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Cost of Non-Europe Report

European Code on Private International Law

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A European Code on Private International Law

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Contents

Table of figures

On 11 October 2012, the Committee on Legal Affairs (JURI) requested a Cost of Non-Europe report (CoNE) on the perspective of having a European Code on Private International Law. This Cost of Non-Europe report analyses the formal question of the code, and more particularly the question of 'gaps' in the Private International Law of the European Union which need to be filled, and the cost to citizens and businesses of not filling them. This Cost of Non-Europe report also contains quantitative and qualitative arguments in favour of a European Code on Private International Law.

This report has been drawn up by the **European Added Value Unit** of the Directorate for Impact Assessment and European Added Value, within the Directorate for Internal Policies (DG IPOL) of the European Parliament.

It builds on external expertise contributed by GHK and presented in a separate annex (Research paper on the perspective of having a European Code on Private International Law, by Nick Bozeat).

Introduction

Cost of Non-Europe (CoNE) reports are intended to evaluate the possibilities of benefits, gains or the realisation of a 'public good' through common action at EU level in specific policy areas or sectors. The evaluation includes the assessment of the potential impact of legislative proposals and could itself pave the way for further legislative initiative reports or other important initiatives put forward by the European Parliament. Much preparatory work has already been carried out by the Committee on Legal Affairs of the European Parliament (JURI).

The Cost of Non-Europe report identifies economic and social costs, and also costs related to incomplete protection of citizens' rights, which are borne by stakeholders or citizens as a result of the absence of Private International Law provisions at EU level. The costs relating to the complexity of the current framework of Private International Law are also examined, bearing in mind duplications and overlaps. Finally, the possibility of a European Code on Private International Law and its advantages are analysed.

Until 1997, the Treaties did not provide for the harmonisation of Private International Law. The Treaty of Amsterdam introduced, for the first time, provisions relating to civil matters in Articles 61 and 65 insofar as harmonisation was necessary for the functioning of the Internal Market. These provisions were later modified by the Treaty on the Functioning of the European Union, with Article 81(2) mentioning the functioning of the internal market as an aim of harmonisation without including it as a prerequisite for action of the European legislator in the field of Private International Law. In other words, there is a clear tendency to further harmonisation of Private International Law over the past years. This tendency reflects the changes and needs of an increasingly inter-connected European population which undertakes and develops more and more private international activities, many of which affect individual rights and freedoms.

The present CoNE aims quantifying the cost of not having a Code on Private International Law in thirteen areas which have been identified as 'gaps' and

which cover important aspects of citizens' daily lives. By adding up the cost of these areas, it is found that around 140 million Euros could be saved every year in the European Union if a Code on Private International Law existed. Furthermore, other non-economic advantages of such a Code are mentioned and analysed. The research note annexed to this paper develops the rationale behind these findings and contains further details on the methodology used.

The cost of not having a European Code on Private International Law

The research annexed to this document covers thirteen areas (table 1), the aggregated cost of which is calculated to be around €138 million a year for the European citizens. The areas correspond to identified **'gaps**': areas directly related to the citizens' day-to-day lives which are still unregulated at European level. These gaps entail severe consequences and important costs for both the administration and EU citizens. They correspond to topics in which European regulation covering applicable law, jurisdiction, recognition of judgements, etc. is missing. In some cases, an area is considered as a 'gap' because there is absolutely no European Private International Law on the matter, whereas in other instances a gap has been found due to the absence of coverage of either applicable law, the jurisdiction or the recognition of judgements.

Once the gaps have been identified, the **stakeholders** affected are also pinned down (individuals, households, businesses in general and SMEs in particular). The economic impact of Private International Law for each one of these groups of stakeholders is different, and certain 'losses' are difficult to quantify (see chart 1 below). This is particularly the case of emotional costs of the lack of a comprehensive Code on Private International Law: the time and energy spent by citizens and the worries that they must undergo (for example, in the case of international adoptions, divorces, etc.) have been tentatively quantified and taken into consideration as twice the cost of the legal costs incurred because of the legal gap in Private International Law.

