



**UINL GUIDANCE ON NOTARIAL AUTHENTICATION
WITH ONLINE APPEARANCE**

Adopted by the General Meeting of Member Notariats on 03.12.2021

Preamble

New technologies have been an integral feature of notarial practice for many years, particularly in the context of procedures, which precede or follow the notarial act itself, communication with public bodies and record-keeping.

The Covid-19 pandemic and global developments in information technologies have accelerated the use of those technologies in almost all fields; for these reasons, notariats all over the world have needed to develop solutions enabling the profession to operate in this new environment without sacrificing, however, the fundamental principles of notarial practice.

These guidelines seek to complement the general principles of the International Union of Notaries with regard to new technologies, with specific focus on the exercise of the notarial function and the drawing-up of authentic instruments in a virtual context.

In particular, the Guidelines relates to the execution of authentic instruments with the "online appearance" of the clients before the notary. By this expression it is meant that identification and consent given at a specific time by appropriate technological means can be equivalent to physical appearance before the notary, when the latter has no doubt about the identity of the person appearing and about the time when s/he gives her/his consent, and can attest to both.

The guidance is intended to apply to all UINL Member Notariats, irrespective of their level of progress and development in the digital arena, in order to reinforce trust in the public notarial function and the legal certainty, which it provides.

Identification of the parties by the notary.

1) Whatever digital identification system is employed, it must not operate to the exclusion of the notary's direct and personal verification of the parties' identity in accordance with the notary's national law. Furthermore, execution with "online appearance" must not prevent the notary carrying out, by appropriate means, the verification of capacity and other verifications required by his national law.

The constant developments in technology should be a complementary means of assisting the notary in the cognitive process of identifying the parties, for example through the use of electronic identity documents or access to official databases.

In the assessment of the personal data needed to identify the holder, the notary may use digital data as an additional element on which to base his conviction, but never as the only element.

The stricter rules on representation and powers of attorney must also be respected. Otherwise, the rules on verification of identity and declaration of intent may not be met. The presentation of a paper power of attorney during a videoconference can in no way be considered sufficient: on the contrary, the power of attorney must be transmitted in digital form and meet the highest standards of verification of the identity and consent of the principal. Furthermore, it must be ensured that the power of attorney remains valid and in force when the legal transaction is carried out.

2) The notary must remain solely responsible for the identification of the parties, even if he decides to proceed with the aid of digital tools. Moreover, the notary must be able to select the tools used to verify the identity of the parties, whether through personal knowledge of the parties or through digital identification methods within the framework established by the competent legislator.

Verifying the free expression of the will of the parties and security of data transmission.

3) An IT platform provided by the Government or approved by the notarial institution must be used for online interaction with the parties. The platform must ensure the confidentiality of personal exchanges, as well as secure and clear interaction. It must strictly comply with professional secrecy and all data protection standards, particularly with regard to the cross-border transfer of sensitive data.

4) In view of the public function performed by the notary when drawing up an authentic act, the platform used must be public and, where this is not possible, the use of private platforms must be evaluated with great care, especially with regard to the security of sensitive data transmission and the secure management of the videoconference.

5) Wherever possible, in order to ensure legal compliance and security of sensitive data, the platform should be managed or supervised directly by the notariat or established expressly for this purpose.

6) The notary must have power, where any doubt exists, to refuse to draw up a remote authentic instrument. It is essential to underline the importance, in drawing-up an authentic instrument, of preliminary online consultations and videoconferences as well as the analysis of original documents received in digital format and all other elements available to the notary.

Compliance of the system with rules of territorial competence

7) It is necessary to consider the impact that the introduction of the authentic instruments with "online appearance" may have on rules governing the territorial competence of notaries, where such rules exist. Since cyberspace has no borders, new connecting factors may need to be considered for videoconferencing or for any other electronic technology-based means of authentication, including, for example, the residence or nationality of the parties or the location of the property that is the subject of the contract.

It may be considered that the notaries who are most familiar with the applicable law and local requirements and who have better access to other relevant authorities should be directly responsible for authentic instruments granted with "online appearance". Although this requirement does not apply to authentic instruments with physical appearance, it may make more sense in the case of online appearance, since the applicant does not need to travel to the office of the notary that is considered to be most appropriate. This criterion can be applied to both real estate and corporate transactions.

The notary's area of competence might be expanded to encompass an "augmented" concept of the notarial office: in this scenario, the place of execution of the notarial instrument would be the place where the notary's office is located, provided it is within the territorial limits established by national law, irrespective of the physical geolocation of the parties to the notarial instrument. It is necessary not only to be certain of the identification of the person but also to establish the exact moment of completion of the act or legal transaction in time. The precise time and place at which the binding declarations of the parties were made and became unequivocally linked to each other must be determined without a doubt. The legal relationship crystallizes when the notary grants the act by means of her/his electronic signature. The legal transaction could therefore be regarded as having been granted at the notary's office.

