

„Notary Act in Cross-border Traffic and Regulation (EU) 2016/1191“

**I. The European Public Document<sup>1</sup>**

The title of my lecture refers explicitly to the “Notary Acts in Cross-border Traffic”. The scope of this topic is characteristic of most EU member states with a civil law system as in these countries – such as Austria and Slovenia – enforceable notary acts, drawn up by “civil law notaries” without doubt represent the most important type of public documents. However, there are Member states of the European Union which do not know the term “notary act”. This is the reason for discussing the topic more generally, which is on the basis of the term “Public Document”.

Based on a comparative law analysis of the CNUE (Conseil des Notariats de l'Union Européenne) on national rulings for a public document in England, France, Germany, Poland, Romania and Sweden created for the European Parliament in November 2008, the Parliament requested the Commission „to submit to Parliament [...] a legislative proposal on establishing the mutual recognition and enforcement of authentic acts“<sup>2</sup>.

This<sup>4</sup> would have been a regulation supplementing the already existing regulations on recognition and enforcement of judgments including public documents such as the Brussels I Regulation No 44/2001<sup>3</sup>, the Brussels IIbis Regulation No 2003/2201<sup>4</sup>, the EEO Regulation No

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<sup>1</sup> Cf *Rechberger*, Die Europäische öffentliche Urkunde – ein Eckpfeiler der vorsorgenden Rechtspflege? in *Rechberger* (ed), Brücken im Europäischen Rechtsraum (2010) 5.

<sup>2</sup> *CNUE*, Comparative study on authentic instruments national provisions of private law, circulation, mutual recognition and enforcement, possible legislative initiative by the European Union (2008) No IP/C/JURI/IC/2008-019.

<sup>3</sup> European Parliament resolution of 18 December 2008 with recommendations to the Commission on the European Authentic Act (2008/2124(INI)).

<sup>4</sup> Cf Recommendations on the context of the proposal requested P6\_TA-PROV(2008)0636.

<sup>5</sup> Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 2001/12, 1.

<sup>6</sup> Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 2003/338, 1.

<sup>7</sup> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 2004/143, 15.

<sup>8</sup> Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 2009/7, 1.

2004/805<sup>5</sup> and the Maintenance Regulation No 2009/4<sup>6</sup>. The proceedings for verification of the correctness of public documents in cross-border traffic would have to be abolished. The prospective legal act ought to apply to all public documents concerning civil and trade matters with the exception of those that concern immovable property which are listed in a public register or have to be listed or can be listed therein <sup>9</sup>.

As a next step, and in implementation of the Council's previously presented Stockholm Programme<sup>10</sup>, the Commission presented a "Green Paper"<sup>11</sup> in 2010, in which 11 questions concerning national public documents as well as the options to ease the free circulation of public documents were open for discussions. The key points of the proposal concerned "*free movement of documents by eliminating legalisation formalities between Member States and recognition of the effects of certain civil status records<sup>12</sup>[...], so that legal status granted in one Member State can be recognised and have the same legal consequences in another*".

On 24 April 2013 the Commission presented a proposal for a regulation concerning the abolition of legislation of documents and the necessity to bear an apostille. It further regulated the administrative co-operation as well as the introduction of multi-lingual EU standard forms.<sup>13</sup> On 4 February 2014,<sup>14</sup> the European Parliament accepted the proposal already at the first reading and the final text of the regulation was determined on 9 June 2016. The regulation was published in the Official Journal of the European Union on 26 July 2016 and will be applicable in approximately two and a half years after its coming into force (Art 27 (2) Public Documentation Regulation).

According to Art 2 (1) Public Documents Regulation the Regulation applies to public documents, „*which have to be presented to the authorities of another Member State*“. Simultaneously Art 2 (4) provides for that the Regulation *does not apply* to the recognition in a Member State "*of legal effects relating to the content of public documents issued by the authorities of another Member State*".

<sup>9</sup> Cf *Rechberger in Rechberger*, Brücken 5 f.

<sup>10</sup> *European Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens*, OJ C 2010/115, 1. Cf also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, [COM\(2010\) 171](#) final.

<sup>11</sup> Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM (2010) 747 final.

The Public Documents Regulation comprises those public documents which are issued by EU member states' authorities and have a probative value – not nearer defined by EU legislation („*establish one or more of the following facts*“) – concerning one of the jurisdictions listed exhaustively in Art 2 (1).<sup>15</sup> This definition of a public document conversely implies that documents issued by private persons are excluded from the scope of the Regulation; the same is true for public documents issued by the authorities of third countries (explicitly recital 17 Public Documents Regulation).<sup>16</sup>

“Authority” means according to Art 3 (2) Public Documents Regulation „*a public authority of a Member State, or an entity acting in an official capacity and authorised under national law to issue or receive a public document covered by this Regulation or a certified copy thereof*“. The originally recommended amendment by rapporteur *Rapkay*<sup>17</sup> „*including courts or notaries issuing public documents as referred to in point 1 [meaning Art 3 (1) of the Proposal], or a Union authority*“ was only seen as a legal clarification and was not included in final version.

