



## STUDY ON THE DEFINITION OF NOTARIAL AUTHENTIC ACT and ANNEX on COSTS.

DOCUMENT DRAFTED BY THE “AUTHENTIC ACT” WORKING GROUP OF UINL.  
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### FOREWORD

The aim of this study is to briefly set out and clarify the reasons why the effectiveness of the authentic instrument is superior to that of any other document, namely because it enjoys public trust.

We need to begin by stating the obvious. Documents having legal content and effects exist since man learned to express himself through writing. Among these, there are also those documenting legal transactions among individuals. Starting from this, some formulations were gradually found, in order to improve their effectiveness thanks to the addition of guarantees during their formalisation.

These guarantees are sometimes very simple, as in the case of the Common Law *deed* where the presence of two witnesses, a stamp and the sacramental formula *signed as a deed* are sufficient. A *deed* is considered additional evidence, like any other evidence, and does not benefit from any privileges.

The guarantees are far more complete and sophisticated, instead, in the case of the authentic instrument, the most recent source of which is found in the *iuditia ficta* dating back to the Middle Ages, where in order to give veracity to the act and make it enforceable, the parties simulated a request before the judge which the responding party accepted. The judge checked the legality of the act that thus had the same value as a judgment. Nobody could challenge or object to its enforcement, excluding exceptional cases of default. Highly specialised officials, namely notaries, gradually fulfilled the role of the judge. Vis-à-vis the document, their function is similar to the one of the judge and the ensuing effects identical to those of judgments, subject to contingent revision by judicial authorities. However, in principle, the document is recognised and enforced as an authentic instrument. It enjoys public trust.

This set of guarantees, that include the presence of the notary, and give special substantive and probative effects and enforceability, has been recognised by the highest judicial authorities. For example, the decision of the Court of Justice of the European Union dated 9<sup>th</sup> March 2017 establishes that *the act of reserving activities relating to the authentication of instruments for creating or transferring rights to property to a particular category of professionals in which there is public trust and over which the Member State concerned exercises particular control constitutes an appropriate measure for attaining the objectives of proper functioning of the land register system and for ensuring the legality and legal certainty of documents concluded between individuals .....the notary’s involvement is important and necessary..... since the participation of that professional is not limited to confirming the identity of a person who has appended a signature to an instrument, but also involves the notary’s becoming acquainted with the content of the instrument in question in order to ensure that the proposed transaction is lawful as well as verifying that the applicant enjoys legal capacity.* And this same Court strengthens this

recognition by establishing in its decision dated 24<sup>th</sup> May 2011 that *notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into by individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article 49 EC deriving from the particular features of the activities of notaries, such as the restrictions which derive from the procedures by which they are appointed, the limitation of their numbers and their territorial jurisdiction, or the rules governing their remuneration, independence, disqualification from other offices and protection against removal.*

To explain why the effect of the authentic act is superior to that of any other document, such as the Common Law *deed*, this study takes, as its starting point, the definition of the authentic act developed within UINL and CNUE and, on the basis of the Fundamental Principles of the Latin/Germanic Notariat and the Deontology and Rules of Organisation for Notariats - analyses what EU Regulations refer to as the “authentication procedure”, focusing in particular on the guarantees it includes, such as organisation, liability and the regime of notaries, as well as their accurate and rigorous work in the drafting and validation of authentic instruments.

This study is a first step aimed at establishing the universal circulation of authentic acts as documents having superior effectiveness than any other.

## **STARTING POINT**

We will take as our starting point the definitions of authentic act established by the General Meeting of UINL and CNUE, held at La Granja, on June 16, 2017 and Cancun, on November 11, 2017, and underline key aspects.

“Authentic instrument” means a document which has been formally **drawn up as an authentic instrument** and that:

(i) the **authenticity** of which relates to **the date, the signature and the content of legal acts and legal relationships recorded in the instrument.**

(ii) has been **established by a public authority or a delegate of a public authority** who has received on a permanent basis **special State powers** to draw up authentic instruments, in accordance with a **procedure regulated by law.**

Under this procedure the public authority or delegate of the public authority is required to:

--- Ensure that the parties give their consent with a **clear and perfect knowledge** of the **legal scope and consequences** of the instrument.

--- Act **independently and impartially.**

--- **Verify the identity and legal capacity of the parties** as well as the **legality of the instrument.**

--- Provide the parties with **complete and comprehensible legal information.**

--- And, as a consequence of the verification of the legality and validity of the instrument, **refuse to act if the purpose of the instrument is illegal or in bad trust.**

The authentic instrument is characterised by its **permanent and enhanced efficiency.**

We will now examine the key constituent parts of the foregoing definition of authentic act.

## **CONSTITUENT PARTS OF THE DEFINITION**

### **1. Established/Drafted by a public authority or delegatee of public authority who has permanently received special powers from the State.**

#### **1.1 Delegating public authority and its conditions. Notion of authority.**

Public trust is part of the powers of the State. The only depositaries of public trust are those who exercise it because the State grants them this authority or delegates the exercise of this authority to them.

This notion seems clear in the latest Regulations of the European Union, where authenticity is defined as an autonomous notion of Community law, affecting and directly applicable in all EU member States.

\*\*EU Regulation no. 650/2012, Recital 62): “The ‘authenticity’ of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State”.

\*\*Regulation no. 44/2001 : the definition of the notion of ‘court’ includes “any authority designated by a Member State as having jurisdiction over matters falling within the field of application of this [...] Regulation”. Notaries are one of these authorities, as established by the Court of Justice of the European Union in case no. 484/15, regarding a writ of execution issued by a Croatian notary. The latter is an authority according to the Regulation, but does not exercise the judicial function that falls to judges. The notary’s instruments are always subject to contingent review by the judicial authorities.

\*\* Regulation no. 650/2012 : For the purposes of this Regulation, the term ‘court’ means any judicial authority and all other authorities with competence in matters of succession which exercise judicial functions, and fulfil the conditions established by the same provision. The same notion can be found in case no. 551/15 CJEU.

The following Regulations go in the same direction:

\*\* Regulation (EU) 2016/1103, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

\*\* Regulation (EU) 2016/1104, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of property consequences of registered partnerships.

Numerous laws in UINL member countries start from this same principle: the notary is both an official and a delegatee of a public function. The choice of the above-mentioned reference legislation is justified by the fact that they are international laws standardising and connecting the notarial function, so as to produce notarial authentic instruments that may be recognised and enforced on an equal footing in all countries.

Ultimately, the function of authentication, of public trust, falls to the State and only the latter can confer it to its authorities, or delegates of said authority. If the State fails to confer it, then there is no public trust or authenticity as described previously.

This is why the “Deontology and Rules of Organisation for Notariats” lay down that “The Notary is a Public Official to whom the State has delegated its power allowing him to confer authenticity to the documents he drafts, to ensure their storage and give them probative force and enforceability”.

### **1.2. Access to the public function and conditions. Exercising the profession individually vs. exercising it as a corporation. Minimum level required of notaries: homogeneity of training.**

Resolution no.7 of the General Meeting of Member Notariats of the Union held in Rome in November 2005 establishes that the essential condition in order to be able to exercise the profession of notary is that the candidate should have a degree in law. Furthermore, article 5 of the Rules of Organisation for Notariats requires that notaries have to obtain the highest legal qualifications in their respective countries in order to practise law and have the necessary legal knowledge to effectively and accurately check the legality of the acts and documents they authenticate.

The aforementioned Resolution adopted in Rome in 2005 establishes, as an essential condition, that the notarial function should be public and exercised independently and impartially. Title 1.2. of the Fundamental Principles of the Latin Notarial System completes this requirement as follows: “The notarial function is public and, as a result, notaries have the authority of the State. They exercise their function impartially and independently, outside any State hierarchy. Notaries only act on behalf of the State that delegates its function of authentication to them”.

