

EXPLANATORY REPORT

A. GENERAL REMARKS

In view of the significant growth in the possibilities of effecting transmissions electronically, the International Commission on Civil Status (ICCS) was desirous of extending the option of utilising this new method of communication to exchanges between States of data relating to the status of persons or to nationality. To this end, the ICCS is of the opinion – given that electronic signatures enable the despatch and receipt of the data to be proved – that data transmitted by electronic means with an electronic signature should have the same evidential value as data transmitted by the means habitually used by civil registrars. The ICCS considered it necessary to establish a legal framework. For this purpose it drew on the principles found in Directive 1999/93/CE of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures and in the laws already existing in the ICCS member States. Under this Convention, such transmission by electronic means is applicable to data the exchange and issue whereof are provided for in ICCS Conventions (see the Appendix), but can be extended to other data on certain conditions. This Convention does not affect the provisions in force in the Contracting States concerning the issue and utilisation of data, or the international agreements and conventions on the subject.

B. COMMENTARY ON THE ARTICLES

Article 1

The Convention is designed to enable the Contracting States to utilise electronic means for communicating data to each other. This also holds good for requests for information and replies thereto. Subject to Article 5, the Convention is applicable to data the exchange and issue whereof are already provided for in other ICCS Conventions; it creates no new obligation to exchange or issue information. It was decided that the Convention should apply automatically to future ICCS Conventions having the same object.

Article 2

This Article sets out the conditions that must be satisfied before a transmission by electronic means can be recognised as having the same value in law as a transmission in a material form. Technology in this area is constantly evolving, but these are basic conditions that are indispensable notwithstanding any subsequent developments. The conditions should, in order to correspond to international norms, be interpreted in the following way: - a transmission by electronic means must guarantee the integrity and authenticity of the information transmitted: the contents of the communication must not be capable of modification during the transmission. Both the sender and the recipient must be irrefutably identified and they must be sure that the data transmitted by the one and received by the other are identical. - a transmission by electronic means must guarantee the security and confidentiality of the communication: the message must be protected against any destruction or alteration, whether accidental or intentional, during the transmission and must be accessible only to the identified sender and addressee.

The Convention must be applied in such a way as to comply with the provisions in force regarding data protection and notably the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, done at Strasbourg on 28 January 1981, and, for the member States of the European Union, the provisions of Directive 95/46/EC of the European Parliament and of the Council

of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Article 3

This Article contains the undertaking entered into by the Contracting States: if the conditions set out in Article 2 are satisfied, the States must attribute to data communicated electronically exactly the same value in law as if they had been transmitted in a material form.

Article 4

Article 1 of the Convention states that electronic transmission may be used in the case of data the exchange and issue whereof are provided for in existing or future ICCS Conventions. Transmissions will generally take place between authorities or civil registrars of the Contracting States. However, some Conventions (for example, No. 16, on the issue of multilingual extracts from civil status records, No. 20, on the issue of a certificate of legal capacity to marry, No. 27, on the issue of a life certificate, and No. 28, on the issue of a certificate of nationality) envisage the issue of documents to individuals. In order to facilitate the steps to be taken by users in such cases, it appeared necessary to confer on civil registrars or another authority power to act on behalf of individuals.

Accordingly, Article 4, paragraph 1, enables a Contracting State to empower certain of its authorities (for example, a town hall, a civil registration office or a notary) to make or receive an electronic transmission at the request of duly entitled individuals. The text does not specify under which law such entitlement is to be determined. In practice, the authority asked to transmit the request will refuse to do so if the individual is not entitled under its law to obtain the data sought. Likewise, the authority of the requested State will refuse to transmit the data if this would be contrary to its law.

A list of the authorities so empowered must be communicated to the Swiss Federal Council (see Article 12).

In order to facilitate the use by individuals of data transmitted in this way, Article 4, paragraph 2, enables a Contracting State to empower authorities receiving a communication by electronic means to issue a certified paper copy thereof, in the form provided by its national law. However, the certification will relate only to the transmission itself: the authority will certify solely that it has received the data reproduced in the paper document and not that those data are correct.

Article 5

Although this Convention was originally intended to be no more than the “handmaid” Conventions drafted by the ICCS, it was considered desirable to include an option of extending its application to data the exchange or issue whereof are not provided for in those Conventions: examples would be national forms, records or extracts drawn up in conformity with ICCS Recommendations or bearing codes approved by the ICCS, or data appearing in population registers. Such an extension appeared useful in view of the foreseeable developments in the utilisation of these new technologies and the services that can thereby be rendered to both administrative departments and users. The optional extension can be made only by member States of the ICCS and will create an obligation solely as regards a Contracting State that is a member of the ICCS and has declared that it accepts the extension.

Article 6

This Article is intended to enable the ICCS to facilitate the use of electronic means of communication. Measures that might be envisaged include a directory of the electronic addresses of the authorities concerned that would be made available to the Contracting States.

Article 7 to 14

The final clauses contained in these Articles have been brought into line with the practice of other international organisations; thus, unlike earlier ICCS Conventions, the notion of accession is used here only for non-member States.

Articles 7 to 14 call for few comments. Under Article 9, entry into force of the Convention is conditional on ratification, acceptance or approval by two ICCS member States. Under Article 8, any State which is not a member of the ICCS may accede to the Convention, after it has entered into force, provided that it is already party to one or more ICCS Conventions providing for the international communication of data. In that event, the Convention would apply, for the acceding State, not to all data but only to those covered by the Convention or Conventions by which it is already bound.

The communication of the list referred to in Article 12 is designed to enable a State that receives from an authority of another State a request for data on behalf of an individual to check the regularity of the request.