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**Contribution from the COUNCIL OF THE NOTARIATS OF THE EUROPEAN UNION
(CNUE) to 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] final.)**

Throughout their lives, European citizens are required from time to time to provide proof of their civil status, or rather of a specific civil status, in order to benefit from certain rights and honour certain obligations. The situation becomes more complicated when the civil status or certain circumstances necessary to obtain a particular civil status have to be certified outside the country in which the citizen has lived habitually. These practical complications generate difficulties for European citizens, feelings of impatience, powerlessness and, in legal relations, real uncertainty that can only be resolved with time and money, elements not everyone has or wishes to have at their disposal.

The European institutions have made considerable efforts to avoid or minimise these complications and, to this end, one of the directions taken is the proposal to adopt legal texts correcting them. The CNUE wishes to make its contribution and collaborate by suggesting some possible lines to follow in the legislation being drawn up and whose extreme utility it naturally recognises.

On the whole, the CNUE's response to the Green Paper intends to promote the free movement of public documents and the recognition of the effects of civil status records. The Green Paper contains eleven questions, which raise another preliminary question: what is the scope of this Green Paper? Does it deal, in general, with the movement of public documents, whatever their content, or only with those related to civil status?

In any case, the eleven questions can be grouped into two distinct sets. The first, including the first six questions, deals with purely formal aspects of the public document and, more specifically, the possible withdrawal of formalities that help identify it as such, but which do not affect its content and do not add anything to its quality. The second set, including questions 7 to 11, deals with the effects that should be attributed to civil status previously declared or recognised in a Member State that is not the Member State of origin.

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 CNUE considers that these formalities have fulfilled satisfactorily the function for which they were created, but also considers that the time has come to abolish them, for a whole series of public documents, between the administrations of the various Member States, as has previously been done for the national administrations, and all the more so when these Member States are part of the same international structure, as is the case of the Member States of the EU.

This abolition – in no way new in the European legislative context (let us recall the Convention of the Council of Europe of 1968, that of 25 May 1987, Regulations 1348/2000, 44/2001, 2201/2003, 805/2004, 1896/2006, 861/2007, 4/2009 and 1259/2010 in addition to other proposals for regulations, such as that on successions and on matrimonial property regimes, the European Parliament's resolution of 18 December 2008 on the European Authentic Instrument, the revised Lugano Convention of 30 October 2007 concerning civil status, the Conventions of the International Commission on Civil Status, hereafter ICCS (numbers 2, 16 and 17, among others,)) – constitutes a simple measure to facilitate the movement of public documents in the European judicial area, without actually lessening their quality. It is because of the very quality of the document, the process of its creation and the participation of its author that the legal systems attribute special legal effects to public documents and favour their free movement.

However, the CNUE considers that the abolition of legalisation, the Apostille and other similar formalities must not jeopardise the high level of legal certainty required for the movement of public documents in the European legal and judicial area. And this must be shown by the possibility for the destination State, and specifically its administrations, to refuse any foreign public document whose authenticity raises serious doubts, on the understanding that, according to the Community Acquis, an authentic instrument is an instrument that has been issued by a public authority within the limits of its competences, in accordance with the requirements provided by the law and which guarantees its legal content.

Finally, for the CNUE, it is essential, independently of the abolition or not of these formalities, but all the more if they have actually been abolished, to establish lines of cooperation between the authorities and information channels for citizens and authorities in addition to standard multilingual models where this is possible.

Question 2 Should closer cooperation between Member States' authorities be envisaged, in particular as regards civil status records, and if so, in what electronic form?

Cooperation between public authorities must be an objective pursued by the Member States. It lies in the principles of mutual trust and an obligation to inform beyond national borders in order to make life easier for citizens – these are essential conditions in order to progress towards the European area of justice.

What cooperation measures between the authorities could be adopted?



- Adopt common official models for certain subjects that are valid in all the Member States and contain the necessary information, as specified in the answer to question 5.

- Enhance the institutional and official channels of communication between the professional bodies (courts, notaries, administration) in order to then open the channels of communication between the authorities of the various professions. In order to:

- Obtain online a civil status record or documents linked to civil status or necessary to acquire or modify civil status.
- Confirm online the existence and authenticity of the document presented.

- Favour and ensure the reporting of modifications in civil status that have taken place in a third country, for example through the use of appropriate electronic means (<http://ec.europa.eu/imi-net>) and platforms created *ad hoc* (that of the ICCS could be used as a model).

