

General Comment on the Green Paper

“Less bureaucracy for citizens - promoting free movement of public documents and recognition of the effects of civil status records” (COM(2010) 747/3)

Brussels, February 2011

The Commission’s analysis is superficial and incomplete. It risks misinforming the debate.

With its Green Paper, the Commission wants to “launch a public consultation on ways of improving the lives of citizens in terms of the movement of public documents and the application of the principle of mutual recognition in relation to civil status matters.” It argues that the current legal situation creates problems for many European citizens who live in a Member State other than their own and who have to face cumbersome (and costly) administrative procedures, and some legal uncertainties, given that their documents are not automatically recognised in their country of residence. According to the Green Paper, an estimated 12 million European citizens—i.e., roughly 2.5% of the EU’s population—face this problem.

According to its Green paper, the Commission’s stated purpose is to “reduce bureaucracy” and to “improve the lives of citizens”. There is no doubt that these objectives are laudable and highly worthy of support. However, there is reason for serious doubt with regard to the definition and analysis of the problems to which the Green Paper purports to present possible solutions. Indeed, the Commission’s analysis and understanding of these problems appears incomplete, simplistic, superficial and, to some extent, misguided. In addition, there is an apparent lack of differentiation between different types of public documents for which different solutions could and should be envisaged. The same one-size-fits-all approach is not appropriate for all kinds of public documents.

“Bureaucracy” is not the only problem

The fundamental mistake in the Commission’s analysis is that it presents “bureaucracy” (i.e., the lack of automatic mutual recognition of public documents) as the main problem and hence envisages the “elimination of bureaucracy” (i.e., the mutual recognition of documents) as the best solution. But in reality, the problem is rooted in **divergences of material law between different Member States**—i.e., that the significance and effect of a given public document, or the conditions that must be fulfilled in order to obtain a given document, are not the same in one Member State as

they are in another. In such situations, applying a principle of automatic mutual recognition would risk creating confusion and uncertainty rather than facilitating citizens' lives. An appropriate solution for such problems would be to harmonise material law where possible and, in situations where such harmonisation cannot be reached, seek instead solutions in which a convergence of material law remains a pre-condition for any mutual recognition of public documents. **For any measures or efforts aimed at legal harmonization that affect family law, Article 81.3 of the TFEU requires unanimity of all Member States. No EU law that entails a change of family law in a Member State can be passed by a simple majority but needs the consent of all 27 Member States.**

Among the public documents that may be affected by the principle of “mutual recognition” proposed in the Green Paper are:

- Birth certificates
- Death certificates
- Adoption certificates
- Marriage certificates
- Documents relating to a “Civil Partnership” or other formalised partnerships between persons of the same sex

Reasonable and problematic “automatic mutual recognition”

As indicated above, each type of document needs to be examined separately. For some types of documents the principle of “automatic mutual recognition” appears much less problematic than it does in others. For instance, the application of a principle of “automatic mutual recognition” to death certificates does not seem to raise major concerns. It simply certifies that on a given day, a given person has died. In order to allow for the mutual recognition of such documents, it is only necessary to ensure their intelligibility and reliability. To achieve this, they could, for example, be issued in all official EU languages (as is already the case with passports) and there could be measures to ascertain that they have been issued by the competent public authority of the Member State concerned. It seems logical that the competence for issuing such documents should lie with the Member State where the event has taken place.

In contrast, the situation is significantly different for documents relating to marriage, civil partnership, adoption and (due to major discrepancies in material law regarding artificial procreation) birth certificates. These documents refer to matters in which considerable differences exist between the legal systems of different Member States. This means that considerable differences of legal effect also exist between the documents concerned, some of which may produce effects under the law of one Member State that are considered undesirable—or even illegal or adverse to the public order—in another Member State. This concerns especially “marriages” or “civil partnerships” between persons of the same sex, which may be concluded in some Member States, whereas in other Member States there is no correlative for them. Indeed, a number of Member States have recently amended their Constitutions in order to explicitly exclude the recognition of such same-sex marriages or formal partnerships. **Given the important disparities among Member States regarding both the legal status and social acceptance of these partnerships, it thus seems impossible to apply a**

principle of “mutual recognition” to the relevant civil status documents. Indeed, a proposal requiring one Member State in which no legal framework for the formal recognition of same-sex relationships exists to recognise and give full legal effect to same-sex marriages or civil partnerships concluded in another Member State would be tantamount to **imposing the political or social choices of some Member States on all others.** This would not only lead to new practical problems (e.g., the creation of a new kind of “marriage tourism”) but would also stand in clear contradiction to Article 81.3 of the TFEU, which requires unanimity for all measures affecting family law and thus protects the sovereignty of Member States with regard to these matters.

