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The Economic Relevance of Notarial Authentic Instruments

Study commissioned by the
International Union of Notaries (UINL)

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Content

1 List of abbreviations

ABA	American Bar Association
Art.	Article
BGB	“Bürgerliches Gesetzbuch”, German Civil Code
BGH	“Bundesgerichtshof”, German Federal Court of Justice
CEPEJ	European Commission for the Efficiency of Justice
Cf.	Confer
CNUE	Council of the Notariats of the European Union
DBR	Doing Business Report
DNotZ	“Deutsche Notarzeitung”, German Notarial Journal
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
Ed.	Edition
Eds.	Editors
e-ID	Electronic Identity
et al.	Et alii
etc.	Et cetera
et seq.	Et sequens
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GmbH	“Gesellschaft mit beschränkter Haftung”, German limited liability company
id.	idem
i.e.	Id est
IMF	International Monetary Fund

JURI	Committee on Legal Affairs
JSC	Joint-stock company
LLC	Limited Liability Company
loc. Cit	Loco citato
L. Rev.	Law Review
Ltd	Limited (limited liability company)
n/a	Not available
op. cit.	Opere citato
Para.	Paragraph
Paras	Paragraphs
Plc	Public limited company
pp.	Pages
PR	People's Republic
Rep.	Republic
SPRL	"Société privée à responsabilité limitée", Belgian Limited Liability Company
TFEU	Treaty on the Functioning of the European Union
VAT	Value added tax
UK	United Kingdom
UINL	International Union of Notaries
USA	United States of America
USD	United States Dollar
ZERP	"Zentrum für Europäische Rechtspolitk an der Universität Bremen", Centre of European Law and Politics University of Bremen

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3 Foreword

The UINL has asked me to undertake an analytical and empirical study of the economic relevance of notarial authentic instruments in a sample of jurisdictions around the world, part of them being members of the UINL and providing for a notariat in the latin tradition and part being outside such system. I have accepted the challenge because some years back, in 2010, I had already tried to develop my thoughts on some of the relevant issues in a small book "An Economic Analysis of the Notarial Law and Practice".[1]

This new study will build on the previous one by adding more analytical reflections based on newer literature, and by especially testing the results against empirical data. It maintains its focus on the economic dimension without denying that the work of the notaries has broader political and cultural connotations such as the fight against money laundering, providing transparency in important business transactions and securing title to property for larger parts of the population. The data were partly collected by the UINL through a questionnaire that was sent out to its members, whom I thank for their support.[2] In addition, I used data collected in other studies. The purpose of the questionnaire was - and I quote its introduction - "to examine whether legal certainty increases as a result of the notary's involvement in the Member States of the UINL, whether this increased level of legal certainty reduces the costs of the economy and everyone and whether the higher initial costs of notarial legal services and the additional time they require can be justified economically" (further on referred to as: "**Answers to Questionnaire**").

We have to state at the outset that we would have wished to present a more comprehensive set of data, in particular with regard to the interrelation between preventive justice as provided by notaries, solicitors, lawyers and conveyancers, and curative justice provided by courts. After some efforts, we share Yale Law School

[1] R. Knieper, An Economic analysis of the Notarial Law and Practice/Eine ökonomische Analyse des Notariats (English and German), 2010 (Notariat); It reassures me to note that my thoughts have been taken up by notaries; for instance: K.Woschnak, Binnenmarkt und Notariat – Umfeld, Ökonomik, Ethik, Recht, 2015, and J. Bormann/N. Hoischen, Ökonomische Aspekte notarieller Tätigkeiten im Grundstücksrecht, in: Rheinische Notarzeitung, 2016, pp.345-350

[2] The template of the questionnaire is documented in the annex. The following members have submitted a more or less complete set of answers to the Questionnaire: Andorra, Argentina, Austria, Belgium, Bulgaria, China (PR), Colombia, Congo (Rep.), Costa Rica, Croatia, Estonia, France, Georgia, Germany, Guatemala, Hungary, Italy, Korea (Rep.), Kosovo, Lithuania, Luxembourg, Mali, Morocco, Portugal, Russian Federation, Slovakia, Turkey and Uruguay

librarian and lecturer Sarah Ryan's sigh that in empirical case law research "[s]earching for trends in the common law is a Sisyphean task"[3], and we hasten to add: also in the civil law. Despite the lack of completeness and with some hesitation, we decided to present data anyway, cautioning against their sometimes anecdotal character and wishing that deeper studies would be undertaken in the future.

The question as to the economic pertinence of the notarial authentication of documents and the public office of the civil law notary in general has become topical. Notaries are once again viewed with sceptical interest, as many times before in their history. Four factors in particular have renewed the interest and criticism in recent times.

Firstly, the institution of the civil law notary does not exist in all EU Member States, and the European movement towards a single market requires that all special institutions, structures and organizations at a national level, which are not involved in the immediate exercise of governmental authority, be examined with regard to their market-restricting effects. The notarial system is particularly targeted by scholars and politicians from the United Kingdom (UK), since what "seems oddest to English buyers is that a single notary acts for both parties". This comes as a "culture shock". Instead of trying to understand the specific functions and public office of the notaries, who act in the interests of both parties and thus cost-effectively, it is suggested to reduce or eliminate them and replace them by solicitors/conveyancers, who would have to be engaged by each party, thus driving costs up.[4] The hostile attitude survives the decision of the UK to leave the EU.

Secondly, a while ago, a large and important part of the world embarked on realising the principles of decentralised property, contractual freedom and market economy and, as part of this process, must now redefine the function of the State and its sovereign powers. Inevitably, this also includes the issue as to whether or not the institution of the civil law notary should be adopted by those countries, providing neutral and impartial professional legal advice to all parties in a transaction and authenticating documents in a public office. A certain amount of competition has developed with regard to the advice to these countries, with various models being proposed. In this

[3] Sarah Ryan, A Sampling Strategy for Empirical Research, in: http://library.law.edu/news/sampling-strategy-empirical-case-law-research

[4] EU, Directorate General for Internal Policies, Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens, 2016. Study authored by P. Sparkes et al. (quoted as Sparkes EU Study), pp. 162 and 165.

context, it comes as no surprise that advice from the common law world in general and the USA in particular does not support a system where civil law notaries play an important part. International organizations such as the World Bank have supported the negative attitude.

Thirdly, the opportunities of digitization, in particular through block-chain, seem to point to a lessening importance of institutionalized trust in market relations and in the utility of authentication. It is alleged that, indeed, information costs will be minimized when all information is readily available without being possibly distorted by obstruction and power asymmetries. It cannot be excluded that one day a combination of technological advances and behavioral predictability will render man-made advice and registration superfluous and one will have to rethink the infrastructural institutions and mechanisms. However, it seems that we are not there yet. For the time being, a new illusion seems to emerge which makes believe that the information system of the net is free of power inequalities and information asymmetries and that professional advice, credible commitments and the protection of trust in impersonal transactions is no longer needed. Dr. Dominik Gassen, notary in Bonn/Germany, has contributed his reflections on this very topical issue to the study.