- Adopt solutions for cases where the documents required in one country do not exist in another or when there are serious doubts about the authenticity of the document presented, or if it does not contain all the required information or when mistakes, flaws or signs of fraud are detected, in order to:

- create an inventory of experiences to share
- systematically exchange information through supranational institutions, working groups and delegated individuals in each State
- create a database containing models of acts and certificates of documents from other EU Member States or third countries
- work together on checks by the Member States' consular services or specialists.

- Set up continuous training classes for the competent authorities of each Member State on new elements, fraudulent practices and detecting mistakes, new communications channels with citizens and the authorities of other countries, etc.

In any case, cooperation must increase progressively. The prerequisite for effective cooperation between the authorities of the various Member States is the efficient, flexible, fast and secure internal organisation of each Member State's civil status registers.

Meanwhile, work should be based on good information provided by each Member State and close cooperation possibly strengthened by setting up central information points or specific interlocutors for civil status issues in each EU Member State.

For closer cooperation, a network could be set up based on the European Judicial Network model. A network would not only have the advantage of enabling the Member States to know the identity of the interlocutor, but would also enable the efficient exchange of practical information on the content of civil status registers between countries. Furthermore, it would enable existing best practice to be identified and communicated to the Member States with respect to the modernisation



of national civil status registers, particularly as regards the fast availability of secure data thanks to new technologies.

Another stage of more developed cooperation could be achieved through the interconnection of the various registers. The Notaries of Europe have already had the opportunity to experience the utility and pertinence of interconnecting registers by creating and developing the European Network of Registers of Wills.

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?

The Notaries of Europe are not in favour of a single registration point that would contravene citizens' freedom. With regard to people's geographical movements, it would require a person residing in another Member State than that of the place of registration to take steps that could be difficult.

Furthermore, it would contravene the freedom of each Member State to record what it wants on its civil status records and in its registers. Since legislation in the Member States is different and does not necessarily provide for the recording of the same events, this diversity should be preserved. Imposing a single registration point contravenes the freedom of each Member State to record what it wants on its civil status records and in its registers. Deciding on a single place, possible contradicting the internal law of this country, is too great an infringement on the sovereignty of each State

Finally, the European Union's jurisdiction to impose such a point of registration is more than questionable.

In this respect, the interconnection of civil status records would be very useful, as it would enable information to move rapidly and at less cost between registers. Indeed, the Notaries of Europe are not in favour of creating a single new European civil register, to be located in whichever State, and where all registration of European citizens' civil status would have to be started from scratch. Such a solution:

- would be costly, as it would involve setting up a completely new register, looking for a headquarters and employing staff.

- would require reporting channels to be adopted for data generated in Member States other than that in which this register would be located. It is true that this register could be technologically linked with delegations open in each member country, but simply connecting the place where the event determining civil status was created with a register that was not located close to this place would be inconvenient and would involve costs.

- would contribute to a standardisation of information, thus endangering the criteria specific to each Member State, the specificities that would be excluded or ignored, obliging the Member

State to keep their infrastructure, even for the simple disclosure of facts that this particular Member State considered important.

- would lead to additional significant costs to operate the system and train the staff involved in any way in the events or documents giving rise to the creation or modification of civil status.

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

In order to facilitate cooperation between the Member States and citizens' lives, there is no doubt that it would be useful to publish the list of national authorities competent to deal with civil status matters and to designate an interlocutor or an information point. The list of national contact points and information concerning, for example, competent authorities and the effects of civil status records in each state could be included in the European Union's e-Justice portal.

Accordingly, the e-Justice Portal could become a one-stop-shop for information, easily accessible online, with data on the documents necessary to certify, obtain or modify civil status, what form it takes, its content, who, how and where it can be obtained, who issues this information, what are its effects, what additional requirements might be necessary, etc.

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

The introduction of standard multilingual forms available for the authorities of each Member State could be useful to limit the need for and cost of translation. But there should not be indiscriminate use of standard forms and this should not be the only possible solution.

Experience issuing multilingual extracts of certain civil status records in the context of the ICCS can be taken into consideration as a source of inspiration/departure point for preparing standard forms.

The design of the forms should be uniform. However, these forms should provide for the possibility for the authorities of each Member State to add certain specific details regarding events not foreseen by the form. The implementation of such forms should thus not give rise to the creation of a single European civil status.

These documents should include sections at least in the language of the country of origin (so they can also be used in this country and so it is not necessary to ask for another copy in this language) and in that of the destination country, in which the citizen declares that the record will be used, in addition to the language chosen by the citizen (which can be his/her own language if he/she does not understand either language).

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?

The CNUE supports the opportunity to use standardised forms to prove a specific civil status, in addition to situations, events or specific capacities from which a particular civil status derives.