Similar issues present other important obstacles to the mutual recognition of documents relating to divorces, adoption and birth certificates. The conditions under which a divorce can be obtained, for example, differ widely from one Member State to another (ranging from total prohibition in Malta to the “express divorce” recently introduced in Spain). In the same vein, there are considerable differences in Member States’ legislation on adoption, with some Member States allowing (and others prohibiting) the adoption of children by unmarried persons or same-sex couples. In these areas, therefore, the mutual recognition of civil status documents cannot be automatic but must be subject to the receiving Member State’s own policy approach.

Increasing fragmentation and contradiction between Member States’ laws

In this context, it should also be observed that less than one hundred years ago, the convergence of the legislative situation regarding marriage, divorce and adoption was much greater than it is today. This convergence was undermined initially by those Member States which, with varying degrees of liberality, gradually provided for the availability of divorce and then, more recently, by those Member States which, unilaterally and with a complete lack of concern over any need for a harmonised and convergent approach within the EU, introduced institutions such as the PACS (in France), the Civil Partnership for same-sex couples (e.g., in the UK, Germany, Austria) or same-sex marriage (in the Netherlands, Belgium, Spain, Portugal and Sweden). The Netherlands even allow (albeit in the form of a notarial contract) the formal establishment of a “marriage of three persons”. When these innovations were introduced in these countries, the Member States in question relied on their sovereignty. It should be self-evident that the sovereignty of Member States not wishing to adopt or recognise these innovations requires equal deference and respect.

Paradoxically, therefore, at a time when there is increasing uniformity in the legislation of different EU Member States in other areas of law, the development of family law is moving in the opposite direction: It is increasingly fragmented. One may find this regrettable—but one must recognise that the responsibility for this situation clearly lies with those Member States that unilaterally departed from the natural concepts of “family” and “marriage”. It would be absurd then to impose their choice on the other Member States.

Rules of Conflict

Member States, when confronted with trans-border civil law issues, currently use rather complicated rules of conflict to determine the applicable law. These rules are not fully

harmonised at the EU level and this may at times lead to legal uncertainties. The mutual recognition of legal acts, judicial decisions or administrative documents may seem a very simple solution to such problems. But rather than being simple, it is simplistic. There is the clear disadvantage that this approach might result in obliging some Member States to respect and implement decisions that stand in contradiction to their own laws and concepts of domestic public morality.

***Example:** A Spanish same-sex couple moves to Lithuania and requests that their “marriage” be recognised under Lithuanian law. They also claim tax benefits associated with the marriage. It is likely that Lithuania would not recognise their marriage but consider it to be in contradiction to Lithuanian public order.*

What Member States can do is solve such legal conflicts on the basis of a “personal statute” that they can attribute to foreign nationals. In the above example, Lithuania might apply Spanish marriage laws (and recognise relevant documents) if the persons concerned are Spanish citizens. However, all conflict-of-law rules contain a general clause that guarantee the respect of the domestic public order. Hence, no Member State can be forced to apply laws or recognise documents that violate their public order. Some additional examples show the complexity of the situation:

***Example:** If an unmarried French citizen, who has adopted a child under French law, settles in Austria, the Austrian authorities will likely recognise the adoption even if single persons cannot adopt children in Austria.*

***Example:** Two Polish men move to Spain where they get “married”. Some years later, they move back to Poland and request that their “marriage” be recognised under Polish law. They also claim tax benefits associated with that marriage.*

***Example:** A Hungarian lesbian couple travels to Belgium to undergo an artificial insemination with an anonymous sperm donor. Back in their country, they request recognition of the birth certificate of their “mutual child”. They also claim family allowances.*

***Example:** Malta is the only EU Member State where married couples cannot be divorced. Malta may recognise foreign legal acts on divorce—but probably not if they concern Maltese citizens or a marriage that has been concluded in Malta.*

As the above examples illustrate, there are a variety of situations in which there are conflicting laws and conflicting concepts of public order as well. It may be useful to proceed to a more systematic study of these situations and of the solutions that different Member States apply to them. An automatic mutual recognition of civil status documents in the case of conflicting material law is certainly not a solution but, rather, would create much confusion and an insolvable debate about which public order prevails over the other.