Although in some countries, notaries are public officials who are part of the State administration, this does not affect the value of authentic instruments, if they include all the guarantees examined in this study in the documents they draw up. To this regard, even if there is no corporative organisation required in order to be a member of UINL, the authentic instruments drawn up by notaries will have the same value and be equally liable to circulate at international level as the acts drafted in UINL member countries.

### **1.3. Function of corporative organisations. Corporative supervision, procedures and scope.**

Resolution no.7 of the General Meeting of Member Notaries held in November 2005 in Rome lays down that to be members of the International Union, notaries of a given country have to be legally organised. Title III, paragraph 12, of the Fundamental Principles of the Latin Notarial System requires that notaries be members of a collegiate body, a requirement also established under article 21 of the Deontology and Rules of Organisation. Article 26 establishes that either directly or through the Chambers or Associations of notaries, the State has the power to scrutinize, check, inspect and sanction notarial activities, which will be placed under the protection of courts. Infringements and sanctions will be established legally, under the “*nula poena sine lege*” principle. In the most serious cases, the corporative sanction may consist in temporary suspension from office and even exclusion from the notarial profession.

The trust of States in delegating the power of inspections to notarial Associations and Chambers varies from case to case. Some countries do not understand that it is in the interest of the same notaries that the notarial system function correctly, since it concerns their future. At any rate, direct or indirect State control over the activities of individual notaries assures that authentic acts have probative force, are enforceable and enjoy the benefit of dual presumption of legality and accuracy of content, as set out under Title II, paragraph 8 of the Fundamental Principles.

Member notaries wished to lay emphasis on the fact that checks and inspections of notaries ultimately fall to the State, subject to final supervision by the judicial authorities. Checks performed by the collegiate bodies have to go hand in hand with those performed by the State.

### **1.4. Special liability of notaries: administrative, third-party and criminal.**

The corporative liability of notaries is compatible with third-party liability, which tends in almost all States to be objective or results-related liability, as well as administrative and criminal liability. In many cases, this liability is increased owing to the fact that Notaries exercise a public function or that this function has been delegated to them. Here, again, the more serious infringements may lead to suspension from office as a corporative sanction. The severity of the sanction increases the value of the authentic act. Notaries may also incur criminal liability, sometimes aggravated by the fact that they fulfil a public function.

What is essential in the notarial authentic instrument, is that State scrutiny be permanent and not only “*ex post*” vis-à-vis a document validated in breach of rules.

### **1.5. Drafting and authorisation of the authentic instrument by Notaries. “Drawing up”.**

Paragraph 6 of the Fundamental Principles lays down that notaries have sole responsibility for their draftsmanship. To this regard, they are the only authors of their acts and do not share this responsibility with anyone. Since notaries are free to accept or refuse a document or to make any amendments they deem suitable, in agreement with the parties, and in accordance with article 16 of the Deontology and Rules of Organisation, they have to refuse their services when the act in question is against the law or public

order or liable to mislead third parties, and/or implies the fraudulent circumvention of laws, third parties or public authorities; if a notary accepts a document, even a draft or rough version, or confers the quality of authentic instrument to a document previously drafted as a private agreement, he takes on responsibility for it and thus becomes its author.

It is important to distinguish between the registration of a non-notarial document and bringing such a document to the level of a notarial authentic act. In the first case, its existence is simply acknowledged at the time of registration. In the second, the notary has to include all the elements - identification, assessment of capacity and representation, informed consent, checking of legality, etc. – as he would do in the case of an authentic instrument drafted entirely by him. This second document is the only one that has the value of a notarial authentic act.

Furthermore, it is necessary to distinguish drafting from validation, the solemn moment when the Notary, through his signature, confers the value of authentic instrument to the document, if it fulfils all the conditions and contains all the elements required by law. The instrument becomes authentic as of the moment of its signature. It is an official act resulting from the capacity of public official or delegatee of a public function that the State confers to the notary and that allows the latter to attribute the quality of public trust to the document.

Unlike other law practitioners, the notary signs the documents he draws up and validates them, taking responsibility for them and, at the same time, gives them the value of public trust on behalf of the State.

### **1.6 Ownership of documents. Responsibility for archives. Permanence of archives.**

The authentic act is also a public document and its scrutiny does not fall only to the issuing authority or the appearing parties, who can make it public or keep it secret. Nothing prevents a private document from remaining secret. On the other hand, the State may have access to an authentic instrument in the cases provided by Law, and, in most countries, the owner of the archives or notarial register may be the guardian or depository of said document. Without prejudice to the duty of professional secrecy, which is essential in the relationship of the Notary with the client and for the notarial document itself, the authentic instrument cannot remain concealed or secret and without making exceptions to the duty of professional secrecy, it is always accessible by means of a judicial authorisation or, failing that, through administrative bodies having the power to obtain the information they need to fulfil their functions.

This is why article 3.1. of Deontology and Rules of Organisation requires that Latin-type notaries ensure the storage of documents for an unlimited period of time. Being public officials, notaries cannot deny the public nature of their archives or registers. This does not mean that the latter are accessible to all, but that the State may be informed of them to fulfil its mission. The authentic instrument is not subject to the same treatment as the documents of other legal practitioners in the Anglo-Saxon world, whose archives often disappear when the latter cease to exercise their profession.

## **1.7 Position of corporative bodies and notaries as collaborators of public authorities. Provision of information: money laundering, tax audit, etc.**

The authentic instrument also contributes to the fulfilment of the missions pursued by the State, not only by facilitating the collection of evidence in judicial proceedings, but also by providing important information to the administration. A broad range of issues, such as money laundering, tax audits, urban planning, habitat, agrarian or industrial policies, land registry, etc., find an invaluable source of information for public policies in the authentic act. Article 10 of the Deontology and Rules of Organisation establishes that, without undermining their duty of professional secrecy, notaries co-operate with State institutions and agencies for delegated functions and within the framework of official relations tied to their remit.

## **2 . Drafted as an authentic instrument.**

### **2.1. Not all the documents drafted by the notary can be qualified as authentic instruments: restrictions.**

Paragraph 11 of the Fundamental Principles of the Latin Notarial System specifies that the notary's work extends to the legalisation of signatures affixed by individuals to private documents, as well as the certification of true copies of originals and any other activities provided for by a given national legislation. These include acknowledging certain facts or circumstances that notaries may see, hear or perceive. In this case, notaries certify the public trust of the documents they authorise, but these are not the subject of this document, as only the documents that follow the authentication procedure resulting from the previously mentioned definition may be considered authentic instruments. Below, we will examine the different stages of this authentication procedure that is the reason for and basis of the special effects tied to the authentic instrument.

## **3 . Compliance with a legal procedure.**

### **3 .1 Identity**

The Fundamental Principles of the Latin Notarial System, Title II, paragraph 3, establish that Notaries have the duty to identify parties. Moreover, this is the case in all notarial laws. To this end, notaries may resort to all available means from identity documents to modern means of electronic identification, whatever these may be. However, in authentic instruments, notaries can never delegate, waiver or defer this duty to the means used. Owing to their specialism, the legal duty of identification which notaries are bound by prevails over any other identification tool or instrument that cannot replace their function. If the notary ever has any doubts on the exactitude of the identification made through such technological means, he will have to check identity in parallel, using his own means. Thus, ad exemplum, in some countries, since a very long time, the Notary can resort to witnesses who know the party and who in turn are known by the notary.

Likewise, if a party resorts to an electronic signature as a tool to produce a digital document, the notary will have to make sure that the electronic signature device has actually been used by its owner and that it is the person appearing before him. For reasons of specialism, resorting to an electronic signature in an authentic act does not exempt the notary from the duty of checking the identity of the appearing party. The

value of the authentic instrument is greater than that of any other document, and this implies that the notary has the duty of identifying, a duty he cannot delegate. This is why it is difficult to imagine doing without the physical presence of the party before the Notary, especially if we link identification with the assessment of capacity mentioned earlier.