Table 1: Impacts of the lack of a Code on Private International Law

Business costs	Administrative costs	Legal costs	Social and emotional costs	Wider economic costs
Costs related to the running of business activities, such as unrecoverable debt, contracts which are not honoured and enforcement being difficult, and in general loss of revenue due to the deterrent effect	Applications for the recognition of civil status, requests for 'apostilles' and certifications for cross-border activities and to prove eligibility to cross-border entitlements	Professional legal advice and eventual defence in court, validation of cross-border contracts, recognition of status documents, management of gifts and estates and other assets.	Inconvenience, loss of well-being, stress, discomfort of proceeding through often a long and personal legal process.	Uncertainty and inconvenience due to the previous costs creating a barrier to the movement of people, goods and services. This acts as a **deterrent**, so business and individuals are less likely to realise the benefits of the Internal Market.

Source: own, with data by GHK (report attached).

The **calculation** of the costs has been made by summing up the volume of economic activity per sector, then assuming a small percentage of problematic cases (those in which legal assistance is required), even though in reality problematic cases might be more numerous, and finally calculating the cost per problematic case for each one of the identified gaps.

Table 2: Estimated Cost of Non-Europe per annum

Gap	CoNE (€ million)
Legal Capacity	7.5
Incapacity	16.8
Names and forenames	2
Recognition of de facto unions	8.7
Recognition of same-sex marriages	4.2
Parent-child relationships	19.3
Adoption decisions	1.65
Maintenance of de facto unions	13.1
Gifts and trusts	5.6
Movable and Immovable property	5.56
Agency	14
Privacy	1
Corporations	38.3
Total	**137.71**

Source: GHK

In absolute terms, around €138 million a year might sound like a somewhat low figure for the whole EU, its 27 Member States and its nearly 500 million inhabitants at the time these pages were drafted. However, it is important to bear in mind that Private International Law matters affect mostly citizens who have links with at least two different Member States. It is estimated that around 3.2% of the entire European population is born in a Member State other than the one they reside in, and around 4% of the European population is involved in cross-border activities and Private Law relationships that involve the Law of more than one Member State, having an international component that makes the application of Private International Law necessary. For those 20 million European citizens, the lack of a European harmonised approach to Private International Law is definitely costly.

Example 1: out of the estimated 700,000 adoptions each year in the EU, about 1% is expected to be problematic from a legal point of view (though the percentage could potentially be much higher). Given the complexity and sensitivity around adoption issues, a cost of €5,000 in legal assistance is therefore a sensible estimation. Added to emotional costs of around €10,000 per case, it is estimated that standardised European Private International Law could save 7000 families around €15,000 each (a total of €1,65 million a year in Europe).

Example 2: It is calculated that about 25% of the names and surnames of Europeans might pose a problem for identification and recognition in another Member State. Furthermore, many Europeans decide to change their names after marriage and divorce. Assuming 1% of the people living outside their Member State had to start administrative procedures because of their name, and fixing in around €200 the cost per case, it is estimated that citizens could save about €2 million a year if there were a Code on Private International Law which would clarify their legal situation.

Whereas European citizens are in a position to inform themselves of their basic legal rights and obligations with regard to purchase or employment contracts, family matters or succession rights in domestic cases by looking at their civil law, they do not have a comparable possibility in international cases: they are generally bound to contact a lawyer, and one with experience in Private International Law. The calculations above show how important the costs of not having accessible and comprehensible European legislation on Private International Law can be for citizens. They are only **direct** costs which are likely to have wider impacts on individuals, families and companies, **particularly in SMEs**, which might be considering decisions such as moving between Member States or investing cross border.

Factors that might affect cross-border private business

1. Uncertainty about Private International Law
2. Language
3. Differences in culture and perceptions
4. Prices
5. Access to services
6. Administrative barriers

Source: author

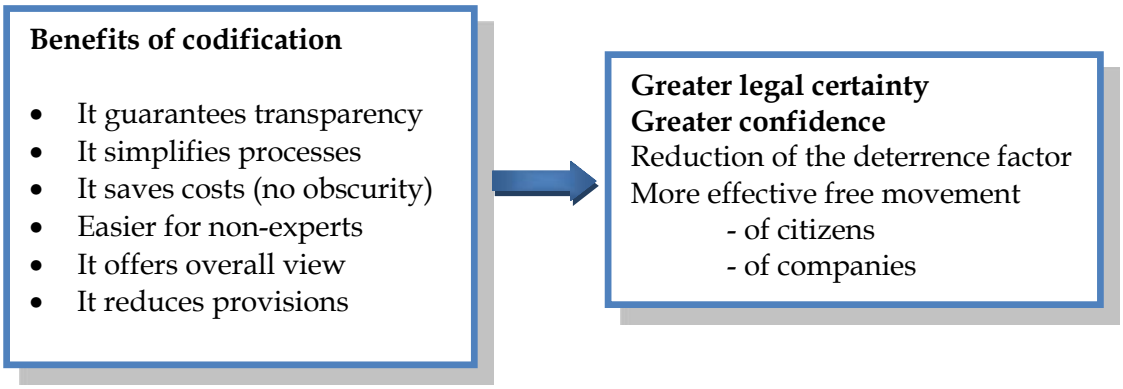
Nonetheless, the uncertainty resulting from the absence of European Private International Law in these areas coupled with the differences between national laws may combine to stop individuals, families and small businesses taking choices they would otherwise prefer. The research note annexed shows that the uncertainties about whether supposed straightforward family matters could be resolved may act as a "tipping point" that undermines free movement. For a small company, concerns about differences in legal capacity and uncertainties about whether difficulties, if they arose, could be resolved easily, may well have the effect of the company deciding that **cross-border trading 'is not worth the potential hassle'**.