The definition of the public document (Art 3 together with Art 2 Public Documents Regulation) therefore comprises three constitutive elements:

1. the issuing of the document by a national authority or an institution authorised to deal in public matters (e.g. notaries).
2. the probative value of the document, although not defined in greater detail
3. the relation to one of the categories (a) –(m) listed in Art 2 (1).

## **II. About Recognition and Enforcement of Public Documents**

As is known, for the term “public document” within EU law the Judgment of the ECJ C-260/97, *Unibank A/S v Flemming G. Christensen* is of relevance. In there, the ECJ specified as a criterion for an enforceable document amongst others: Since these documents „*are enforced under exactly the same conditions as judgments, the authentic nature of such instruments must be established beyond dispute so that the court in*

<sup>12</sup> Examples include administrative documents such as diplomas or patents; notarial acts such as sales deeds for property and marriage contracts; civil status records such as birth, marriage or death certificates; plus judicial documents such as court rulings or documents issued by a court: Green Paper, COM (2010) 747 final, No 3.

<sup>13</sup> Cf for the competence base of the Commission Proposal *Woschnak*, Unionsrechtliche öffentliche Urkunde? – Ein Versuch zum Urkundenrecht der EU, ÖJZ 2015/53, 394.

<sup>14</sup> *European Parliament*, Legislative resolution of 4 February 2014 on 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)).

*the State in which enforcement is sought is in a position to rely on their authenticity. Since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments.*<sup>17</sup> What is addressed in this context is the *formal* probative value. Corresponding one can find in literature that public certification has to guarantee authenticity of the document (guarantee of origin) and its correctness resp credibility as well.<sup>19</sup>

By legal definition of the public document in Art 4 (3) (a) EEO<sup>20</sup> the case law of the ECJ was codified under secondary law.<sup>8</sup> The definition of Art 4 (3) (a) (i) EEO clarifies with its formulation: the authenticity of the document „*relates to the signature and the content of the instrument*“ the understanding of the formal probative value under European Law. In the most recent Regulations concerning the law of International Civil Procedure (Succession Regulation<sup>22</sup> and Brussels Ibis Regulation<sup>23</sup>), the same view of the formal probative value is expressed, when in each of the legal definitions of public documents the following paragraph can be found: „*the authenticity of [the authentic instrument] relates to the signature and the content of the instrument*“ (Art 3 (1) (i) Succession Regulation No 650/2012 Art 2 (c) (i) Brussels Ibis Regulation No 1215/2015).

Within the EU acquis, the recognition of public documents was stipulated for the first time in Art 13 (3) Brussels II Regulation No 1347/2000<sup>24</sup> (now Art 46 Brussels Ibis Regulation). Furthermore, that principle is standardized in Art 48 (1) of the Maintenance Regulation No 4/2009 and has been included in Art 34 Proposal for the Succession Regulation.<sup>25</sup> In literature the question of “recognition” of public documents was repeatedly discussed and almost unanimously rejected.<sup>26</sup>

<sup>15</sup> Cf *Woschnak*, Binnenmarkt und Notariat (2015) 99.

<sup>16</sup> See *Austrian Chamber of Notaries*, Stellungnahme zum Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates zur Förderung der Freizügigkeit von Bürgern und Unternehmen durch die Vereinfachung der Annahme bestimmter öffentlicher Urkunden innerhalb der Europäischen Union und zur Änderung der Verordnung (EU) Nr. 1024/2012, 5.

<sup>17</sup> Report *Bernhard Rapkay*, Amendment 12, A7-0017/201.

<sup>18</sup> ECJ 17.6.1999, C-260/97 Coll 1999, I-3715.

<sup>19</sup> Cf *Brenn* in *Fasching/Konecny*, Kommentar zu den Zivilprozessgesetzen, 2<sup>nd</sup> ed, V/1 (2008) Art 57 Brussels I Regulation Rz 7.

<sup>20</sup> Regulation (EC) No 805/2004 – creating a European Enforcement Order for uncontested claims, OJ L 050, 71.

<sup>21</sup> Cf *Rechberger* in *Fasching/Konecny*, 2<sup>nd</sup> ed, V/1 Art 4 EEO Rz 4.

It is specifically unclear *how* the concept of recognition of foreign judgments deriving from a member state would be applicable. As the recognition of foreign judgments would also mean that the effect of the decision as an act of public authority (of a court or other state authority) of a Member State will be extended to the national territory. The foreign decision would then develop the same effect nationally as it has in the country of origin<sup>27</sup>. But the same judicial effect as is the case of foreign judgments would simply not exist with public documents because they don't have any *res iudicata* effect nor a declaratory character. However, a "recognition" of public documents could be interpreted in such a way that the substantive constitutive effect in the country of origin would be nationally extended. Such an extension would also have to be assessed in the same way as it would be concerning foreign judgments, i.e. according to the substantive law determined by the private international law of the state of recognition. The „recognition“ of public documents postulated by the mentioned regulations cannot change anything merely because the recognition should be the same as with judicial judgment and there, as already stated, the extension of substantive constitutive effects is simply excluded.<sup>28</sup> In literature occasionally the view is expressed, that the rules which would be applicable on the form and the effects of the legal transaction certificated in the document according to the international private law of the state of recognition were overridden by the "recognition" of the authentic instrument.<sup>29</sup> As a result the transaction certificated in the document would be „immunized“ against objections of its legal effectiveness pursuant to the applicable substantive law.<sup>30</sup> Such an understanding of the meaning "recognition of public documents" led to the result that large parts of the international private law were undermined. In all those areas of law, where the conflicts of law are not harmonized this would bring with it a severe infringement of the competences of the Member States. This opinion is also expressed by *Hess* in the "Heidelberg Report " when he formulates: „*Therefore, the reference to recognition in Article 46 Reg. 2201/2003 should not be interpreted as an enlarged concept of 'recognition' which deviates*

