



*Committee on Legal Affairs
The Chair*

01.2.2016

Mr Pavel Svoboda
Chair
Committee on Legal Affairs
BRUSSELS

Subject: Opinion on the legal basis of the 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) No 1024/2012 (COM(2013)0228 – C7-0111/2013 – 2013/0119(COD))

Dear Mr Chair,

In November 2015, the Committee on Legal Affairs decided of its own motion, pursuant to Rule 39(5) of the Rules of Procedure, to provide an opinion on the appropriateness of the change of the legal basis requested by the Council for the above-mentioned proposal.

The legal bases proposed by the Commission were, on the one hand, Article 21(2) of the Treaty on the Functioning of the European Union (TFEU), which relates to the adoption of provisions to facilitate the exercise of the rights of citizens for free movement and residence within the territory of the Member States, and, on the other hand, Article 114(1) TFEU, which concerns the adoption of measures for the approximation of provisions laid down by national legislation or administrations having as their objective the establishment and functioning of the internal market.

Parliament's position was strongly supportive of the Commission's proposal that documents related to businesses should be included in the public documents covered by the simplifications foreseen by the proposal. However, the agreed text has changed the legal basis by removing Article 114(1) TFEU from the initial dual legal basis, at the Council's request, as the majority of the Member States preferred a more restrictive scope for the regulation, covering mainly civil status documents.

The aim of this opinion is to determine the validity and the appropriateness of the new single

legal basis.

I - Background

The proposal simplifying the acceptance of certain public documents in the European Union aims to fulfil the very important role of making formalities easier for citizens who move across borders.

A large number of EU citizens live in a Member State other than their own, and this number is steadily increasing. Ever more citizens have links to another state, be it for family or professional reasons or just for holidays. All these people may potentially at some point come into contact with the administrative authorities of the country they are visiting or residing in – tourists with the health system, students with a university administration, workers with the tax and social insurance authorities, etc.

In 2011, the Commission published a strategy document listing the 20 principal criticisms of the internal market voiced by members of the public and businesses. Many of these criticisms concerned administrative formalities. It is now recognised, moreover, that problems with the cross-border application of family law, tax law, social insurance law, etc., deter many citizens from taking the plunge and moving to another Member State.

Every year, several hundred thousand such public documents have to be legalised or certified in order to be recognised in Member States other than that in which they originated. Reducing the additional cross-border formalities is thus a further important step to facilitate freedom of movement by citizens.

Finally, it is important to note that this proposal for a regulation in no way harmonises the substantive law of the Member States in the fields concerned. It does not provide that a Member State must recognise the content of a document from another Member State. The aim is purely to reduce additional cross-border formalities by removing both legalisation and *apostille* formalities for a range of public documents.

II - Relevant Treaty articles

Article 21 TFEU, in Part Two entitled 'Non-discrimination and Citizenship of the Union', is presented as the single legal basis in the text agreed upon by the co-legislators in trilogues for the regulation (emphasis added):

Article 21 TFEU
(ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in

accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

[...]

Article 114(1) TFEU, in chapter 3 entitled 'Approximation of Laws', was included in the initial proposal as a second legal basis, with the aim of covering public documents used by EU businesses in cross-border circumstances. This legal basis was, however, subsequently removed at the request of the Council as a consequence of a restriction in the scope of the regulation:

Article 114 TFEU
(ex Article 95 TEC)

1. [...] The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

[...]

III - General principle for the choice of legal basis

It is settled case law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure"¹. The choice of an incorrect legal basis may therefore justify the annulment of the act in question.

In this case, it therefore has to be established whether the proposal either:

1. pursues a twofold purpose or has a twofold component, and one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental; or
2. simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other.

According to the case law of the Court of Justice, in the first case the act must be based on a single legal basis, namely that required by the main or predominant purpose or component, and in the second case the act will have to be founded on the various corresponding legal bases.²

IV - Aim and content of the proposal

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

² See the Case C-411/06, cited above, paras 46-47.

Recital 1 in the agreed text states that the regulation aims to ensure the free movement of public documents within the Union in order to promote the free movement of Union citizens, and stipulates that, in order to achieve the policy objective set out in Article 21 TFEU, *"the Union should adopt concrete measures simplifying the existing administrative requirements related to the presentation in a Member State of certain public documents issued by the authorities of another Member State"*.

The compromise stipulates that the regulation is to apply only to certain public documents, mainly concerning civil status. According to Article 2(1) of the agreed text, *"this regulation applies to public documents issued by the authorities of a Member State in accordance with its national law which have to be presented to the authorities to another Member State and whose primary purpose is to establish"* birth, death, marriage, divorce, parenthood, adoption, etc. The Commission proposal included in its scope also "the legal status and representation of a company or other undertaking", which was subsequently removed at the Council's request, largely restricting the regulation's scope to civil status documents.