In any case, identification through whatever means ultimately falls to the notary who cannot renounce to the benefit of technological means.

### **3.2 Legal Capacity**

The same Fundamental Principle mentioned above establishes that notaries have the duty of checking the capacity and authority of the appearing parties to conclude the act or transaction in question. Being an authentic instrument, the appearing party should not only have intellectual capacity, but should enjoy the foregoing capacity when the act is concluded. Therefore, the notary will have to make sure that the appearing party does not suffer from any condition or alteration of his intellectual capacity when giving his consent. As has been stressed time and again in notarial literature, this has to be assessed by the notary in a proximity relationship with the appearing party. The party's capacity can only be assessed directly and not indirectly.

Furthermore, this Fundamental Principle also establishes that the notary has to ensure that the intentions of the parties uttered in his presence are expressed freely.

### **3.3 Informed Consent: perfect understanding of legal scope and consequences. Providing thorough legal information. Is it possible to foresee everything? Documentary evidence.**

Resolution no. 7 of the General Meeting of Member Notariats of the International Union specifies that the notary has the duty established by law of legally assisting and advising the parties. Title IV, paragraph 13 obliges notaries to lend adequate assistance to whichever of the parties is in a condition of inferiority, in order to achieve the necessary balance to conclude the contract on an equal footing. This rule is applied strictly in national consumer protection legislation. This is part of what is referred to as the "balancing function" of the notary.

It specifies that when drawing up authentic instruments, notaries have to provide thorough legal information. This does not imply that they have to foresee all possible implications, especially if these are the product of external elements or circumstances that notaries are not aware of. Thorough information means the consequences resulting directly from the legal transaction under normal circumstances.

As mentioned previously, the liability of notaries, which in the case law of most UINL Member States, is subjective, i.e. that it is sufficient that they fulfil an adequate procedure, has now become objective, i.e. their involvement has to lead to a given result. The direct consequence of this is that lack of information may result in the (at least third-party) liability of notaries. This approach based on case law implies that notaries, who unlike other law practitioners, take responsibility by signing authentic acts, have to be extremely careful regarding the amount of legal information they provide and ensure informed consent. Moreover, if a notary believes that civil-type



charges, such as administrative or tax charges, may arise for the appearing party as a result of the authentic act, he must mention it in the act, and this mention has to be signed by the appearing parties and the notary himself, to avoid any further liability-related complaints.

In no notarial documents drawn up, it is virtually impossible to determine this liability, since the authors of the act are the professionals of two parties with opposite interests and none of them sign the document as Latin-Germanic type notaries do.

### **3.4 Independence and impartiality, even in countries that allow the involvement of two notaries.**

As public officials, notaries not only have a duty towards parties but also towards legality and truthfulness. To this end, notaries have to act impartially and independently. Fundamental Principle no. 2 specifies that notaries do not fall within the hierarchy of State officials. They cannot act under hierarchical pressure, all the more so because they are liable for their actions both towards third parties and criminally. Article 5.4 of Deontology and Rules of Organisation defines the position of notaries, by stating that they have to act independently vis-à-vis the parties and the Administration, but without ever damaging the latter. Furthermore, it also lays down that notaries have to avoid influencing or discriminating parties. The principle of the independence of notaries is also mentioned under Title 1.2 of the Fundamental Principles.

Regarding impartiality, the Deontology and Rules of Organisation state that it has to be active, compensating the absence or asymmetry of information of the parties, by paying special attention to the contracting party requiring more assistance and offering advice as competent professionals. To this regard consumer and user protection legislation requires that notaries be particularly watchful.

### **3.5 Checking validity and legality: scope of the act. Illegal acts or acts in bad trust: influence of circumstances or related facts known/unknown to the notary. Refusal of service.**

The duty of notaries to act according to legality derives directly from their capacity of public officials and the fact that they fulfil a function either entrusted or delegated to them. The State cannot act against the law, nor can its delegates. This principle can be found both in Deontology and Rules of Organisation, under article 3.1, and the Fundamental Principles, paragraph 5, which lays down that notaries have to adapt the intentions of the parties to legal requirements and check legality.

The protection of legality by notaries generally occurs in a negative, silent but extremely effective manner: when an act is against the law, they may refuse their services. The Deontology and Rules of Organisation, under article 16, mentions the cases in which notaries can refuse their services, when an act is contrary to the law or Public Order or implies a fraudulent circumvention of the law or public authorities, with special reference to tax authorities and the prevention of money laundering.

And they should not only refuse their services in order to uphold the law, but also when an act or transaction is liable to mislead third parties or constitutes a fraud

against third parties. To this regard, notaries not only check legality, but also the transparency of legal actions.

Checking legality cannot concern facts that are related to the action or transaction giving rise to the authentic instrument, but which the notary could not have been aware of. Ultimately, checking legality has to include everything deriving from the authentic instrument and concern all the facts or circumstances known to the notary. However, it is necessary to add that so-called side agreements or simulations do not harm third parties who are not aware of them, nor the State that may not have knowledge of them.

In Latin-Germanic notarial systems, legality is checked “ex ante”, which reduces the risk of disputes to virtually negligible levels from a statistical viewpoint, thus cutting the costs and the time needed for actions in court. This is the big difference with the Common Law systems based on *deeds*, where an official or a delegatee of a public function in charge of checking legality is not involved. The number of disputes, compared to the number arising in relation to *deeds*, clearly shows the effectiveness of what is referred to as “preventive legal certainty”, based on prior checks performed by notaries.

#### **4. Authenticity concerning:**

##### **4.1. Date.**

The date of the authentic act constitutes proof and has to be accepted by all, even courts, unless it is proven to be false following fraud proceedings.

##### **4.2. Signature.**

The indications mentioned under paragraphs 3.1 and 3.2 apply to signature which, in addition, expresses consent to an action and thus requires the indispensable direct involvement of the notary at that given moment.

##### **4.3. Contents of acts and legal relations contained in acts.**

The content of the statements of the parties in an authentic instrument are covered by public trust. This does not necessarily imply that the parties have declared the truth or their ultimate intentions in the document, but rather, that before a notary and after having been duly identified and their legal capacity checked, they made a number of statements, the consequences of which were explained sufficiently to them. As a result, in an authentic act there cannot be *exceptio rei non lectae* nor, excluding exceptional cases, the concurrence of defects of error, malice, violence or intimidation. The public faith is also linked to what the Notary personally verifies and records in the act. The same does not apply to other cases in which notaries are involved, such as the mere legalisation of signatures affixed to documents not requiring the same formalities as the authentic instrument.

Moreover, legal systems tend to increase criminal liability in cases of fraudulent action concerning a public document. The aim is to encourage the truthfulness of the

statements delivered by the parties, taking into account the huge credibility that an authentic instrument has to enjoy in the legal field.

## **5 . Permanence**

It has already been mentioned that the authentic instrument is also a public document, since archives or registers can be accessed by the State in the cases provided by Law, which can even be the owner of these archives or registers for an unlimited period of time. The same does not apply to all the other types of documents involving legal practitioners other than notaries. Moreover, when these practitioners cease their activities, sometimes their archives are lost and clients may only have the copies they possess. In case of loss or theft, neither the State nor the parties are able to prove the existence of these documents. In one member country there is the opportunity to exceptionally withdraw some forms of authentic instruments.

It is important to draw the line between authentic acts as living legal documents and historical documents.