Fourthly and in counter-current of the previous points, the subprime crisis which erupted in the USA and had severe repercussions in the world economy led authors from many countries to propose that the USA should consider the introduction of a neutral professional intermediary into the system of the conveyance of real estate property, similar to a civil law notary.[5]

However, critical proposals predominate. They range from the complete abrogation of the public institution of the civil law notary to the divestment of the civil law notary from his current practice areas, such as conveyancing,[6] or from the field of consumer protection.[7]

[5] R.J. Shiller, The Subprime Solution, 2008, Chapter 6; P.L. Murray, Real Estate Conveyancing in 5 European Union Member States, 2007, Knieper, Notariat

[6] An opinion expressed by the study of the Centre of European Law and Politics (ZERP), University of Bremen, et al., Study COMP/2006/D3/003, Conveyancing Services Market, December 2007 (short: "ZERP Study").

[7] An opinion expressed in the Proposal for a Directive of the European Parliament and the Council on Consumer Rights dated 8 October 2008 COM(2008) 614/4.

Evidently, a study of the economic relevance of notarial authentic instruments has to understand and react to the criticism. We will do this in due course, whereby both the criticism and the reaction refer to the central role of property rights, contractual agreements and enforcement as well as the concept and reality of the pricing mechanism in market economies.

4 On the interrelation between the State and the Market

4.1 Theoretical bases

Before doing so, the notary's organization, work and functions as well as the authenticated documents must be situated into a wider economic and political context and into the general debate on the interrelation between the State and the market. I state with inadmissible brevity that I subscribe to theories and findings, formulated early on by Adam Smith[8] and now repeated and refined by modern economic theory and history that institutions, i.e. rules and constraints on individual conduct and behaviour, were and are indispensable to provide "the credible commitment that has enabled more complex contracting to be realized", as formulated by Nobel prize laureate D. North.[9]

In a widely discussed book D. Acemoglu and J. Robinson have explained: "Inclusive economic institutions foster economic activity, productivity growth, and economic prosperity. […] Inclusive economic institutions require secure property rights and economic opportunities [...] Secure property rights, the law, public services and the freedom to contract and exchange all rely on the state, the institution with the coercive capacity to impose order, prevent theft and fraud, and enforce contracts between private parties. To function well, society also needs other public services: a transport network so that goods can be transported; a public infrastructure so that economic activity can flourish; […] The state is thus inexorably intertwined with economic institutions, as the enforcer of law and order, private property and contracts, and often as a key provider of public services. Inclusive economic institutions need and use the state"[10]. And another Nobel prize laureate to reinforce: "Notre choix de société n'est pas un choix entre Etat et marché, comme voudraient nous faire croire interventionnistes et partisans du laissez-faire. L'Etat et le marché sont complémentaires et non exclusifs. Le marché a besoin de régulation et d'Etat, de concurrence et d'incitation".[11] (In translation : « Our choice of society is not a choice between State and market, as both interventionists and partisans of laissez-faire want

[8] In his "An Inquiry into the Nature and Causes of the Wealth of Nations", (1776) in particular Book 5

[9] D.C. North, Institutions and Credible Commitment, in: Journal of Institutional and Theoretical Economics, 149/1 (1993), p. 10; also: D.C. North, Institutions, Institutional Change and Economic Performance, 1990, p.3

[10] D. Acemoglu/J.A. Robinson, Why Nations Fail – The Origins of Power, Prosperity and Poverty, 2012, pp. 75/76

[11] J. Tirole, Economie du Bien Commun, 2016, p. 24; I have tried to develop my thought in R. Knieper, National Souveränität – Versuch über Ende und Anfang einer Weltordnung, 1991, Teil II

us to believe. The State and the market are complementary and not exclusive. The market needs regulation and the State needs competition and incitation »).

Market economies are based on de-centralized, private property that can be exchanged by contracts. These characteristics lead economists to base their research on the concept of 'methodological individualism'. The term expresses the conviction that a proper understanding of the behaviour, conduct and preferences of individuals allows to correctly analyse and predict economic developments.[12]

Under this approach, individuals legitimately endeavour to increase their own benefit and utility. Accordingly, from an economic point of view, the value of goods, services and also of rules may therefore be assessed solely in terms of their utility to one or more individuals.

Within this system, the market is characterized as a sensitive and highly flexible mechanism, via which the aggregated individual (i.e. the macroeconomic) demand and the aggregated individual (i.e. the macroeconomic) supply meet. The price is the regulator for the millions of decisions made by purchasers and suppliers. As both sides are looking for the best possible solution, prices move towards a point where supply and demand are in equilibrium and the market is cleared.

The wealth generating effect of the market mechanism is based on the assumptions that no participant in the transactions is able to force a price through and that no third party intervention disturbs the mechanism.

At the same time, history teaches that the pursuit of individual and particular preferences and interests necessitates the articulation, execution and representation of the general, the public interest by the State. The State provides the general rules; it provides the general physical and social infrastructure; it finances general and public services through general, non-market generated revenues. Neither the State nor its personnel is legitimized or empowered to pursue or assist particular interests, even

[12] J. Tirole, Économie du Bien Commun, 2016, pp. 123, 166; P. Samuelson/W. Nordhaus, Economics, 3rd (18th) edition, 2007, pp. 84 ss., H. Schäfer/ C. Ott, Lehrbuch der ökonomischen Analyse des Zivilrechts, , 4th edition 2005, pp. 3, 57 ss., S. Roth, Volkswirtschaftslehre für Einsteiger, 2006, pp. 1 ss.

when participating on the market. When it happens, it is rightly labelled corruption and excess of power by State officials.

No abstract and once-and-for all valid dividing line between the private and the public sphere can be drawn. It is a continuous and never finally settled political decision – hopefully arrived at democratically – what activity can and should be left to private persons and what activity is carried out by the State. Again history teaches that societies were particularly dynamic where – in the words of Adam Smith – the 'invisible hand' guided private persons to a contribution of the general welfare by pursuing their individual and egoistic interest in benefit and profit, while the 'visible hand' of the State – again in the words of Adam Smith – provided for all works and institutions which are highly advantageous for the society at large but do not generate profits high enough to compensate the costs of private entrepreneurs, such as defence, transport, health and education,[13] what we would call today physical and social infrastructure.

Publicly maintained infrastructure and private market exchange are complementary in the sense that infrastructure provides the general prerequisites that enable or at least facilitate the production of goods and services and their exchange on the market: publicly financed roads are the material basis for private transport; an educated and healthy workforce is indispensable for the private production and circulation of goods and services.