Such forms should logically be multilingual and reflect, in addition to the general data required by all the Member States, the additional data that a Member State's legislation might consider necessary. To this end, blank spaces should be foreseen. As mentioned in the reply to the last question in the Green Paper, an impact assessment comparing the Member States' legislation in this area would make the drafting of such forms easier.

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?

The Notaries of Europe are not in favour of merely drafting European guidance enabling the national authorities to make the recognition of the effects of civil status records more effective in cross-border situations. Such an initiative would not respond to the real needs of European citizens and would be pointless if standardised forms were created.

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?

First, it should be specified that two elements play a decisive role when analysing the question of automatic recognition that means that the effect that the civil status records produce in a Member State is extended to the other Member States: on the one hand the Lisbon Treaty that has just enhanced the provisions relating to EU citizenship in Articles 18 et seq. of the TFEU and, on the other, the case law of the Court of Justice of the European Union. Any future legislative instrument will have to take these two factors into consideration.

Second, the Notaries of Europe wish to emphasise that the ideas stated below concern only civil status records.

Third, the Notaries of Europe would like to specify that a distinction is necessary between the different types of civil status record. Some only relate to what can be referred to as an objective fact (i.e. birth or death, or date of marriage). Others set down a legal situation (filiation, marriage, etc.).

With this clear, the Notaries of Europe are in favour of recognition in principle of objective facts of civil status established in another Member State. Only such recognition guarantees sufficient legal

certainty and the permanence of a person's civil status, essential in matters of personal status. It is therefore important that situations regularly created in a Member State and set down for example in a civil status record can produce their effects in all the other Member States.

Conversely, given the diversity of legislation, the automatic recognition of legal situations created in another Member State and transcribed in a civil status record does not yet seem desirable. Indeed, as an example:

- certain legislation sets down and validates same-sex partnerships and marriages whereas in other legislation there is no wish to accept such unions; and so with automatic recognition, there would be a risk of encouraging the phenomenon of law shopping.
- two people could conclude a marriage or registered partnership with the sole aim of granting one of the spouses a right of residence, to avoid expulsion or to create rights vis-à-vis public social security bodies or private insurance and, through automatic recognition, they could circumvent the application of conflict-of-law rules and the law designated by these rules by contracting their marriage or registered partnership in a Member State other than that of their habitual residence; so with automatic recognition there would be the risk of encouraging the phenomenon of simulated marriages and partnerships.
- given that civil status records only bring a (refutable) proof, in no case producing constitutive effects, the consequence of automatic recognition could be to confer on the civil status record – used in a cross-border context – wider legal effects than in its country of origin.

So, stating as a principle the automatic recognition of legal situations set down in civil status records amounts to forcing all Member States to recognise a situation set down by this record, whereas they would not have wished to recognise such a situation. This is why the Notaries of Europe considers it premature to establish automatic recognition as a principle.

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?

In our response to question 8, we said that civil status records testify to events in the lives of each citizen, which can be put in two main categories:

- a) those, as it were, objectively certain and for which the statement is unlikely to be subject to legal assessment by the Member States (such as birth and death).
- b) those for which the statement is, on the other hand, linked to an assessment/qualification/production of effects based on the laws that each Member State applies (e.g. attribution of name, marriage, recognition of filiation, adoption, etc.).

For civil status records relating to events indicated **under a)** we feel that automatic recognition could be applied. However, for civil status records relating to events **under b)**, we feel it is inevitable to harmonise the conflict-of-law rules related to the underlying subjects, although fully aware of the presence of remarkable difficulties. Indeed, the instrument should apply not so much to



civil status matters but rather in relation to the various matters underlying the events to be documented, namely in all the sectors that can have an effect on personal legal status, such as identification (name) and personal and legal position (marriage, filiation, adoption, etc.).

And yet the harmonisation of conflict rules is necessary for the following reasons:

The assessment of the validity of the legal effects of the legal act certified by the civil status record is currently subject to private international law and the statutory regulations designated by it. Consequently, the validity of the conclusion of a marriage or change in name, for example, is only subject to the law that applies to the marriage or name according to private international law.

From this perspective, harmonisation of the conflict-of-law rules is the only approach likely to effectively promote the free movement of citizens in the European Union without actually stimulating, for example, simulated marriages/partnerships and the seeking out of a specific law. Moreover, the method based on conflict-of-law rules is inevitable in order to settle relations with third States and thus to guarantee the free movement of EU citizens whose civil status has been established in a third State.

The Green Paper seeks to recognise in general the validity of legal documents attested by civil status records. The examples cited hereafter, and in the reply to question 8, clearly show that abandoning the distinction between the recognition of evidentiary value and the character of the certificate of civil status records on the one hand, and that of the validity of legal documents that are at the origin of the document on the other, would have considerable negative repercussions. From this perspective, only the method based on conflict-of-law rules makes it possible to effectively avoid, for example, simulated marriages and partnerships and the search for a specific law that is weaker and more permissive.