## **6 . Increased force.**

- **6.1 . Probative force.**
- **6.2 . Enforceability**
- **6.3. Presumption of legality and accuracy.**
- **6.4. Recognition and enforcement of the authentic instrument at international level.**

Title II, paragraph 8 of the Fundamental Principles of the Notarial System lays down that: *“Notarised deeds enjoy the benefit of dual presumption of legality and accuracy of content; they may be contested only through judicial channels. They are enforceable instruments with conclusive force”*. And paragraph 10 adds:

*“Notarised deeds that meet the aforementioned standards should be recognised in all States and should have the same conclusive force, be enforceable in the same way and create the same rights and obligations as in their country of origin”*.

It is necessary to underline that the superior effectiveness of the notarial document is strengthened in some countries by increased criminal punishment in case of false declarations in a public document, or what is referred to as *querelle de faux*. As a result, the great credibility of the authentic act implies:

- increased liability for whoever makes a false declaration;
- civil sanctions for whoever recklessly challenges a public document.

Lastly, it is only too clear that the effects of authentic acts are not underscored by notaries, but by respective national laws acknowledging the superior effects of authentic acts in different ways.

## CONCLUSION

It is important to point out that we have talked about superior effects, while very often the expression used in legislation is “privileged effects”. This difference in terminology is intentional and stems from the acknowledgement that a privilege normally draws its origin from a gratuitous concession, whilst in the case of authentic acts, it is not a gratuitous concession of the authors, i.e. notaries, but the result of the guarantees that converge during their drafting. Guarantees resulting not only from the activities carried out by notaries during the drafting of documents, but also from the specific rigour which notaries and the notarial organisation alike are subject to. The superiority of these effects is the consequence of the superiority of the “inputs” that make up the authentic act and which leads the State to confer public trust to it. We cannot talk about privilege, rather the superiority of guarantees.

It is sufficient to recall here what is set out in Regulation UE 650/2012, Recital 62 :

*“The ‘authenticity’ of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State”*. And to recall that this regulation is applied directly throughout the European Union.



## STUDY OF THE DEFINITION OF THE NOTARIAL 'ACTE AUTHENTIQUE'. ANNEX ON COSTS.

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It is often, wrongly, claimed that the intervention of a notary to execute an *Acte Authentique* unjustifiably increases the cost. But the facts show otherwise. Arguments in support of this misunderstanding usually fail to take account of the following considerations:

### **1. The alternative to the intervention of a civil law Latin Notary is not a private agreement drawn up without any control of legality.**

The argument used against the *Acte Authentique* is that the intervention of a notary should not be mandatory under any circumstances. Why should a citizen waste time and money paying a notary when everybody who can read and write is able to download a form from the Internet and draw up a contract on their own? This appears undeniably true, but when we get down to the real world, the shortcomings with this theory began to show

Most legal transactions involving a notary are instruments of particular importance in the lives of the individuals or firms concerned. Making a will, regulating personal and property relations between married couples, buying a house, taking out a long-term mortgage, incorporating a company, etc. are not activities that a prudent person would undertake without seeking proper legal advice from either a notary, or a lawyer, or any other type of specialist. A sensible person will engage the services of an expert for such matters. And accept the corresponding cost. One might object that people have to be free, and even make mistakes by saving something that is not due. But "do-it-yourself" is never good solution, because the facts of relevance to the law are rather more complicated than they might seem.

Legal relations regarding property and long-term rights not only affect the present owner and their successors or those who directly by them from the present owner. The validity and legal effectiveness of this relationship affects all the future owners of the property, creating chains of ownership in which if one link is broken, all the subsequent owners are affected by it, and can forfeit their property or their rights in it because – as Roman law put it, – *nemo plus iuris in alium transferre potest quam ipse habet*, or put more simply, *nemo dat quod non habet*: one cannot transfer to another something which one has not acquired. In other words, if any one link in the chain is null and void, or as no legal effect for any reason whatsoever, the would-be buyer cannot subsequently sell the property to anyone else subsequently. The property rights of everyone in the ownership chain thereafter are automatically null and void.

Roman law then dealt with the issue of how to solve the following legal dilemma: Let us say that A decides to buy an expensive house from B, and in order to save on costs A decides not to take legal advice and draws up his own contract. He duly pays the full price, but due to his lack of practical experience, his agreement lacks one essential requirement that renders it null and void. At a later date, A decides to sell his house to a third party, C. But if B, or his successors or assigns, are aware of the fact that the contract is void they can claim ownership of the house against both A and C. And even though C was wholly extraneous to the previous transaction, which has been found null and void and with no legal effect, C may forfeit the house, despite having purchased it in good faith.

This cast-iron rule could create huge difficulties in transactions because of the lack of security afforded to any potential buyer of a property or other right. Legal structures have therefore been created to either prevent given rise to legal uncertainty of title – preventive legal security systems – or introduce corrective measures *a posteriori* by indemnifying the party for loss of title – litigation-based systems – or offering compensation – title insurance systems. It is obvious that all these systems have to be paid for.

In *common law* countries, *title insurance* or *title search* is used to check that title exists. In the French-origin civil law Latin notarial systems, the notary checks the legal title and certifies that the conveyancing operations are legal by executing an *Acte Authentique*, whose features have been examined in the previous paper. As we shall be seeing shortly, in the German BGB-origin systems, the public deed, or *Acte Authentique*, also plays an important function.

At all events, and for the purposes of relevance here, every system developed by different legal cultures to guarantee the certainty of legal transactions necessarily gives rise to a cost. In the case of *title insurance* it is the insurance premium; for a *title search*, it is the fee charged by the professional searching the title deeds; in the *Acte Authentique* systems, it is the notary's fee. What all these systems share in common is that, for better or for worse, all of them require the services of a professional, because "do-it-yourself" cannot do the job adequately. The question is which is the most efficient system: the non-system solution does not work.

Still on the subject of subsequent transfers of property ownership rights, in the French-origin systems the transfer of property stems from the conclusion of a legal purchase agreement. It is not created by registration of the agreement. Given the special features of the notarial deed, which have already been studied in the paper to which this is an annex, ownership is proven by the chain of notarial title deeds. The purpose of the property register is only to establish priority in the event of double sales. The legality of the chain of transfers is determined by the *Acte Authentique*.

In the German-inspired notarial systems, on the other hand, property ownership is transferred – on the basis of an *Acte Authentique* – only by the act of registering it in the Property Register. The only legally recognised right is what is in the Register. All registered rights are deemed to exist in relation to their rights-holder and any other unregistered rights are deemed to be non-existent. But the right of ownership given by the Property Register is also based on these specific

features of the notarial *Acte Authentique*.<sup>1</sup> The notarial deed is a prerequisite for registration in the German Property Register. And to a certain extent the *Acte Authentique* makes the original deed compatible with the *Auflassung*. Otherwise there could often be a statistically important mismatch between the likely consequence of the original agreement made in the form of the *Acte Authentique* and the transfer of title resulting from the abstract transfer agreement published by the Property Register on the basis of the *Auflassung* which would lead to the system becoming unsustainable due to the amount of compensation having to be paid as a result of unenforceability of the original agreement. One of the functions of the German notary is to ensure that the original agreement and the *Auflassung* point in the same direction.

The first conclusion to be drawn is that, despite the differences between these two great systems – which have intermediate variations in many different countries – the special features of the *Acte Authentique* are enormously important in terms of achieving preventive legal security and on the functioning of the Registers. Good title is the basis of a good Register. It is not possible to construct reliable Registers on the basis of unreliable title.

Some *common law* systems also have registers for recording private documents or *deeds* that are not legally equivalent to *Actes Authentiques*. This difference means that third parties do not enjoy the same level of protection because the title deeds published in common law registers are not sufficiently reliable. Suffice it to read the warning about possible fake or fraudulent title deeds on the Land Registry or Companies House websites that everyone can see when beginning to search these registers, as has been pointed out in the main part of this study.