Apparently, it is not possible to delineate once and for all and beforehand what activity might be profitable or not and what public works might be advantageous or not. Both elements hinge on historical circumstances and socio-political environments and decisions. What is profitable today, may become unprofitable tomorrow and profitable again at a later stage. Rail transport and postal services are classical examples. What might be seen as advantageous today, might be considered superfluous tomorrow. In this perspective, it is not excluded that the digitization of the (global) economy might challenge the division of private and public spheres profoundly. In addition, the delineation of the two spheres is influenced by political decisions. The body politic might decide one day that education, health or even justice might be left to the private

[13] A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, 1776, Book IV, Chapter 2 (for the invisible hand) and Book V, Chapter 1 (for the public works)

sector and dispensed at a price generating a profit. Private schools and private clinics and arbitration are examples, even if mostly distorted by hidden or public subsidies by the State.

Although these are eminently political issues, they are not totally at the discretion of political decision-makers for two reasons. Firstly, international Conventions as well as national Constitutions of many States have established basic rights of access to health, to drinking water, to education and also to justice and corresponding obligations of the States to provide relevant infrastructure to these ends. At the current stage of international and national legal development, a total privatization of education or health services that would exclude significant portions of the population from them would be anti-constitutional and illegal. The same is true for the denial of justice. Secondly, economic history teaches that the suppression of physical as well as social infrastructure would very seriously handicap a sustained private production and circulation of goods and services on the market and would lead to serious reductions of the common wealth. For very practical considerations, governments are limited in their choices in the long run for fear of losing competitiveness.

4.2 The Administration of Justice

Societies in which it is allowed and legitimate to pursue egoistic interests and individual preferences in relations between private persons on the market will have to provide institutions and mechanisms to resolve disputes between business partners. Disputes are inexorable because the legitimate pursuit of individual interests does not sum up to the common wealth but necessarily creates conflicts. They have to be resolved.

The Kantian categorical imperative and the Rawlsian veil of ignorance are proper and moral concepts of an intrinsic resolution of such conflicts but cannot be relied on. Without outside assistance, parties will not systematically find solutions themselves, unless by relying on physical force and coercion to enforce alleged private rights with dramatic consequences for economic development, as is evidenced daily in failing States. Indeed, history teaches that social and economic costs of self-enforcement are prohibitive and terrible. Instead, business partners with conflicting interests in dispute may be able to convene on outside assistance by agreeing on arbitration or mediation.

That is a viable approach but necessitates both agreement and a mutual will of good faith for compliance with the mediator's/arbitrator's decision as well as financial means.

In light of these practically tested alternatives, it comes as no surprise that the public administration of justice is considered fundamental for the functioning of the market. It is largely uncontested that it is the only general guarantee of an appropriate protection of property rights and an effective and cost-efficient enforcement of contracts. Already Adam Smith insisted that "Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government."[14] After long studies of economic history, Douglass North came to the conclusion that the "inability of societies to develop effective, low-cost enforcement of contracts [is] the most important source of both historical stagnation and contemporary underdevelopment in the Third World"[15].

Indeed, the authority of a court sentence rendered by a neutral and impartial judge, together with its forced execution by a non-partisan enforcement officer, guarantee the lawful solution of disputes between private parties with divergent interests. Their maintenance as a public service and power is all the more of crucial importance for the smooth functioning of market relations because it alone justifies the monopolisation of force in the hand of the State.

In consequence, international Conventions such as the European Convention on Human Rights (ECHR) as well as national Constitutions define the affordable access to neutral, objective and law applying justice as a basic human right, to be guaranteed by the State through the maintenance of a judiciary as an independent branch of government. These criteria coincide with those used for social infrastructure.

[14] Adam Smith, Book V, Chapter 3

[15] D.C. North, Institutions, Institutional Change and Economic Performance, 1990, p.61-63

And, indeed, States and especially economically viable States dedicate substantive parts of their budgets into the administration of justice. This is firmly documented by the Council of Europe for its members but holds also undoubtedly true for other jurisdictions.[16]

4.3 The Case of Authentic Instruments

Are notarial authentic instruments part of the social infrastructure? This is asserted when qualifying them as “preventive justice”, thus associating them with justice in general. However, labelling does not suffice. Rather, the answer must be distilled from their content and effect, which are attributed to them by national law.

All legal systems which provide for such instruments stipulate that they have distinct and material probative value and force. Despite important divergences in detail, the core mission of notarial work is similar. As documented in the following table, civil law notaries perform authentications of documents. They draw up public instruments, which incorporate contracts, declarations of intent that are not only of legal, but generally also of economic significance. Before doing so, they are obliged to verify the identity and capacity of parties and/or other persons such as representatives involved, explain the rights and duties emanating from the instruments, especially when one or more of the parties are not knowledgeable, and discuss the risks.

In some countries such as Belgium, Columbia, Costa Rica, France, Georgia, Kosovo, Lithuania, Mali, Portugal and Congo the authentic instruments are executory and enforceable without further requirements, while in others such as Austria, China, Croatia, Germany, Slovakia the enforceability must be specially consented by the parties. In Morocco legislative efforts are underway to extend the effect of the instruments to enforceability. In any event and whenever the enforceability is attached to the instrument, the notary has a duty to advise the parties on these consequences.

In certain jurisdictions, the authentication of economically important transactions with far-reaching financial or personal consequences in the areas of property law, corporate law, family law or succession law is prescribed by statute. It is for the legislator to

[16] Cf. the data of 45 Council of Europe Member States in: European Commission for the Efficiency of Justice (CEPEJ), European judicial systems – Efficiency and quality of justice, Edition 2016

decide which transactions should be subjected to such mandatory notarial control. As far as conveyance is concerned, for instance, the notarial authentication is mandatory in Andorra, Argentina, Belgium, Bulgaria, Congo, Costa Rica, Estonia, France, Germany, Guatemala, Italy, Kosovo, Lithuania, Luxembourg, Mali, Morocco, Portugal, Russia, Turkey and Uruguay, while in other States it is not or not any longer, such as in Colombia, Croatia, Georgia, Hungary and Slovakia. The voluntary character does not prevent clients from involving notaries in their transactions in order to obtain legal certainty. Andorra reports in its Answers to Questionnaire that parties request authentication in the “immense majority of cases” (99.9%) irrespective of its voluntary or compulsory character; Austria affirms 202,000 and the Republic of Korea 300,000 authentic instruments in 2015 notwithstanding its voluntary character; Georgia asserts that roughly 6% of real estate purchases were based on authentic instruments in 2015 although not mandatory, for Slovakia the percentage was 20%.