Such effects undermine free movement and the operation of the internal market and thus contribute to the wider and high Cost of Non-Europe, reflected in the variations between Member States and higher prices than would otherwise be the case, paid by EU citizens for similar goods and services.

Thus it is also paramount to bear in mind the **deterrent effect** that the lack of a consistent Code has. In other words, it is difficult to estimate how many citizens would have to or like to get involved in procedures that involve Private International Law (changing their name, adopting a child from a different country, owning real estate in other Member State than that of their residence) and do not do it because there is no clarity as regards the law applicable to these transnational situations or the Court they will have to seize in case of problems.

Qualitative benefits of a Code on Private International Law

The research note attached identifies a number of gaps which could be filled either through a **sectoral approach**, either through **codification.** This Cost of Non-Europe report focuses on the latter as the best solution, understanding it like in previous European Parliament studies and in accordance with Point 1 of the Interinstitutional Agreement of 20 December 1994: a 'procedure whereby the acts to be codified are repealed and replaced by a single act containing no substantive change to those acts'. A European Private International Law Code would be the result of bringing about the different existing instruments regulating questions of Private International Law at European level as well as initially adding those instruments newly enacted to deal with the closing of gaps.



As seen above, there is an economic case for a Code of Private International Law. However, there are other **advantages** of such a Code which are not directly of economic nature, though they are no less important. Some of them are shown in the examples above.

First of all, **transparency** is enhanced: the codified rules of Private International Law, which affect citizens daily in their legal relations, are more easily accessible for them. This accessibility is positive not only because the laws governing these relations are in a uniform European piece of legislation, but also because they are systematically organised in a coherent way.

Secondly, it would allow **simplification of the field** of Private International Law and its application in international cases. However, the problem of conflicting sources of law will still remain as long as other possible sources of law (for example, other international treaties) exists and are applicable in the Member States.

Thirdly, from a perspective of legislative clarity, legal certainty and paperwork reduction, a Code would help to **reduce provisions by creating a general part of European Private International Law.** Certain definitions of legal terms and statements relating to the scope of the various legal rules which are currently repeated in every new legal instrument would only need to be made once, avoiding repetitions and inconsistencies in wording that hinder a common interpretation. Should the legislator want some differentiation made, this would still be possible. Any new legal instrument and any revision can build directly on the existing definitions, **simplifying and reducing the manpower and cost of new legislation and increasing legal certainty.** Similarly, o**pt-ins and opt-outs would also be clearer in a Code**, as it would be possible to indicate clearly whether each chapter applies or not to all Member States. The main beneficiaries of these improvements would be citizens, legal practitioners, the legislator and even the Court of Justice, which would need to rule only once on some repeating questions: judgements stating that a definition in one European regulation shall be read the same as in another would become an unnecessary thing of the past.

Moreover, a Code on Private International Law would also facilitate communication between practitioners in different Member States; it would **improve judgement recognition**, which is one of the main goals of Title V of the TFEU relating to the area of Freedom, Security and Justice. It would also **prevent forum shopping**, avoiding that the parties in a controversy manipulate the result of a process by choosing the law governing the subject of litigation. The interest to bring an action to the courts of a specific Member State would not exist anymore if Private International Law was codified at European level.

Recommendation

The codification of Private International Law has a significant economic advantage (savings **around 140 million Euros** per year, and mostly for European citizens and SMEs) and many non-economic advantages linked to simplification. The main potential additional impact on reductions of costs lies in its **cumulative effect**: codification would make it easier and less expensive for individuals, families and businesses considering decisions that could be affected by the absence of European Private International Law.

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