To get some idea of the risks that may arise in systems which do not recognise the *Acte Authentique*, even with a properly developed Land Registry of the kind existing in the United Kingdom, one only has to recall that insurance companies exist there to provide policies to indemnify buyers against the risks of fraudulent documents, undisclosed third-party rights, misidentification, signatures of minors or legally incompetent persons, defective title, undisclosed encumbrances, faulty registration, undisclosed heirs, intestacy, misrepresentation, defective title, etc.<sup>2</sup> To take but one example, Countrywide is an insurance company that offers Defective Title Insurance contracts linked to the Law Society, and charges the following premiums: 0.125% to insure against lost title deeds (the ‘links’); 0.25% against adverse possession, and between 0.35% and 0.50% against the risk of third party usucaption...

Something similar occurs with the company registers.

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<sup>1</sup> The highly efficient German property conveyancing system is based on separating the original agreement (of sale, exchange, donation etc.) and the abstract title transfer agreement, *Auflassung*. In the Register only the abstract agreement is entered, namely, the proprietor's consent to the change of title. The simplicity of the *Auflassung* ensures that possible defects of title or causes of nullity are absolutely exceptions to the rule. Any problem affecting the original agreement is not transferred to the *Auflassung*, but the transfer of title remains valid and any loss or damage caused is made good through the indemnity mechanism inherited from the ancient *condictio* from Roman law. If discrepancies were frequently to be found between the result of the *Auflassung* and the original contract, the system would probably become unsustainable. But it is precisely the control exercised by the notary in the notarial *Acte Authentique* that prevents this disparity from occurring.

<sup>2</sup> see the specimen policies at Countrywide, [cli.co.uk](http://cli.co.uk), or Themelton.co.uk.

The *Financial Times* has reported<sup>3</sup> fact that criminals are taking advantage of the British *Companies House* because it “does not have the power to verify even basic details but which gives scammers and kleptocrats the imprimatur of a UK business”. The National Crime Agency estimates that hundreds of billions (1,000,000,000) of pounds of dirty money is laundered through London every year. More than 10,000 people have complained that their legitimate details on Companies House have been stolen by fraudsters operating through companies. 76 beneficial owners in the registry share their name and date of birth with individuals on the US sanctions list. Over 2,000 persons of significant control behind companies on the registry were disqualified directors. Lacking the identification and control of legality specific to the *Acte Authentique*, “Companies House is worse than useless,” said one interviewee because, “by not doing basic checks, they’re aiding and abetting fraud”.

It is beyond believe that anyone would want to run such risks, and in systems that guarantee legal certainty based on the *Acte Authentique* there is no need to take out insurance against them. The intervention of the civil law Latin notary to check the form and the substance of the document by checking the legal situation from both these aspects not only benefits the contracting parties themselves, but also future third party buyers because the notary acts as a gatekeeper to control the legality of the whole ‘transmission chain’ and ensures that none of the links are defective which would damage buyers at a later date. “Do-it-yourself” would only increase these risks, and push up the cost of title insurance. And for very large contracts professional services are inevitably needed. Let us now take a closer look at the costs.

## **2. Alternative systems to the *Acte Authentique* are not more economical than the civil law Latin notarial system. The benefits of increasing returns to scale, and government price control.**

### **2.1 The civil law Latin notarial system is more economical than alternative systems.**

By acting in the capacity of a public official or person delegated to perform a public function, civil law Latin notaries represent the State in every instrument they legalise. Just as the State must treat every citizen impartially, the notary is also bound by the same duty of impartiality. This is what distinguishes the notary from freelance professionals who are only concerned with protecting the interests of their private client.

The KNIEPER report on *The Economic Relevance of Notarial Authentic Instruments*, provides the following figures — taken from the earlier paper by MURRAY and STÜRMER<sup>4</sup>— comparing the

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<sup>3</sup> *Financial Times*. Caroline Binham, 4 May, 2019.

<sup>4</sup> P. Murray drew comparisons between the conveyancing costs of four common law countries and three civil law countries for transactions worth 100,000 and 250,000 euro. The data were partially updated in 2016 in the Knieper report. See the details at the end of this paper in annex I. Although they operate in different fields, real estate agents charge between 4% and 6%. In most instances, this is ten times the fees charged by a notary. Although it is the notary who has the sole responsibility and liability to



2007 transfer costs of land worth €100,000 and land with a house worth a total of €250,000 in Estonia, France, Germany, England and Wales and in the USA. We have added Spain to this list. These figures are stated as a percentage of the purchase price. The study attached as Annex I also shows these costs as a percentage of the total conveyancing costs.

| Transaction value  | 100,000 euro           | 250,000 euro           |
|--|------------------------|------------------------|
| Estonia  | 0.38% (0.40% in 2016)  | 0.37% (0.40% in 2016)  |
| France   | 1.35% (2.07% in 2016)  | 1.08%. (1.32% in 2016) |
| Germany  | 0.45%. (0.55% in 2016) | 0.36%. (0.42% in 2016) |
| England and Wales, including searches), and the seller's and purchaser's solicitors' fees. | 1.48%                  | 0.65%                  |
| USA. Including title insurance, and the seller's and purchaser's lawyers' fees             | 1.23%                  | 0.65%                  |
| Italy  | 0.5% in 2016           | 0.5% in 2016           |
| Spain  | 0.40%                  | 0.37%                  |

In short, apart from the case of France, where the notary also acts as a tax collector and provides additional services, the civil law Notary's costs are considerably lower than elsewhere. In the United States of America, where the services of an *escrow agent* are frequently engaged, the fees, left to market forces, usually range between 0.80% and 1.75%.

With regard to trading companies, the issue is not so much the cost, which is very low using the *Acte Authentique*. but rather the fact that the lack of authentic title makes the common law countries' Companies Register untrustworthy. Indeed the Companies House website itself clearly warns, as the KNIEPER report has pointed out:

*"Companies House cannot take any responsibility for the consequences [of any registrations] and omissions."*

*Indeed — as KNIEPER has remarked— this disclaimer acknowledges the poor quality of the registration services and reveals the very limited usefulness of the register for protecting good faith business partners and the ease of doing business. It does not prevent the hijacking of companies or identity theft or fraudulent pretention of powers of attorney. Crucial functions, which are guaranteed by a well-organized register in civil law jurisdictions, are absent. In fact, Companies House reports that it has to deal with 50 to 100 cases of company identity theft every month.*

When buying a company, common law deregulation may appear more economical, but it offers less certainty and ultimately increases costs. For each transaction, a legal opinion must be sought in order to have certainty regarding the data on a particular company, which delays the

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*ensure that legal security of the property transfer agreement, the Notary's portion of the additional conveyancing cost is comparatively marginal.*

procedure and increases the cost. Registration with a Companies Register which is based on *Actes Authentiques* guarantees certainty regarding the data registered there, for it protects any third parties searching its. This makes searches faster and cheaper. If the Companies Register cannot guarantee this protection, every interested party must eventually commission the services of a legal adviser to provide a legal opinion, which makes the overall cost soar. Each party become accustomed to having their own legal adviser, with the result that they have to repeat the request for a legal opinion unnecessarily, multiplying the overall cost.

The status of the civil law Notary as a public official or a person delegated to perform a public function, who is required to rigorously check and ensure the legal authenticity of the deed being legalised — the *Acte Authentique* — fully protects the parties to the deed and all subsequent third buyers, offering protection against the weakness that the British *Land Registry* or *Companies House* websites warn against, by alerting the public about the possibility that fake or fraudulent title deeds may be registered with them. And all this protection is guaranteed at a cost that does not exceed that of common law systems. Indeed, quite the reverse. We will return to both these points shortly.

For the moment, we may consider the saving on costs and the greater legal certainty guaranteed by the institutional status of the civil law Notary. as the Nobel Laureates, COASE, NORTH and ACEMOGLU have stated in their paper, demonstrating that economic prosperity depends on having adequate institutions.