Table I "Role of Notaries"

Subject matter / State	Authentication of Instruments	Mandatory Intervention in Conveyance	Mandatory Intervention in Company Matters	Mandatory intervention in succession matters
Andorra	x	mandatory only for transactions with non-resident foreigners	x	no
Argentina	x	x	mandatory for JSC	no
Austria	x	no	x	last wills: voluntary; execution of estates: mandatory
Belgium	x	x	x	x
Bulgaria	x	x	no	no
China	x	no	no	no
Colombia	x	x	x	x
Congo, Rep	x	x	x	x
Costa Rica	x	x	x	x
Croatia	x	no	x	no
Estonia	x	x	no	x
France	x	x	no	partly mandatory
Georgia	x	no	no	no
Germany	x	x	x	no
Guatemala	x	x	x	x
Hungary	x	no	no	x
Italy	x	x	x	no
Korea	x	no	no	no
Kosovo	x	x	no	x
Lithuania	x	x	no	x
Luxembourg	x	x	x	no
Mali	x	x	x	x
Morocco	x	n/a	n/a	n/a
Portugal	x	no	no	last wills: mandatory; execution of estates: voluntary
Russian Federation	x	x	x	n/a
Slovak Republic	x	no	no	x
Turkey	x	x	no	last will: mandatory; execution of estate: voluntary
Uruguay	x	x	x	x

Source: Questionnaire

In the overwhelming majority of jurisdictions, the civil law notary may only attest to something as being true and correct if he has personal knowledge of the relevant fact or circumstance. For example, when authenticating transactions concerning title to real estate, the civil law notary must check the contents of the land register or other public

documentation of title. As explained by the European Court of Justice for the specific case of the Austrian legislation, "the participation of that professional [the notary – R.K.] 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."[17]

A civil law notary is obligated to decline the authentication of declarations made by individuals whom he knows to lack legal capacity, and of any acts that are legally void, illegal or evidently intended to pursue prohibited or dishonest ends. Civil law notaries may only issue certifications of the existence, the incorporation, transformation or other circumstances relating to legal entities or of powers of attorney, if they have satisfied themselves as to their accuracy via the commercial register or by other legally accepted means. The identity of any person acting before a notary has to be verified and documented. Only in the Republic of Korea the control duties are more limited: the notary only verifies the identity of the parties and the power of attorney and should refrain from authenticating illegal acts.

In the course of the authentication procedure, the civil law notary must explore the intention of the parties involved, determine the factual situation, instruct on the legal implications of the transaction and reflect their declarations clearly and unambiguously in the deed. Furthermore, civil law notaries are required to ensure that errors and doubts are prevented or alleviated and that inexperienced or unsophisticated parties are not disadvantaged or being taken advantage of. Doubts and ambiguities in the articulation of intent must be discussed. The civil law notary must inform the parties about the legal implications, consequences and risks of their declarations of intent and the contractual agreements contemplated, while also advising them on potential problems concerning performance safeguards. Whenever the civil law notary has reason to believe that a party may be assuming a risk which, as a result of his/her inexperience, he/she is unable to properly assess, the civil law notary must actively caution that party in order to ensure a 'level playing field' for all parties involved. This expanded duty to caution is intended to ensure that the declaration to be authenticated is based on careful consideration and reflects true preferences. Based on the intention

[17] ECJ, Judgment of 9 March 2017 – Piringer – http://curia.europa.eu, para 64

so ascertained, the civil law notary must then formulate a proposal for the deed to be drawn up.

Contrary to the lawyer/solicitor/conveyancer, whose duties are contractually established and limitable, the notary's duties are both contractual and statutory, private and public. In case of breach he/she bears contractual liability and is at the same time subject to disciplinary sanctions.

The duty to instruct, inform, caution and advise does neither replace the parties' declarations of intent nor their economic appraisal of the transaction. We have asked in the Questionnaire whether the notary was authorized to advocate on the preferences and the business motivation of the parties before authentication. The clear and unanimous answer was 'no'. Party autonomy is not restricted.

To situate the notarial intervention in a categorical matrix, which has been developed by Nobel prize laureate R. Thaler, his advice and orientation are needed when decisions are difficult because

- choices and their consequences are separated in time and not evident to assess,
- the complexity of the issue (such as the negotiation of a mortgage) goes beyond everyday problems,
- the issue does not arise frequently (such as the purchase of a house),
- there is a lack of immediate feedback,
- the consequences of the options are not readily understandable.[18]

In all these circumstances, the advice of the notary in the context of authentication have the effect of a 'nudge', which does not limit the freedom of decision but adds to its rationality.

The extent of the duties to verify, inform and advise is summarized in the following table.

[18] R.Thaler/C. Sunstein, Nudge, Part 1: When do we need a nudge?

Table II "Verification Duties and Duties to inform and advise"

State/subject matter	Identity of parties	Legal capacity of parties	Power of attorney/ representation	Legality of transaction	Object of the contract	Information and advisory duties
Andorra	notary	notary	notary	notary	not necessarily	yes, both parties
Argentina	notary	notary	notary	notary	no	yes, both parties
Austria	notary	notary	notary	notary	notary	yes, both parties
Belgium	notary	notary	notary	notary	notary	yes, both parties
Bulgaria	notary	notary	notary	notary	notary	yes, both parties
China	notary	notary	notary	notary	notary	yes, both parties
Colombia	notary	notary	notary	notary	no	yes, both parties
Congo, Rep	notary	notary	notary	notary	notary	yes, both parties
Costa Rica	notary	notary	notary	notary	notary	yes, both parties
Croatia	notary	notary	notary	notary	notary	yes, both parties
Estonia	notary	notary	notary	notary	notary	yes, both parties
France	notary	notary	notary	notary	notary	yes, both parties
Georgia	notary	notary	notary	notary	notary	yes, both parties
Germany	notary	notary	notary	notary	notary	yes, both parties
Guatemala	notary	notary	n/a	notary	notary	yes, both parties
Hungary	notary	notary	notary	notary	notary	no
Italy	notary	notary	notary	notary	notary	yes, both parties
Korea	notary	notary	notary	notary	notary	no
Kosovo	notary	notary	notary	notary	notary	yes, both parties
Lithuania	notary	notary	notary	notary	notary	yes, both parties
Luxembourg	notary	notary	notary	notary	notary	yes, both parties
Mali	notary	notary	notary	notary	notary	yes, both parties
Morocco	notary	notary	notary	notary	notary	yes, both parties
Portugal	notary	notary	notary	notary	notary	yes, both parties
Russian Federation	notary	notary	notary	notary	notary	yes, both parties
Slovak Republic	notary	notary	notary	notary	notary	yes, both parties
Turkey	notary	notary	notary	notary	notary	yes, both parties
United Kingdom (England & Wales)	if convened: solicitor	if convened: solicitor	if convened: solicitor	if convened: solicitor	if convened: solicitor	if convened: solicitor
United States of America	if convened: lawyer	if convened: lawyer	if convened: lawyer	if convened: lawyer	if convened: lawyer	if convened: lawyer
Uruguay	notary	notary	notary	notary	no	yes, both parties

Source: Questionnaire and circumstantial evidence

It is the intensity of the notary's duties that justifies the evidential value of the authenticated instruments. They serve to reassure private persons – partners in a transaction as well as third parties – as well as government authorities, public and private registers as well as courts as to the accuracy of the facts and circumstances it evidences. In a way, it creates legally enforceable expectations by replacing subjective trustworthiness through objective evidence. The content of the instrument provides proof of the statements made, even if the person making the relevant statement is not trustworthy. The information contained in the instrument benefits from a – rebuttable –

presumption of correctness and truthfulness. Entries in commercial registers and land registers that are of material importance for both the asset situation and the business decisions of individuals and legal entities are performed in reliance on the statutorily presumed accuracy of notarial authentic instruments. Court decisions are made based on them, without need for taking further evidence, as are compulsory executions.