The regulation's main purpose is to abolish legalisation and *apostille* formalities for the public documents covered by it. Various simplifications are also made with regard to certified copies and certified translations.

In order to rule out attempted fraud, the regulation also provides for the use of the Internal Market Information (IMI) system for mutual assistance purposes. This system, which is already used in the economic sphere, permits an authority in an accepting Member State to ask the authorities of the issuing Member State for assistance. This enables the authority which has issued the document to confirm to the accepting authority the authenticity and evidentiary value of the document.

Finally, one of the cornerstones of the proposal is the creation of EU multilingual standard forms [see Articles 6a, 6b, 6c, 6d, 6d1 and 6e of the agreed text]. Issuing multilingual standard forms is intended simply to avoid the problem of translation, along similar lines to what is already being done with E-forms for social insurance purposes.

The EU standard forms merely obviate the need for the customary formalities and translations. They by no means result in a requirement to recognise the substance of the forms (particularly in the field of family law).

V - Analysis and determination of the appropriate legal basis

The Commission proposal stipulated that the regulation was to apply only to certain listed public documents, largely concerning civil status. However, the proposed text originally foresaw the simplification of administrative formalities relating to public documents concerning businesses as well. As a consequence of this, the original legal bases of the proposed regulation comprised not only Article 21(2) TFEU, but as a second legal basis, Article 114(1) TFEU. This is because Article 114(1) TFEU would be the suitable legal basis to cover the cross-border use of public documents by EU businesses within the internal market.

As requested by the Council and conceded by the European Parliament, the agreed text removes public documents concerning "the legal status and representation of a company or

other undertaking" from of the scope of the regulation. As businesses are no longer directly concerned by the regulation, this also justifies the removal of Article 114(1) TFEU as a second legal basis, leaving the proposed regulation with a single legal basis in Article 21(2) TFEU.

In the light of the foregoing, the regulation is to be based exclusively on Article 21(2) TFEU, which empowers the European Parliament and the Council to adapt provisions with a view to facilitating the exercise of the fundamental rights of Union citizens to move and reside freely within the territory of the Member States as set out in Article 21(1) TFEU.

Administrative obstacles to the cross-border use and acceptance of public documents have a direct impact on the free movement of citizens. Thus, removing these obstacles would facilitate the exercise of the free movement of citizens as foreseen in Article 21(2) TFEU. The proposal includes provisions on practical tools (e.g. the Internal Market Information System and multilingual standard forms) to make citizens' life easier across national borders. The proposed Regulation is thus to be considered a necessary instrument to promote the free movement of European citizens within the European Union.

Since the aim and content of the proposed Regulation presented in the foregoing is to reduce the costs faced by individuals as well as to reduce bureaucracy *inter alia* by providing for multilingual standard forms, Article 21(2) TFEU is the appropriate single legal basis for the proposed regulation.

VI - Conclusion and recommendation

The agreed text removes Article 114(1) TFEU from the dual legal basis as it restricts the scope of the proposed regulation exclusively to public documents relevant to individuals. It excludes business-specific documents from its scope. As a consequence, the legislative act in question is now solely and appropriately based on Article 21(2) TFEU.

At its meeting of 12 November 2015, the Committee on Legal Affairs approved the agreement reached in trilogues with the Council, with the change in the legal basis. After fully considering the legal basis implications at its meeting of 28 January 2016, the Committee on Legal Affairs accordingly decided, by 23 votes to 2, with no abstentions¹, to recommend that the plenary should formally endorse the agreed text in second reading with the sole legal basis of Article 21(2) TFEU.

¹ The following were present for the final vote: Pavel Svoboda (Chair), Jean-Marie Cavada (Vice-Chair), Mady Delvaux (Vice-Chair), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Axel Voss (Vice-Chair and rapporteur), Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Daniel Buda, Kostas Chrysogonos, Sergio Gaetano Cofferati, Therese Comodini Cachia, Pascal Durand, Angel Dzhambazki, Laura Ferrara, Evelyne Gebhardt, Jytte Guteland, Heidi Hautala, Sajjad Karim, Dietmar Köster, Constance Le Grip, Gilles Lebreton, António Marinho e Pinto, Jiří Maštálka, Angelika Niebler, Emil Radev, Julia Reda, Evelyn Regner, Virginie Rozière, Tadeusz Zwiefka.

Yours sincerely,

Pavel Svoboda