## **2.2. State control over civil law notarial fees and increasing returns to scale reduce the cost.**

Most civil law Latin notarial systems combine the *numerus clausus* and state control of the tariffs laid down and approved by the government which cannot, by any stretch of the imagination, be considered unfavourable, as the figures just mentioned show. Above all, when taking account of the possibility of cross-subsidising policies, under which some services provided by the notary, which are of evident social interest, are charged at lower prices than they would be if left to the free market, as we shall be seeing later in paragraph 7. And after subtracting the cross-subsidised portion of these costs, the price comparison becomes even more favourable in the civil law Latin notarial system.

There is an economic reason that explains why it is possible to reduce the cost in this way: the increasing returns to scale thanks to the *numerus clausus*. By regulating the demarcation of new notarial offices, the government ensures their full employment. The consequence of full employment is the lowering of production costs, since the inputs – labour and technology investment – generate maximum returns.

## **3. The civil law Latin Notary makes it unnecessary to engage two professionals.**

The civil law Notary is a public official or person delegated to perform a public function with the duty of impartiality, guaranteed by the rigorous supervision over the notary's work. This differentiates the notary from any other privately engaged professionals acting for one party who may find themselves faced with a conflict of interests, when the same professional is advising both parties to the deed. Control of the impartiality of the civil law Latin Notary removes the double cost of alternative systems. Only one – necessarily impartial – legal adviser is needed, not two.

The common law professional code of conduct is mindful of the conflict of interest and prohibits, or at least advises against, engaging one only professional to act for contracting parties with opposing interests. By way of example, in the United Kingdom the Solicitors' Code of Conduct regulates the exceptions where a solicitor may act for two or more clients, with appropriate safeguards, where there is a potential client conflict (Rule 3.7). In such cases, after explaining the relevant issues and risks to the clients, and having reasonable belief that the clients understand those issues and risks, the solicitor may not act for the clients unless they give their informed consent in writing. Moreover, the solicitor must be reasonably convinced that the benefits to the clients by acting for them outweigh the risks. In the case of important companies, their collective professional firms will appoint two different members to defend the interests of the buyer and the seller. Obviously, the intervention of the two professionals do not exactly lower the overall cost.<sup>5</sup>

Conversely, the strict supervision exercised over the work of the civil law Notary as a public official or person delegated to perform a public function, with the additional statutory duty of impartiality, makes it unnecessary to engage two professionals in the event of a conflict of interest between the clients. The civil law Latin Notary upholds the law and arbitrates between the parties like a judge. The lower cost of using one notary, rather than two professionals, is obvious.

#### **4. The civil law Latin Notary increases legal certainty: it avoids service by equivalence**

It is important to emphasise the difference between systems in which the buyer's title is guaranteed by a title insurance policy and systems using the *Acte Authentique* based on the control of legal title by a notarial guarantee of all the links in the chain of titles across the

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<sup>5</sup> At present the code of conduct laid down by the Solicitors Regulation Authority (SRA) states that acting for both buyer and seller on a transfer of land for value is "indicative" of a potential conflict of interest. But it does provide that a solicitor may act for both seller and buyer if:

*the solicitor has explained the relevant issues and risks to the clients and they clearly understand those issues and risks;*  
*all the clients have given informed consent in writing;*

*the solicitor is satisfied it is reasonable for them to act for all the clients and that it is in their best interests; and*  
*the solicitor is satisfied the benefits to the clients outweigh the risks.*

*In practice, when a firm of solicitors agrees to act for both parties in a conveyancing transaction, they will usually arrange for a separate solicitor to work for each party. These solicitors will often work in different offices so much of the conveyancing will proceed in the same way as if separate firms were acting. (Homewardlegal.co.uk)*

centuries, making the likelihood of a buyer being dispossessed his property statistically insignificant.

Without the intervention of a notary or a person delegated to perform the public function of controlling the material and formal legality of the deeds which they authorise, there is a much greater likelihood that private professional conveyancers may issue flawed title deeds, which may be null and void, without legal effect, fraudulent or fake. The chain of title deeds collapses like a house of cards if any one link is missing, and the common law systems try to remedy this risk through title insurance. The insurance company indemnifies the insured for loss of title. Obviously this is not a solution, but merely compensation for the damage caused. Depriving the buyer of his property, even when compensated for the loss, is less satisfactory and more costly because there is the additional cost of litigation. But litigation of this kind simply does not arise in systems with a prior legal guarantee of certainty of title, as is the case with the *Acte Authentique*. And as we have seen already, neither is the common law solution more economical initially: indeed, the contrary is true. The comparative costs table given in paragraph 2 of this paper also includes the figures on the United States of America and the cost of title insurance, showing that the costs are higher than under the *Acte Authentique* system.

## 5. The civil law Latin Notary reduces the need for litigation.

It is extremely complicated to draw up statistics reflecting comparisons between the different levels of litigation over deeds legalised by a civil law Notary and those executed in countries without the intervention of a notary. The Knieper report<sup>6</sup> notes that whereas fewer than 0.1

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<sup>6</sup> For the Member States of the Council Europe, the European Commission for the Efficiency of Justice (CEPEJ) stated in 2014 that, indeed, “[i]t has to be noted that the percentage of notarial documents actually challenged by the parties before a judge is very low”, in contrast to disputes between clients and realtors and/or lawyers. Andorra reports that no disputes reach the courts; Estonia confirms that “there are practically no court proceedings against notaries in real estate matters in recent years”; Colombia reports that litigation involving notaries is about 0.02% of all cases; in Italy, the number of court proceedings involving notaries are “close to zero” according to the Answers to Questionnaire, while CEPEJ reports that “only 0.003% of notarial deeds concerning real estate are challenged before a Court every year (and the number of non notarial contracts challenged every year before a Court is instead much higher)”; Korea reports 1 to 3 cases per year against notaries, as compared to 50 cases against lawyers and 100 to 150 cases against realtors; Kosovo has until now not registered any case against notaries; Lithuania reports one case against a notary, all years combined.

A study commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, although mostly critical towards notaries, quotes two authors (P. Sparkes EU Study) of whom one confirms that only one authentic instrument out of thousand becomes subject to a court dispute in Germany, whereas the other asserts that in 2003 out of 4.5 million French actes authentiques only 4,000 gave rise to negligence claims against notaries.

Given the constancy of these figures, the CEPEJ does not exaggerate when concluding “that the pre-emptive filter of the notary screens courts from a large amount of extra workload.”

Again, the picture is very different in the USA. A report on data collected by the American Bar Association (ABA) for the period of 2004 to 2007 reveals “a dramatic spike in lawsuits filed by sellers and agents against buyers, buyers against sellers and agents, brokers against title and mortgage companies and even lawyers against lawyers” and recommends that buyers should be eager to interview professionals with a view to find a person with whom one feels “comfortable with [...] who will look out for you, goes through the process with you step by step and communicates what they’ll need from you during the process.”

The successor ABA Study for the years 2012-2015 by the Standing Committee on Lawyers’ Professional Liability on the “Profile of Legal Malpractice Claims” extends the previous findings and reveals that since the 2008 subprime disaster and recession real estate claims have dropped but still reach 14.33% in 2015. For the years 2012 to 2015, real estate matters accounted for 14.89% of all claims against lawyers, which corresponds to 6,577 out of a total of 44,185 cases. That is the second most important category of malpractice claims, behind personal injuries claims. Real estate law “includes legal activities dealing with all aspects of real property transactions including, but not limited to, real estate conveyances, title searches and property transfers...”. “32.66% of all errors reported relate to the preparation, filing and transmittal of documents.” A commentator explains that “[t]hese errors do

percent of disputes over notarised title deeds result in a judgement against the notary, in the recent US sub-prime crisis and in the years that followed, legal malpractice claims against US lawyers have exceeded 40 percent. Some 32.66 percent of all the errors reported have concerned the preparation, filing and transmittal of documents

We have already seen how, and at what cost, title insurance companies try to compensate the loss and damage caused by flawed title deeds. There is no doubt that the notary's control of legal title by means of the *Acte Authentique* must necessarily be more efficient than the absence of any such control, and this is reflected in the figures. And, let us say it again, the cost is not only the same, but can even be less than do-it-yourself conveyancing.