The costs for the establishment of such evidence is borne by the parties to transactions and not by third parties. Once the documents are authenticated and given effect, no more title search or other forms of due diligence is required to establish the documented facts.

In a series of decisions[19] on the compatibility of the nationality requirement for notaries imposed by various national legislations with European law, the European Court of Justice found that, while notaries do not exercise public authority within the meaning of Article 51 TFEU, "notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into by individuals, (which) constitutes an overriding reason in the public interest capable of justifying restrictions of Article 43 EC [now Art. 49 TFEU] deriving from the particular features of the activities of notaries, such as the framework within which notaries act as a result of the procedures by which they are appointed, their limited number and the restriction of their territorial jurisdiction, or the rules governing their remuneration, their independence, their disqualification from holding other office and their protection against removal, provided that those restrictions enable those objectives to be attained and are necessary for that purpose".[20]

By its Judgment of 9 March 2017, the European Court of Justice has reiterated and clarified its analysis and the characterisation of the authentic instrument. It had to rule whether the Austrian legislative decision that "confers on notaries and courts alone the power to authenticate signatures appended to the instruments necessary for the creation or transfer of rights to property [and that] constitutes a restriction on the

[19] ECJ, Judgments of 24 May 2011, Commission v. Austria, C-53/08, para. 96; Commission v. Belgium, C-47/08, para. 97; Commission v. Germany, C-54/08, paras. 96 and 98; Commission v. Greece, C-61/08, para. 89; Commission v. France, C-50/08, para. 87 and Commission v. Luxembourg, C-51/08, para. 97.

[20] ECJ, Judgment of 24 May 2011, paras 96 and 98 (Commission v. Germany)

freedom to provide services guaranteed by Article 56 TFEU"[21], was to "be allowed as a derogation, on grounds of public policy, public security or public health, as expressly provided for under Articles 51 and 52 TFEU, [… and] be justified by overriding reasons in the public interest".[22] The Court found:

- "First, however, as the Austrian and German Governments, among others, have noted, it should be stated that the land register is of crucial importance especially in certain Member States which operate a system of civil-law notaries, particularly in property transactions. In particular, each entry in a land register — such as the Austrian land register — alters rights, in so far as the rights of the person who has requested that entry arise only after the corresponding entry has been made therein. Maintaining the land register thus constitutes an essential component of the preventive administration of justice in the sense that it seeks to ensure proper application of the law and legal certainty of documents concluded between individuals, which are matters coming within the scope of the tasks and responsibilities of the State.

- In those conditions, national provisions which require verification, by recourse to sworn professionals — such as notaries — of the accuracy of entries made in a land register contribute to guaranteeing the legal certainty of property transactions and the proper functioning of the land register and relate, more generally, to the safeguarding of the sound administration of justice, which, in accordance with the case-law of the Court, constitutes an overriding reason in the public interest.

- Second, it is necessary to recall that the Court has already held, in its judgment of 24 May 2011, *Commission* v *Austria*, (C-53/08, EU:C:2011:338, paragraph 96), in relation to the freedom of establishment, that the fact that notarial activities pursue objectives in the public interest, in particular that of guaranteeing the legality and legal certainty of documents concluded between individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article 49 TFEU resulting from the particular features of the activities of public 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, provided that those restrictions make it possible for those objectives to be attained and are necessary for that purpose. […]

- Consequently, it must be held that the objectives invoked by the Austrian Government constitute an overriding reason in the public interest capable of justifying national legislation such as that at issue in the main proceedings.

  It is, however, still necessary to verify whether the measure at issue in the main proceedings satisfies the requirement of proportionality within the meaning of the case-law set out in paragraphs 53 and 60 of the present judgment.

- In the present case, as is apparent from the observations made by the Austrian authorities during the hearing, the notary's involvement is important and necessary for the purposes of entry in the land register, 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.

  In those conditions, 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

[21] ECJ, Judgment of 9 March 2017 – paras 50/52

[22] ECJ, Judgment of 9 March 2017, para 53 (notes omitted, emphasis added)

> 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."[23]

The rulings and considerations of the European Court support and comfort the position that I have developed in my above mentioned study on notaries. They reflect the concept of a preventive administration of justice: While public courts adjudicate disputes that have arisen in market relations and create legal certainty by assuring an efficient enforcement of contracts through *ex post* intervention, public civil law notaries create legal certainty by an *ex ante* identification of persons, verification of facts and law, and authentication of documents. They do not interfere in market relations but set a secure frame to facilitate their peaceful and undisturbed establishment and execution.

These specifics justify to qualify the authentic instrument as part of the social infrastructure, deliberately established and maintained by national legislation.

As with other sectors of infrastructure and public goods, it is difficult to ascertain that this specific one is indispensable for the functioning of market relations. Access to health, to drinking water, to education or to physical infrastructure may be privatized without immediate effect on the persistence of a market. States dispose of political discretion to define the extent, contours, financing and functioning of infrastructures in interrelation to the market, as far as they are not hindered by international Conventions and Constitutions.

This being said, it is hardly imaginable to assume that States will refute the concept of legal certainty altogether, since it will inevitably lead to unsustainability of business relations and ultimately a failure of the State. However, States can reject the concept of the authentic instrument as a guarantor of legal certainty and leave to private parties on the market to organize it as a private good. Results can be compared over time.

[23] ECJ, Judgment of 9 March 2017, paras 58-65 (notes omitted)

5 The Ideology of Legal Origins

It is fair to say that, in a broad brush, the authentic instrument is a central part of the legal system in civil law jurisdictions, while in common law jurisdictions the objective of legal certainty is rather pursued by private initiative. In a certain way, this is an extension of the general confidence in party witnesses and experts in common law litigation as opposed to the trust laid in documents in civil law litigation. Both in the curative and preventive administration of justice the role of documents is perceived and weighed differently. Both concepts are path dependent and results of legal history.