The recognition of events or legal documents will be doomed to failure when they have occurred or been concluded in a third State, given that the corresponding civil status records would not be dependent on the Community legislation, which is limited to documents from Member States. As regards civil status records from third States, the harmonisation of conflict-of-law rules is nevertheless inevitable to avoid the same legal situation with foreign elements relating to a third State and involving EU citizens in particular (e.g. marriage between an Italian man and a French woman concluded in Morocco) varying from one Member State to the next.

Finally, only the harmonisation of conflict-of-law rules would make it possible for the parties to be granted the freedom – although limited – to choose the law applicable to their civil status (see observations relating to question 10), without having recourse to the search for a fraudulent and permissive law, as mentioned above.

In this context, it should be noted that the harmonisation of conflict rules comes up against fewer obstacles than those to which the Green Paper alludes. For example, with respect to the material conditions of the conclusion of the marriage, most Member States already foresee a (distributive) link to the national law of each spouse so that harmonisation in this area should not pose major problems. With respect to the ‘conflicting’ areas such partnerships outside traditional marriage (registered partnerships, same-sex marriage), it must be admitted that political reluctance is greater.

On the other hand, this reluctance would exist, to the same extent, for an automatic recognition. If we wish to effectively improve the recognition of these partnerships in the European Union, we must have recourse to the method based on conflict-of-law rules and foresee, for example, a link to the law of the register (*lex libri*).

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?

Choice of applicable law.- If the regulation proceeded to harmonise conflict-of-law rules, in general, the right to choose the applicable law should be foreseen, in accordance with the principle of private autonomy.

Indeed, the choice of applicable law would allow citizens to determine the legal status closest to their own tradition and culture (for example regarding the name, the recognition of a natural child, marriage, etc.) subject to exception of the public policy of each Member State.

The public policy reservation is necessary to the extent that each Member State could consider it appropriate to apply, for certain subjects, only objective connecting factors, in order to preserve its own cultural and legal traditions.

Form.- The choice of applicable law should be made before the public authority competent to do so in each Member State¹, and if this is not done directly before the official of the civil register, by authentic instrument.

When could the choice be made? Ideally the choice would be made before the event/act for which the attestation is required happens through the civil status certificate (e.g. before marriage, before adoption, before recognition of a natural child, etc.). If the choice had to be made subsequently, it could have modifying effects (for example: name change) and the problem of the consequent retroactivity of the effects produced would arise. Consequently, the choice of applicable law following the realisation of the act/event should be allowed on condition that this does not prejudice the rights acquired by third parties.

Which law to choose? With respect to subjects with an impact on the personal legal position (name, filiation/adoption/marriage/registered partnership relationships), it would be desirable to limit the possibility of the choice to the law of the States with which there are close links. However,

¹ The form of authentic instrument guarantees the person making the choice by offering certainty regarding identity, capacity and willingness; favours the document's movement; offers maximum guarantee regarding probative value; enables registration with the civil status registers (given that private agreements cannot be registered) and therefore information and effects vis-à-vis third parties. Latin-type notaries, in particular, could provide considerable added value given their advisory work that always precedes all of their activities and would enable the declarant to be informed, in advance and adequately, regarding the legal consequences of his/her choice (e.g. regarding name, marriage, filiation, etc.).



it is not easy to establish a single criterion that is valid for all subjects given the fact that both the conditions and the requirements to be safeguarded would vary considerably.

So, depending on the subjects, the regulation should foresee the possibility to choose:

- the law of the State of residence of the subject or one of the subjects making the choice
- the law of the State of nationality of the subject or one of the subjects making the choice
- the law of the State of place of birth of the subject or one of the subjects making the choice or the State in which the event occurred (act and/or event) for which the attestation from registers of civil status is required.

Registration of choice.- Registration is essential for information and effects vis-à-vis third parties and this constitutes a fundamental economic value that determines the positive external effects for private individuals and for the community. Subject to national provisions, the facts will be published on the relevant civil status register according to the internal rules of the Member State concerned.

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 crossborder effects of legal situations linked to civil status?

In order to provide a response to this question, it will first be necessary to look further into how the civil status systems of each Member State operate and, to do so, it would be desirable for the Commission to make available to citizens an adequate preliminary report, as was done for the recent Green Papers on Successions and Matrimonial Property Regimes. Such a report should contain in particular a presentation of the various conflict-of-law rules in force in the Member States.

Brussels, 3 May 2011