## 6. The civil law Notary reduces negotiation times.

As already explained in the main part of this paper, systems in which the legal status of the title deed is guaranteed in advance by the *Acte Authentique* — for which the notary conducts both a formal and material verification of the legal status, namely, both the form and the substance of the document — enable property and company registers to be created based on the presumption of their authenticity and offering total protection to third parties who consult them or intend to buy property from the person who has been registered in them as the legal owner. Even in systems in which the register does not protect the buyer if earlier title deeds are found defective, as in France, the notary checks the legal status of each and every link in the chain to ensure the maximum reliability of the title deeds registered. Taking the *Acte Authentique* in combination with public registration makes it much faster and simpler to check the authenticity of the previous title deeds in the chain, or the *title search*, which slows down the common law systems.

Improving the *Acte Authentique* by computerising the property and cadastral registers can greatly improve their effectiveness. This is what has been done in the Netherlands with its KikAkte system. The notary consults the drawing, ownership and any charges on the building in the *Kadaster* — the properties register and the cadastral register — draws up the deed, which is signed by the parties and the notary, and forwards a fully detailed digital copy to the Kadaster which automatically registers the property. According to the 2019 Doing Business report, the whole process takes an average of 2.5 days. The same report states that transmission in the United Kingdom takes 21.5 days, Los Angeles 20, and New York 12 — and with one great difference: the register in Los Angeles and New York only publishes the existence of a transmittal document or charge, but without any other guarantee whatsoever, making it necessary for the contracting parties to take out title insurance to be financially indemnified in the event of a defect of transmittal or defect of title. In short, the common law system takes longer, and is costlier and less secure.

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*not relate to pleadings or contested matters. Instead, these claims relate to the preparation of contracts, leases, deeds, and will and trusts. Participants in the study voiced their concerns that lawyers are not memorializing their clients' decision in writing and taking greater care in drafting agreements, wills and trusts to avoid later disputes over interpretation of those documents."*  
*The comments read like a pleading in favour of preventive justice and notarial professionalism.*

## **7. The notary's office performs many other functions that meet the social needs of the less affluent.**

While acknowledging that cross-subsidising policies must be managed with great prudence and caution, they become inevitable for the provision of certain public services that are intended to be universal and available to every citizen, regardless of their financial situation or geographical location. In view of the exceptional nature of these services, public control must be exercised over any entity providing cross-subsidised services, but this does not prevent them, if properly managed, from being socially beneficial.

This being so, having a government authority to set the tariffs for notarial fees – although this is not the case in every UINL member country – enables the government to finance public policy through the notaries. By way of example, establishing title to property, facilitating access to public housing, land consolidation and re-parcelling programmes, particular forms of mediation or no contentious proceedings, can be taken on by notaries by virtue of the fact that all the work performed by the notary, and its financing, is guaranteed by laying down specific tariffs that makes the whole process viable. An adequately structured tariff system also enables notarial services to cover the whole territory of a given country, making the service accessible to all citizens, regardless of where they may live.

The result is that the less affluent sections of society can also obtain certain services provided by the Notariat, so that every citizen is guaranteed a universal service in terms of financial capacity and geographical location.

## **8. Compatibility with the new technologies.**

The drafting of the Authentic Instrument is not in the least incompatible with the new technologies. On the contrary, their speed and adaptability greatly assist the Notary's work without compromising prior legal certainty.

The Notariats of many countries are using electronic media and signature technologies today both for preparing the original deeds and for issuing duplicates, archived copies and Registry notices or communications with other public bodies. The Secure Verification Code provides access at all times to the Authentic Instruments anywhere in the world.

It is so simple to demonstrate that it requires no further discussion.

## CONCLUSIONS:

- In systems using the Register as a means of publicly declaring property ownership the succession of *Actes Authentiques* create a continuous chain of title thanks to the formal and material legal control of title performed by the notary. In systems based on the Grundbuch, the declaration of property ownership in the Property Register is based on the special features of the notarial *Acte Authentique*. In either case the virtuous consequence of the *Acte Authentique* is what we know as the principle of preventive legal certainty of title.
- These chains make it possible to create a property register that will fully protect all third buyers.
- A similar consideration applies to companies registers.
- The certainty of title guaranteed by the *Acte Authentique* combined with an appropriate publication system by means of a register reduces legal disputes and does away with the need for title insurance-based compensation systems.
- The high degree of reliability of the registers based on the *Acte Authentique* linked to computerised search and registration systems reduces transaction times and costs. One exemplary system is the Dutch KikAkte system, which links the Kadaster/Register to the Notaries and provides total certainty to buyers while reducing real estate transmittal times to an average of 2.5 days.
- The notary's duty of impartiality, deriving from the status of a public official or person delegated to perform a public function subject to rigorous oversight, makes it possible to cut the cost of engaging two private professionals for one transaction, with one acting for the buyer and the other for the seller.
- The aforementioned advantages of the *Acte Authentique* do not necessarily lead to a higher cost; indeed, comparisons with other systems demonstrate the exact opposite.
- All this suggests that systems of prior legal certainty based on the *Acte Authentique* are superior to the typical common law systems which provide compensation based on taking out title insurance. A further drawback with these systems is that they not only fail to provide certainty of title, but they increase the number of disputes and the social costs.
- On the basis of the principles of New Institutional Economics, prior legal certainty systems based on the *Acte Authentique* should be encouraged to avoid and prevent litigation and disputes, ensure social peace, universal legal guarantees, effectiveness and economic prosperity.

## ANNEX I

*P. Murray has compared costs in 2007 for four civil law and three common law States. We present his findings for transfer costs for real estate of a value of 100,000 € (land) and of 250,000 € (land and house).*

*In **Estonia** the transfer costs were in the first scenario (100,000 € sales price): 4,000 € for the realtor, 379 € for notary's fees, and 110 € registration fee. Percentagewise, notary's total fees were 8.43% of total costs and 0.38% as percent of sales price, while broker's fees amounted to 89.12% of total costs. For the second scenario (250,000 € sales price), the transfer costs were: 10,000 € for the realtor, 922 € for notary's fees, and 294 € registration fee. Percentagewise, notary's total fees were 8.22% of total costs and 0.37% as percent of sales price, while broker's fees amounted to 90.16% of total costs.*

*In **France** the transfer costs were in the first scenario (100,000 € sales price): 6,000 € for the realtor, 1,154 € for notary's fees plus 200 € for his overhead charges, i.e. 1,354 € notarial conveyance fees in total, 5,090 € transfer tax and 100 € registration fee. Percentagewise, notary's total fees were 10.79% of total costs and 1.35% as percent of sales price, while broker's fees amounted to 47.83% of total costs. For the second scenario (250,000 € sales price), the transfer costs were: 15,000 € for the realtor, 2,391 € for notary's fees plus 300 € for his overhead charges, i.e. 2,691 € notarial conveyance fees in total, 12,725 € transfer tax and 250 € registration fee. Percentagewise, notary's total fees were 8.78% of total costs and 1.08% as percent of sales price, while broker's fees amounted to 48.91% of total costs.*