Some 25 years back and roughly at a time when former communist States started to rethink the models of market economies and State structures, a group of scholars presented ideas on the legal origins of the civil law and the common law. The purpose was to discredit the civil law tradition and praise the common law tradition with a view to induce the world to follow principles of the common law.

The legal origins theory tries to prove that common law is more market economy and business friendly than civil law. In a number of basic articles, four US-economists allege that civil law is associated with a heavier hand of government ownership leading to corruption, shadow economies and high unemployment, while common law is associated with more efficient protection of private property, lower formalism of judicial procedures, higher independence of courts and judges, higher protection of shareholders and higher income per capita, better reactions to economic shocks and higher productivity gains.[24]

The legal origins theory presaged the yearly publication of 'Doing Business' Reports of the World Bank and their empirical findings on the economic pertinence of institutions, of which the notary and notarial authentic instruments. In the early editions, it was given that eight out of the ten best ranking countries with respect to the 'ease of doing business' were from common law jurisdictions and had no notariat. Efficiency was measured exclusively by looking at costs, time to be spent and the number of

[24] R. La Porta/F. Lopez-de-Silanes/A. Shleifer/R.W. Vishny, Law and Finance, in: Journal of Political Economy 106(6) (1998), pp. 113-1155; revisited in R. La Porta/F. Lopez-de-Silanes/A. Shleifer, The Economic Consequences of Legal Origin, in: Journal of Economic Literature, 46:2 (2008), pp. 285-332

procedures necessary to transfer property or start a business or any other aspect of economic life.

Despite slow changes and the hesitant recognition of quality as a valuable criterion to appraise the efficiency of institutions and organizations, some of the original intentions are still palpable. The statement in the 2016 edition of the Report that services by third parties such as notaries to start a business drives entrepreneurs into the informal sector of the economy and are the reason for "corruption and bribery"[25], for instance in Germany, repeated literally the legal origins theory opinion on civil law jurisdictions as prone to corruption without providing any empirical evidence.

In its 2017 edition, the 'Doing Business' Report indicates a certain correction of focus when alleging that "*Doing Business* 2017 also contains a discussion of the role business regulatory reform may play in the global goal to reduce income inequality. Of course there are many determinants of income inequality, including […] the prevalence of bribery and corruption, among many others. Yet some are linked to the regulatory environment for entrepreneurship. […] A growing body of literature shows that government action to create a sound, predictable regulatory environment is central to whether or not economies perform well and whether that performance is sustainable in the long run. […] However, regulation can also be used as an intervention when market transactions have led to socially unacceptable outcomes. […] Business regulations are a specific type of regulation that can encourage growth and protect individuals in the private sector".[26]

The quotation indicates that the indiscriminate war against regulation is losing ground. The concrete repercussions of such new thinking are not yet fully integrated into the empirical methods and findings, although it seems unavoidable that it will lead to a decrease of common law dominance in the overall rankings.

Evidently, a study on the economic pertinence of the notariat and the authentication of documents cannot ignore the Doing Business Report since the latter pretends to be the "one of the most influential policy publications"[27] of the world and measures the

[25] Doing Business Report 2016, at page 54

[26] Doing Business Report 2017, at page V, 13

[27] Foreword of the 2016 edition of the Doing Business Report, page IV

economic efficiency of institutions. Therefore, the assumptions and assertions of the underlying theory on legal origins must be appraised.

The authors base their findings and recommendations on an interpretation of legal history which defies any historiographical evidence. They assert that the divergence between common law and civil law began with the reception of Roman law in France in the 12th and 13th centuries encouraged and assisted by the Catholic church to back and establish a bureaucratic and centralized State system which culminated in the Napoleonic codifications, while "England was a relatively peaceful country during this period, in which decentralized dispute resolution on the testimony of independent knights (juries) had the power to subvert centralized justice".[28] Besides the bewildering praise of a legal system, where 'knights' were authorized to act as party and judge at the same time and where no commoner seems to have played any role, a simple look into any archive of any medieval monastery in England, Scotland, Ireland, France, Italy, Spain or Germany or into the founding documents of the Universities of Oxford and Cambridge or Bologna or Paris or Prague would have sufficed to understand that England was part of the catholic world and that Roman law was received in all Europe.

The authors do not realize that the exchange among legal scholars was extremely intricate and dense and that it continues – perhaps with a short nationalistically driven hiatus during the 19th and 20th centuries and the current farce of Brexit – until today. Pothier's pre-revolutionary 'Traité des Obligations' was studied by English legal scholars who were attracted by "this contract doctrine such as sanctity of bargain, freedom of dealing and the advantage of the market over government intervention"[29], and Blackstone's definition of property as consisting "in the free use, enjoyment and disposal of all his acquisitions" of 1803[30] is fully echoed in Article 544 of the French Civil Code of 1804 and § 903 of the German Civil Code (BGB) of 1900.

In light of these misrepresentations, it is difficult not to qualify the legal origins theory as an interested ideology. Indeed, it is not surprising that studies to test the empirical

[28] R. La Porta/F. Lopez-de-Silanes/A. Shleifer, The Economic Consequences of Legal Origin, in: Journal of Economic Literature, 46:2 (2008), p. 306; P. Mahoney goes so far as praising the fact that "landowners served as local justices of the peace and the landowning nobility as judges of last resort" as a contribution to the independence of the judiciary: P. Mahoney, The Common Law and Economic Growth: Hayek Might be Right, in: The Journal of Economic Studies, 30/2 (2001), pp.503-525/508

[29] P.J. Cooke/D.W. Oughton, The Common Law of Obligations, 2nd ed., 1993, p. 26

[30] W.Blackstone, Commentaries on the Laws of England, 1803, p. 138

evidence of the superiority of the common law over the civil law do not confirm any of the theses and alleged consequences of the legal origins theory. Even authors who want to support the thesis have to come to the conclusion "that the English legal tradition (the common law) is superior to the French (the civil law), not because of substantive differences in legal rules, but because of differing assumptions about the roles of the individual and the state,"[31] while others underline that "common law and civil law property are similar in their broad outlines, most probably for functional reasons."[32] Again others report on the "puzzle" caused by the legal origins theory that mixed legal families do not show a tendency to totally converge to the common law parts although these are propagated to be more efficient. They come to the conclusion that "civil law is likely to be more efficient than common law in the field of private law."[33]

As to formalism of the court proceedings, a serious re-evaluation of the figures showed that "civil law procedure is not more formalist in civil law countries than in common law countries" and that "procedure in common law countries is more complex, protracted and costly than in civil-law countries taken as a whole but less so than in French civil-law countries considered separately. The differences are small, however, and statistically insignificant. Both common-law countries and French civil-law countries do worse than German and Scandinavian civil-law countries, although, controlling for GDP per capita, only the difference in complexity with respect to the German civil-law countries is statistically significant".[34]