8) In the case of authentic instruments with "online appearance", consideration may need to be given to affording access to all national citizens, without territorial restriction, especially for the benefit of clients living abroad, who would be granted access on the same conditions as residents. National rules of private international law should establish the connecting factors for determining the validity of r

instruments with "online appearance" to which its law applies in cases where the parties are outside the jurisdiction.

However, it is also important to consider the need for the introduction of legislative provisions covering national and cross-border technological tools enabling communication between different digital notarial platforms (e.g. for cross-border use of national means of identification), the acceptance of digital acts, their circulation and execution.

Furthermore it is important to consider the difference between digital authentic instruments which, because of their nature or use, are intended for circulation (such as powers of attorney) and those digital authentic instruments which must be drawn up by a notary appointed in the jurisdiction where the instrument is used (e.g. in the field of real estate and company law) and to take account of different rules on acceptance and recognition established by the competent legislator.

Signature of authentic instruments.

9) It is necessary to create a system that is reliable but also easy for everyone to use. Countries that are already familiar with the drawing-up of authentic instruments in digital form can adapt their system to enable electronic signatures for clients providing the highest level of security recognized by the jurisdiction of the authenticating notary, with the possibility for such signatures to be issued on occasion by the notary directly.

In those countries where no provision has yet been made for digital instruments, consideration might be given to such instruments being signed by the notary alone after obtaining the express declaration of consent of the parties, such fact to be mentioned in the instrument, with, if possible, provision in this case for at least one of the parties to be physically present before the notary.

It is possible to envisage situations where an authentic act is drawn up by notaries in different jurisdictions, each receiving the declarations of the party appearing before him, always provided that both national laws involved in the transaction expressly so permit.

Provision might also be made for the officiating the notary himself to issue digital signatures to the parties requiring his services.

In the digital sphere, it is sometimes difficult to distinguish drafts from the final document. Sometimes it may even be questionable whether consents can be considered to have been given when the draft is partially accepted. It is important to put in place means to clearly distinguish the draft from the final document, so

that the act or transaction is only considered to be complete when, once the final text has been drawn up, all the parties agree, which today is established with certainty by the unity of the document.

It is essential for legal certainty to be able to clearly identify the final legally binding document, the only one that will be validly signed by the parties and the notary.

Restriction on certain categories of authentic instruments.

10) Consideration might be given to limiting the use of remote appearance systems to authentic instruments which, because of their unilateral or constitutive nature, do not give rise to conflict of interests (in particular powers of attorney and instruments forming associations or companies or amending the same).

It is advisable to exclude wills and inheritance agreements from this procedure. The notary may require physical presence, excluding online appearance when, in her/his judgement, the complexity of the act or legal transaction to be granted requires it.

This does not prevent further research in this field in order to explore the possibility of permitting, within the context of the remote notarial act, at such time when the technological tools so permit, all types of legal transactions which comply with the principles set out above without any restriction as to on the nature of the act and/or the number of parties.

Conclusion

The notary must be the central figure in the establishment of the electronic authentic instrument with "online appearance".

Technological tools cannot substitute the notary's responsibility for ensuring the legality and legal security of the instrument, but must be a counterbalance and support for that responsibility which goes far beyond mere technological security.

Technology must be a tool at the service of the notary in performing the obligations incumbent in the exercise of the notarial public function, namely identifying the party, verifying his capacity and understanding as well as ensuring the absence of factors vitiating consent and the legitimacy of the instrument.

In short, it is the notary who is personally accountable for his conduct, which must comply with his national law and the founding principles of the Latin Notariat.

The authentic instrument with “online appearance” requires us to re-examine the principle of personal appearance and to develop other means of contact between the notary and appearing parties. What is important is not physical presence before the notary, but direct appearance before the officiating notary, even if such appearance is via a technological platform.

An authentic instrument drawn up digitally is of no lesser effect than a public instrument established on paper. It is simply another means of achieving the same outcome, but one that allows remote communication with the parties.

The use of new technologies in notarial practice relies on three fundamental pillars:

- **Investment** in state-of-the-art technological systems offering a high level of security.

- **Training** of both notaries and parties to enable broad familiarization with the use of digital instruments.

Continuing education in digital technology must be promoted in order to enable notaries to acquire digital skills and use new technologies efficiently and in a legally secure manner.

- **Legislation**: national legislation should make provision for digital notarial instruments, their creation, scope and effects. All laws governing the form of the authentic instrument in national and comparative law must take account of the possibilities offered by new technologies and recognize their value and effectiveness.

The Notariat must be attentive to recent advances in the field of data storage on optical media, given that their development will mean a practically unlimited storage capacity and permanence of information in terms of volume and duration, which will undoubtedly enhance the notarial document, especially that drawn up on electronic support