*In **Germany** the transfer costs were in the first scenario (100,000 € sales price): 4,000 € for the realtor, 454 € for notary's fees plus 105 € for effectuation, i.e. 559 € notarial conveyance fees in total, 3,500 € transfer tax and 311 € registration fee. Percentagewise, notary's total fees were 6.68% of total costs and 0.56% as percent of value (0.45% without costs of effectuation), while broker's fees amounted to 47.79% of total costs. For the second scenario (250,000 € sales price), the transfer costs were: 10,000 € for the realtor, 904 € for the notary's conveyance fees plus 205 € for effectuation, i.e. 1,109 € notarial conveyance fees in total, 8,750 € transfer tax and 648 € registration fee. Percentagewise, notary's total fees were 5.41% of total costs and 0.44% as percent of value (0.36% without costs of effectuation), while broker's fees amounted to 48.76% of total costs.*

*In **England and Wales** the transfer costs were in the first scenario (100,000 € sales price): 2,000 € for the realtor, 304 € searches fees, 608 € for buyer's lawyer's fees, 571 € for seller's lawyer's fees, i.e. 1,483 € conveyance fees in total, 0 € transfer tax, 441 € inspection fees and 88 € registration fee. Percentagewise, total conveyance costs were 36.98% of total costs and 1.48% as percent of sales price, while broker's fees amounted to 49.84% of total costs. For the second scenario (250,000 € sales price), the transfer costs were: 5,000 € for the realtor, 304 € searches fees, 676 € for buyer's lawyer's fees, 635 € for seller's lawyer's fees, i.e. 1,614 € conveyance fees in total, 2499 € transfer tax, 514 € inspection fees and 220 € registration fee. Percentagewise, total conveyance costs are 16.39% of total costs and 0.65% as percent of value, while broker's fees amounted to 50.77% of total costs. It seems, however, that Murray has omitted costs for title insurance in the UK which are estimated to amount to 182 €.102 If we add these costs as seems appropriate, we arrive at a total of conveyance costs of 1,665 €, which is 1.67% of the sales price in the 100,000 € scenario, and of 1,796 €, which is 0.72%, of the 250,000 € scenario.*

*In the **USA** (upstate New York) the transfer costs were in the first scenario (100,000 € sales price): 6,000 € for the realtor, 467 € owner's title insurance, 342 € for buyer's lawyer's fees, 419 € for seller's lawyer's fees, i.e. 1,228 € conveyance fees in total, 304 € transfer tax, 190 € appraisal fees and 27 € registration fee. Percentagewise, total conveyance costs were 15.85% of total costs and 1.23% as percent of value while broker's fees amounted to 77.42% of total costs. For the second scenario (250,000 € sales price), the transfer costs were: 15,000 € for the realtor, 853 € title insurance, 342 € for buyer's lawyer's fees, 419 € for seller's lawyer's fees, i.e. 1,614 € conveyance fees in total, 761 € transfer tax, 228 € appraisal fees and 27 € registration fee. Percentagewise, total conveyance costs were 9.15% of total costs and 0.65% as percent of value, while broker's fees amounted to 85.05% of total costs.*

*The numbers speak for themselves: In the three jurisdictions practicing authentication, i.e. in Estonia, France and Germany, the percentage of notarial fees and costs for the 100,000 € scenario were 0.38%, 1.35% and 0.56% as percent of sales price respectively, while in jurisdictions without authentication, i.e. England and Wales and the USA (upstate New York), the percentage of conveyance fees were 1.67% and 1.23% as percent of sales price respectively. In their majority, the notarial systems were more cost effective than the non-notarial systems. For the 250,000 € scenario, the percentages of notarial fees and costs were 0.37% as percent of sales price for Estonia, for France 1.08% and for Germany 0.44%, while they were 0.72% for England and Wales and 0.65% for the USA (upstate New York). Again, in their majority, the notarial systems were more cost effective than the non-notarial systems. We want to stress, however, that in higher sales price ranges, the cost effectiveness in the UK is higher than in notarial systems, since the solicitors'/conveyancers' fees do not increase proportionately with the sales price. Murray affirms that "for the largest transactions, UK conveyancing fees are among the lowest among the jurisdictions considered".*



Obviously, the amounts and numbers for the UK and the USA presented by Murray cannot rely on tariffs, differently from most notarial systems. However, there are good reasons to assume that they reflect, indeed, the reality of the market. Murray based his findings for the UK on a representative study of 2006 which had surveyed some 11,000 professional conveyancers, and he based his findings for the upstate New York market on precise information of which he formed averages. In addition, his results for the UK were shared and not contested by another study that had as an objective to paint a bright picture of the English cost effectiveness.

In the Questionnaire, we have asked for fees and costs of conveyance as of 2016 in the notarial system. Apparently there is an evolution as from 2007.

We assume that a similar evolution has taken place in the non-notarial systems but were unable to verify this assumption by figures. However, we are confident that the assumption on fees and costs in the UK and USA (upstate New York) have not dramatically changed: the authors of both studies that we have used here have maintained their figures in later publications, Sparkes and others in the 'Study on Cross Border Acquisition of Residential Property' of 2016<sup>108</sup>, and Murray in a book of 2010, co-authored with Stürner. Certainly, Murray and Stürner have expressed the amounts in local currencies only, which might be more appropriate in a way but complicates comparisons in general, but the most relevant point for our purposes has not changed: the percentages of conveyance costs as part of total sales prices. Faced with the difficulty to research exact fees and costs, we have decided to take the figures and amounts for the UK and USA, as collected in 2006, as reference, being conscious of the fact that they may have evolved.

We start our documentation with the three civil law countries that had also been covered by Murray and by Murray and Stürner.

For 2016, **Estonia** reports notarial fees of roughly 400 € and registration fees of roughly 110 € for a sales price of 100,000 €, and notarial fees of roughly 1,000 € and registration fees of roughly 590 € for a sales price of 250,000 €, which corresponds to an increase from 0.38% to 0.4% and from 0.37% to 0.4% of notarial fees respectively. While registration fees are stable for the 100,000 € scenario, they have doubled for the 250,000 € scenario.

For 2016, **France** reports notarial fees of 2,069 € and additional costs of 400 €, including registration fees, for a sales price of 100,000 € and notarial fees of 3,290 € and additional costs of 400 €, including registration fees, for a sales price of 250,000 €. Percentagewise, the fees amount now to 2.07% for the 100,000 € scenario and to 1.32% for the 250,000 € scenario for notarial fees and registration fees of 0.4% and 0.16% respectively.

For 2016, **Germany** reports notarial fees of 546 € and registration fees of 273 € for a sales price of 100,000 € and notarial fees of 1,070 € and registration fees of 535 € for a sales price of 250,000 €. Percentagewise, the part of notarial fees as percent of sales price has increased from 0.45% to 0.55% for the 100,000 € scenario and from 0.36% to 0.42% for the 250,000 € scenario and the percentage of registration fees is 0.27% for the 100,000 € scenario and 0.21% for the 250,000 € scenario.

In sum, when we compare the conveyance fees and costs in the five jurisdictions covered by Murray's Study today, we can state that the cost effectiveness is still higher in Estonia and Germany as compared to the UK and upstate New York, but lower in France. With respect to France, the Study of 'Dual Conseil' explains that the French exception is owed to the costs of additional services such as the collection of taxes and the archivation of instruments that the French notary assumes...

....Murray and Stürner have concluded that it "is safe to say that the CNUE study has demonstrated that there is no apparent immediate cost advantage that is inherent to any particular system. For instance, for transactions of moderate value the countries with the lowest transaction costs were the notarial jurisdictions of Estonia and Germany. England, France and the U.S. tended to be higher cost jurisdictions. The non-notarial jurisdictions tended to have lower costs for the transaction involving greater values. [...] A notarial system can have either very low or very high costs, depending on the individual system as well as transaction specific circumstances. [...] There is a similar variance in immediate costs in non-notarial countries. England turned out to be a relatively high cost jurisdiction, particularly for lower value transactions. In the State of Maine, also a common-law jurisdiction, transaction costs to participants were 30% lower than in England for transactions of corresponding value, even including the cost of title insurance".