In fact, these findings are not surprising because the big political and societal issues such as State control and militarism, the division of powers and the independence of justice, corruption and bribery do not follow the common-law versus civil-law divide. Common law and civil law jurisdictions are confronted to similar challenges. Functional reasons require that both civil law and common law must offer legal solutions which allow owners to use the object of property peacefully, to establish the right to exclude all others, and to enable the owner to dispose of the object and transfer it to a third

[31] P. Mahoney, op.cit., p. 504

[32] Y.C. Chang/H.E. Smith, An Economic analysis of Civil versus Common Law Property, in: Notre Dame Law Review,88/1 (2012), pp.1-56/9 and 51

[33] N. Garoupa/C. Gómez Liguerre, The Efficiency of the Common Law: The Puzzle of Mixed Legal Families, in: Wisconsin International Law Journal 29/4 (2012), pp. 671-693/690

[34] H. Spamann, Legal Origin, Civil Procedure, and the Quality of Contract Enforcement, in: Journal of Institutional and Theoretical Economics, 2010, pp. 149-165, pp. 149-165/150 and 155

person in negotiated transactions. “Other desirable features of property – its promotion of stability, autonomy, investment incentives, fairness and efficiency – all trace back to this basic interest in the use of things”[35]. Indeed, any jurisdiction that does not succeed to protect property and the fair and cost-effective execution and enforcement of contracts bears responsibility for a loss of social wealth and competitiveness.

Beyond these postulates and necessities, history as well as the present teach that corruption, efforts of politicians in office to pursue private interests and vices instead of the public interests, authoritarian and populist leaders trying and succeeding to threaten and destroy the independence of curative and preventive justice are not specific to either the common law or the civil law system, nor is the system of election of judges whose campaigns are financed by law-firms that expect and receive a benevolent treatment by the elected judges structurally connected to the common law.

This does not mean that the emergence and persistence of institutions and organizations, of notaries and public registers are not path dependent and that “[b]ecause of their different histories civil and common law face different costs of delineating property rights”[36] It is as true that ‘history matters’ as it is true that history is not a fatality. One of the ‘critical junctures’ (Acemoglu/Robinson) in this respect was the decision on the European continent to codify civil law. The codifications pursued, indeed, as one of their objectives to establish a concept of full property as an abstract ‘*ius in rem*’, in total rupture with the feudal distinction between ‘*dominium utile*’ and ‘*dominium plenum*’. The objective was the rupture with the feudal system and not the interdiction to also create limited ‘*iura in rem*’ and to provide a legal base for possession. It was evident that the *ius* and *iura in rem* did not express a relation between a person and the thing but a relation between persons with respect to things: the owner was entitled to exclude all others from the enjoyment of the thing, unless they agreed differently.[37]

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[35] Yun-Chien Chang/Henry E. Smith, An Economic Analysis of Civil versus Common Law Property, in 88 Notre Dame L.Rev. (2012), pp. 1 ss./4

[36] Chang/Smith, op. cit, p. 8

[37] For a full description, cf. R. Knieper, Gesetz und Geschichte, 1996, Teil V; for completeness sake it must be mentioned that the Austrian Civil Code of 1811 still perpetuates both forms of property in its § 357, albeit without any ongoing practical consequences. The “Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich” formulated that the feudal rights “owe their existence a formation of political and economic conditions long passed. […] The few remains are obsolete and condemned to vanish and do not merit to be integrated into the Civil Code” (Motive Volume III, p. 6 –translation R.K.)

Despite discussions, the UK did not follow suit, stuck to the evolving concept of scaled property rights on land, according to which until today nominally all land still belongs to the monarch, which necessitates a more relational and less abstract definition of property rights. This is as uncontested[38] as it is uncontested that English land law is among the most complicated and non-transparent systems of advanced countries. It is hard to find reasons to celebrate the "feudalism and gradualism of common law" as superior to the "Roman origins and anti-feudal Roman-based reform in civil law"[39]. This is all the less understandable because it is recognized that "politically provided public goods like law can be expected to show increasing returns" by their consistency and network effects, while the common law generates high fixed and functional costs.[40]

This latter statement is corroborated by data on expenditure both by the State and by private persons for the judiciary and legal services in common law and in civil law jurisdictions: In 2015, H. Berrer et al. have collected, analysed and presented comparative data on legal costs in a number of European States in a study commissioned by the Council of the Notariats of the European Union (CNUE). The States were both from common law and civil law traditions. They found that total expenditure for legal services, including both government and private expenditure, reached 1.7% of GDP in Ireland, 2.3% in the United Kingdom against 1.2% in the Netherlands, France and Germany, and 1.0% in Austria. As to government expenditure on law courts per capita, it amounted to 151 € in 2008 and to 131 € in 2010 in the United Kingdom, to 106 € and 109 € respectively in Germany, to 79 and 89 espectively in the Netherlands and to 64 € and 99 € in France.[41]

As to private expenditure for the acquisition of legal services, the Study measured the total turnover of legal service providers to individuals and corporations. According to the Study, the total turnover amounted to per capita was 460 € in 2008 and 426 € in 2010 in the United Kingdom and to 432 € and 391 € respectively in Ireland, while in Germany and the Netherlands it was less than 200 € for both years.[42]

[38] Chang/Smith, op. cit.; Mahoney op. cit.; R. La Porta/F. Lopez-de-Silanes/A. Shleifer/R.W. Vishny, op. cit.

[39] Chang/Smith, op. cit. p. 52; also Mahoney op. cit.

[40] Chang/Smith, op. cit., pp. 15 and 9

[41] H. Berrer et al., Dimensions of Legal Certainty in the EU, Study commissioned by the CNUE in 2015, pp. 8-9 and 129-137

[42] H. Berrer et al., op. cit., p. 135 s.

The authors concluded that “[i]t can be safely assumed that a codified legal system combined with the presence of civil law notaries contribute to curbing high private expenditure on legal matters”[43]

The results are accentuated by extending the research to the USA. In 2016, Thomson Reuters Executive Institute reported that the legal services market in the USA amounted to 437 billion USD[44], with a population of 323,157,513[45]. This leads to a per capita private expenditure, measured as total turnover on the legal services market, of 1,352.30 USD.

[43] H. Berrer et. al., op. cit., p. 136

[44] Legalexecutiveinstitute.com/wp-content/uploads/2016/1

[45] www.census.gov/data/datasets

6 The significance of transaction costs

It costs money and takes time to establish authentic instruments. These costs increase the total costs of transactions. As with all infrastructure, it is appropriate to test the usefulness of notarial activities for the smooth, cost-effective and fair process of transactions on the market.