<sup>22</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/207.

<sup>23</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1.

<sup>24</sup> Council Regulation (EC) No 1347/2000 on the jurisdiction, recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for joint children. OJ L 160/19.

<sup>25</sup> COM (2009) 154 final.

<sup>26</sup> Cf *Rechberger*, Brücken 5 (12 ff).

*from the application of the pertinent private international law to authentic instruments.*”<sup>31</sup> It is significant that Art 2 (2) of the Proposal for the Public Documents Regulation declared – rightly – the Regulation will not apply to the recognition of legal effects relating to the content of public documents issued by the authorities of another Member State (now Art 2 (4) of the Regulation).

### **III. About the Problem regarding the “Acceptance” of Foreign Public Documents**

The purpose of the Public Documents Regulation is to ensure the free circulation of public documents within the Union (recital 1). This should no longer – as foreseen in the Proposal of the Regulation – be achieved by „*acceptance*“, but by „*presentation*“ (Art 2 (1) and (2) Public Documents Regulation). Whatever difference would exist between „*presentation*“ and „*acceptance*“ of public documents, is absolutely unclear and remains in the dark.

The concept of acceptance of public documents was not an original creation of the Proposal but is contained in the Succession Regulation for the first time. The effect of this acceptance can only be comprehended through the genesis and the legislative application of the concept within the framework of this Regulation. Starting point is Art 34 “Proposal for the Succession Regulation”<sup>32</sup> which reads: „*Authentic instruments formally drawn up or registered in a Member State shall be recognised in the other Member States, except where the validity of these instruments is contested in accordance with the procedures provided for in the home Member State and provided that such recognition is not contrary to public policy in the Member State addressed.*“ Because of this text it was – not unjustly – feared that the Commission might have in mind the *general recognition of legal status*.<sup>33</sup> The consequence of such a shift of the system would be the displacement of the classical conflict of law-system because – as already mentioned above – questions of international private law would be levered out by rules of international procedural law. Therefore, the MPI<sup>34</sup> suggested deleting Art 34 of the Proposal entirely. Finally, it could be agreed during the

<sup>27</sup> Cf *Rechberger*, Brücken 13; *Andrae* in *Rauscher*, Europäisches Zivilprozess- und Kollisionsrecht, EuZPR/EuIPR Kommentar, 2<sup>nd</sup> ed (2010) Art 48 EG-UntVO Rz 6; *Geimer*, Internationales Zivilprozeßrecht, 5<sup>th</sup> ed 2005, Rz 2776.

<sup>28</sup> Cf *Rechberger* in *Rechberger*, Brücken 13.

<sup>29</sup> *Rauscher* in *Rauscher*, EuZPR/EuIPR, 2<sup>nd</sup> ed, Art 46 Brüssels IIa-VO Rz 2; *Andrae* in *Rauscher*, EuZPR/EuIPR, 2<sup>nd</sup> ed, Art 48 EG-UntVO Rz 6.

<sup>30</sup> *Rechberger* in *Rechberger*, Brücken 13.

<sup>31</sup> *Hess* in *Hess/Pfeiffer/Schlosser*, The Brussels I-Regulation (EC) No 44/2001. The Heidelberg Report on the Application of the Regulation Brussels I in 25 Member States (2008) 162 (point 555).

<sup>32</sup> COM (2009) 154 final.

European legislative procedure<sup>35</sup> that the conflict of law-connection mechanism will not be paralyzed by the „recognition“ of acts not based on state authority<sup>36</sup>. That was the reason why the legal concept of „*acceptance*“ was created<sup>37</sup>. The use of this term now presents a targeted and deliberate reduction.<sup>38</sup> Art 59 (1) Succession Regulation rules: „*An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State concerned.*”

*Prima facie* it is the intention of the European Regulator to limit the effect in two ways: Public documents cannot develop more rights than in the state of origin on the one hand, nor can they develop more legal effect than public documents of the accepting state.<sup>39</sup>

<sup>33</sup> Cf. Geimer, „Annahme“ ausländischer öffentlicher Urkunden in Erbsachen gemäß Art. 59 EuErbVO, in Dutta/Herrler (ed), Die Europäische Erbrechtsverordnung (2014) 143 (145).

<sup>34</sup> Max Planck Institute for Comparative and International Private Law, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, RabelsZ 74 (2010) 522 Rz 255, 256.