Recommendation

The question how to resolve conflicts of law in the area of family and marital law is an important one. But the Commission’s current Green Paper provides an **insufficient basis for the discussion** it wishes to inform. It would therefore seem advisable—in order to inform the debate—for the Commission to provide a full list of civil status issues (such as birth, death, filiation, adoption, marriage, divorce, etc.) where the formal recognition of public documents issued by another Member State might create problems for citizens and to analyse each of the issues separately. For each of the issues concerned,

the divergences and convergences of material law should be carefully examined in order to allow a full assessment of the possible impacts of mutual recognition of civil status documents. **Failing such an analysis, one cannot avoid the impression that, through its Green Paper, the Commission is seeking to impose its own preferred solution onto an unsuspecting and uninformed public.**

In political life, it often happens that the outcome of a debate is pre-determined by the way it is framed—i.e., by the questions that are (or are not) asked. The Commission's Green Paper is highly illustrative of this risk: Accepting it as the sole basis for discussion would mean allowing the debate to go in the wrong direction. **It is therefore recommended that stakeholders should not limit themselves to answering the 11 questions in the Green Paper. Instead, they should clearly point out the inadequacies of the Green Paper as a whole and request the Commission to either analyse each civil status document and its related issues separately or to withdraw the Green Paper.**

Comments on the 11 Questions in the Green Paper

Question 1: *Do you think that the abolition of administrative formalities such as legalisation and the apostille would solve the problems encountered by citizens?*

The Green Paper describes the apostille and legalisation of documents as “obsolete” and “not suitable”. But it fails to provide any argument on which such assessments can be based.

A reduction of bureaucratic formalities would certainly be in the interest of citizens. However, the apostille and the legalisation of documents are not simply bureaucracy for bureaucracy's sake. Their function is to help public authorities ascertain the legality and authenticity of public documents of foreign origin.

If the Commission proposes the abolition of such formalities, it should also explain how public authorities will henceforth be able to ascertain the authenticity and validity of a document of foreign origin. It can hardly be expected that civil servants will be familiar with the outward appearance of all public documents from all other Member States. Nor can they be expected to know which authority in another Member State is competent for issuing which type of documents. Nor can they be expected read and understand all official languages of all Member States.

What the Commission is proposing, therefore, looks like the establishment of a principle of “blind trust” without any control. This is certainly un-bureaucratic, but it is also dysfunctional. It would be far more helpful if the Commission, in the course of proposing the abolition of such “formalities”, could also give some thought to alternative mechanisms that could help to ascertain the authenticity of documents.

Question 2: *Should closer cooperation between Member States' authorities be envisaged, particularly with regard to civil status records and, if so, in what electronic form?*

Such co-operation would certainly be useful. The Commission should elaborate more precise proposals.

Question 3: *What do you think about the registration of a person's civil status events in a single place, in a single Member State? Which place would be the most appropriate: place of birth, Member State of nationality or Member State of residence?*

This proposal is likely to generate new bureaucratic burdens rather than reducing them.

With regard to the three options proposed in the Green Paper, it is worth noting that the place of birth is the only criterion that will always remain the same, whereas a person's citizenship and residence can change. But, at the same time, many EU residents have been born outside the EU. Thus, none of the three criteria can work without a subsidiary arrangement (i.e., if the person is born outside the EU, then the person's civil status must be based on the Member State of nationality; if the person is not an EU citizen, then it must be based on the country of residence).

In short, the proposal needs further elaboration. As it currently stands, its benefits would not be self-evident and the costs would be considerable. (It should be noted that, according to the Green Paper, only 2.5% of the EU's population live outside their Member State of origin. Does the particular interest of a few ex-patriates really justify reforms that are expensive and which affect 100% of the population?)

Question 4: *Do you think it would be useful to publish a list of national authorities competent to deal with civil status matters or the contact details of an information point in each Member State?*

Given that in the larger Member States the list of national authorities competent to deal with civil status matters would be rather long, it seems preferable to designate one contact point in each Member State.

Question 5: *What solutions do you recommend in order to avoid (or at least limit) the need for translation?*

The only foreseeable solution would be to develop standard forms that contain the necessary information in all official languages (as is already the case for passports).

Question 6: *What kind of civil status certificates could be the subject of a European civil status certificate? Which details should be mentioned on such a certificate?*

This could easily be done, for example, for birth or death certificates (given that "birth" or "death" probably has the same meaning everywhere. Given the divergences in material law with regards to artificial procreation, it would exclude documents related to these practices).

