibility does not seem to be analysed in the IA. The explanatory memorandum mentions that the latter possibility applies '[i]n case a particular national authority does not have access to the Internal Market Information System' (Proposal under review, p. 8). However, Article 7 does not seem to subject the public authority's choice to such condition. On the one hand, this possibility to choose may partly solve some of the above-mentioned unexpected negative impacts, as public authorities may opt for the alternative that suit them best, and hence relieve the IMI. On the other hand, this uncertainty could also simply shift the burden from the IMI to a purely national level, and possibly increase the burden. Finally, the estimate of 633,000 euro per year related to the use of IMI.

Hence, the JURI Committee could possibly request the European Commission to elaborate on the administrative burden arising should public authorities decide not to resort to the Internal Market Information System.

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This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Legal Affairs (JURI), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

<http://www.europarl.europa.eu/activities/committees/studies.html>

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