However, it should be noted that such a solution can only be used in areas where there is common ground between the legislation of different Member States. For example, a European standard form for a marriage certificate could

only be used where there is common ground between all legal systems (i.e., for marriage between two persons of different sex).

Question 7: *Do you think that civil status issues for citizens in cross-border situations in the EU could be effectively solved by national authorities alone? In this case, should not the EU institutions provide at least some guidance to national authorities (possibly in the form of EU recommendations) to ensure minimum consistency of approaches with a view to finding practical solutions to the problems faced by citizens?*

It is unclear how EU Institutions (such as the Commission or the Parliament) could assume a role in dealing with civil status issues. It seems natural that these issues should be dealt with by national authorities, given that these are present “on the ground”.

The idea of the EU Institutions providing “guidance” on these matters raises serious questions. The legal status of such “guidance” is unclear. It likely would be some kind of “soft law”, which would be the emanation of an unelected bureaucracy rather than the result of a proper democratic legislative procedure. As such, it could hardly claim any democratic “legitimacy”, yet it could easily be used to pressure certain Member States to change their policies in order to adapt to a perceived “mainstream”. In this way, the sovereignty of Member States, as safeguarded notably through Article 81.3 of the TFEU, would be gradually undermined.

For these reasons, this proposal should not be further examined.

Question 8: *What do you think of automatic recognition? To which civil status situations might this solution be applied? In which civil status situations might it be considered unsuitable?*

The automatic recognition of the legal effects of civil status records presupposes full convergence of the relevant national legislations. It is best left to Member States to decide whether or not they want to automatically recognise the effects of another Member State’s civil records. In some instances, this will be the case while in others it will not.

An area where the approach could be used is in the issuance of birth and death certificates, provided that a standard form is used that guarantees their interoperability.

Where there is no full convergence of national legislation (as is notably the case with marriage, civil partnership and adoption), the adoption of a principle of mutual recognition would clearly have bearing on substantive family law in the Member State that is asked to grant such recognition. **Such a measure would therefore have to be adopted under the procedure foreseen in Article 81.3 of the TFEU.**

It should also be noted that this approach was discussed and rejected by Member States at the time of the adoption of the Free Movement Directive.

Question 9: *What do you think of recognition based on the harmonisation of conflict-of-law rules? To which civil status situations might this solution be applied?*

It seems likely that for many Member States, this approach will be more easily acceptable than the establishment of a principle of automatic mutual recognition. However, the approach requires further study and the Commission should come forward with more detailed proposals: What would be the concrete effect of the harmonised conflict-of-law rules? Would there be any guarantees for Member States that they could preserve their right to safeguard their domestic public order?

It should be noted that the harmonisation of conflict of-law rules, too, may have a bearing on substantive family law in the host Member State. **Therefore, such harmonised conflict of-law rules would have to be adopted under the procedure foreseen under Article 81.3 of the TFEU.**

Question 10: *What do you think of the possibility of citizens choosing the applicable law? In which civil status situations might such a choice be applied?*

This proposal is too imprecise to allow for a full and informed assessment. Does it intend to allow, for example, for two French citizens to go to a French public authority in order to request the registration of their marriage but under German law? This would be a rather strange idea. Or is the intention only to grant such freedom of choice to citizens living in another Member State (e.g., a French and an Italian citizen getting married in Germany and then being allowed to choose between French, Italian and German laws)?

There is a considerable risk that adopting such a principle of “freedom of choice” would generate an undesirable kind of “forum shopping” or “civil status tourism”. The result would be that the meaning of institutions like “marriage” or “adoption” would vary from case to case, since they would be determined by the parties themselves. This would mean that the stronger party (or the party that can afford better legal advice) could impose its preferences on the other party, which would therefore be less protected. **In this way, the fragmentation and inconsistencies that currently exist between different Member States would be imported into the legal system of each Member State.**

This is certainly not an approach that should be followed. What citizens need are clear and reliable rules, not an array of 27 different sets of rules from which they can pick and choose but which they are not able to fully understand or oversee.

Question 11: *In addition to automatic recognition and recognition based on the harmonisation of conflict-of-law rules, do you think that there are other solutions which could provide a response to the cross-border effects of legal situations linked to civil status?*

Another solution would be to seek full harmonisation of substantive civil status provisions. But this would require, for the reasons explained above, to follow the procedure under Article 81.3 TFEU.