Authentic instruments affirm certain economically important facts with probative force. They confirm the identity of actors on the market, the facts as documented in the instruments, and the legality of transactions. Business partners as well as bystanders are entitled to trust the content of the instrument without further inquiry and without having to scrutinize the trustworthiness of the parties involved. Personal trust is replaced by institutionalized trust. They are – together with public registers, which rely on the authentic instrument – the reason for good faith acquisitions. In his studies on economic history, D. North has found that the legal development towards a possible creation of property title in favour of a bona fide purchaser of goods from a non-owner was crucial for modern trade.[46]

These are effects of authentic instruments that are put forward to justify their existence and efficiency notwithstanding undisputed costs. Two major arguments are used against them. One flows from neo-classical economic theory and its approach to legal certainty. The other one does not deny the merits of legal certainty but argues that it can be established more cost-efficiently by private functional equivalents. We will turn to these arguments one by one.

6.1 The View of Neo-Classical Economics

In a nutshell[47], neoclassical economic theory models an actor on the market, an *homo oeconomicus,* who pursues his/her individual preferences in perfect knowledge of all relevant characteristics of the goods, is fully informed about the other market players who in turn are ready to communicate any information; information asymmetries are absent, as much as market power and dominance; all actors try to maximize their own

[46] D.C. North, Institutions, Institutional Change and Economic Performance, 1990, p. 129

[47] For a fuller discussion and references cf. R. Knieper, Notariat, pp.85-90; O.E. Williamson, The Economic Institutions of Capitalism, 1985, pp. 55 ss.; Douglas. W. Allen, Transaction Costs, 1999

utility while at the same time acting in full compliance with laws and contracts. The model abstracts from information asymmetries, from fraud on the market place, from obfuscation of facts, from illegality and assumes that transaction costs are mostly costs of transportation of goods. The State is considered as an interventionist bureaucracy pursuing its own agenda, thus generating superfluous costs and time constraints. Civil law notaries are certainly part of the State.

The theory bears little resemblance with the real world or legal history. That is acceptable for a theoretical model that does not try to analyse facts but explicitly makes assumptions which are not meant to correspond to reality. It allows mathematical exercises, as is the case for neoclassical theory. A pure model can play with abstractions and assume that no fraud, no information asymmetry, no obfuscation of facts, no illegality exists and that thereby transaction costs are zero or close to zero.

E. Goebel has summarized and criticised the model world as follows: “First of all, the notion of an ideal-typical situation is conceived, arriving at an optimum initial allocation of resources that is perceived as being just by all. Then resources are exchanged, solely by means of voluntary contractual agreements, with all individuals being fully informed of the exchange conditions. There are no external effects and no public goods. All assets are in well-defined private ownership, held by individuals (...). It is not difficult to recognise the microeconomic ideal world in this model. All of a sudden, this theoretical model turns into a statement of fact and eventually even a role model. If the market with its exchange relationships functions so perfectly, it is only logical that the state should refrain from interfering in the market. However, as the perfection of the market is not a reality, this conclusion is a fallacy”.[48]

Indeed, any economic model assumptions are perfectly legitimate, as long as they are declared as such. What is, however, extremely disturbing and misleading – both from a practical and an academic perspective – is the endeavour of suddenly proclaiming model assumptions to be the ideal prototype and to even go so far as to redefine the model as a reality to be aspired to and then to call upon the countries of the world to realign their laws and their institutions to fit this model.

[48] *Göbel*, Neue Institutionenökonomik – Konzeption und betriebswirtschaftliche Anwendungen, p. 354 (translation by author).

By way of illustration, I present microeconomic model assumptions of the Doing Business Report when approaching the issue of starting a business. The topic is relevant for the appraisal of the activities of notaries, since in in many jurisdictions they play an important role for the provision of legal certainty: As documented in Table I (Role of Notaries), in a whole range of jurisdictions such as Andorra, Argentina, Austria, Belgium, Bulgaria, Colombia, Congo, Costa Rica, Germany, Guatemala, Italy, Lithuania, Luxembourg, Mali and Uruguay, notaries authenticate the founding documents, identify members and the representatives of capital companies and thus prepare the registration. In some of these countries, they equally assure the correctness of decisions of shareholder meetings.

In order to assess the efficiency of third party participation for starting a business, the Doing Business Report in its 2009 edition conceived a limited liability company having five shareholders, which has full and complete information available to it,[49] employs between 50 to 201 staff,[50] who are, on average, male, 42 years of age, not organised in a trade union and belong to the same ethnic group and religion as the majority of the population within its particular economy.[51] The company complies with the law,[52] adheres to the rules of the market, adjusts its prices in line with demand and is prepared to either leave or re-enter the market depending on the competitive situation.[53] Although the presumptions have slightly changed over time – the gender, religion and race specifications or the aspect of trade union organization have been deleted in the 2016 and 2017 edition but the owners continue to be sane, without criminal record and monogamously married[54] - the Report repeatedly stresses that it does not include the macroeconomic conditions of any given country, the quality of its infrastructures and institutions and the level of education of its populous in its assessments of an enabling, favourable, advantageous and superior business

[49] Business (2009), p. 61.

[50] Business (2009), pp. 63, 64, 66, 67, 73, 75.

[51] Business (2009), p. 66.

[52] Business (2009), p. 66.

[53] Business (2009), p. 10.

[54] Business (2016), pp.122 ss.; Business (2017), p.118

climate,[55] arguably because this would make it more difficult to treat all countries – from Afghanistan to Zimbabwe[56] – in accordance with the same formula.

If such type of randomly chosen criteria were met in reality, a minimalist State without notaries, but also in principle without lawyers, courts or the police would be adequate. State institutions would only be a nuisance for the comparison of data. In a model world of zero transaction costs, legal certainty, the protection of third parties and of good faith in public registers are not relevant, not even the very concept of preventive justice. If every individual was fully informed of all relevant factual and legal circumstances of a transaction and if every actor on the market respected the law and its contractual obligations, efforts to create and maintain legal certainty, to protect good faith and to justify trust would be superfluous and could be considered as unnecessary expense of time and money before a transaction.

However, things change when economic models are used to make policy recommendations for the real world, for instance to eliminate mandatory notarial authentication of documents because they are costly and take time.

6.2 New Institutional and Behavioural Economics

The irresponsiveness of the model to reality leads to extreme divergences of findings and statements between the Doing Business Reports and other, more empirically based studies. While Germany for instance ranks at place 107 in the 2016 edition, place 114 in the 2017 edition and place 113 in the 2018 edition of the Doing Business Report for the ease of starting a business, which is partly blamed on the intervention of a notary, the 2017 *A.T. Kearney Foreign Direct Investment Confidence Index* has explored real investor preferences and found that Germany ranks second world-wide, "which likely reflects its business-friendly regulatory environment"[57]. Germany is but an example. The almost systematic mismatch between the ranking of countries in the Doing Business Reports on the one hand and the real economic strength as well as the confidence of investors is documented in the following comparison.

[55] Business (2009), pp. V, 1, 79; Business (2017), p. 15

[56] Business (2017), pp. 188-251.

[57] 2017 A.T. Kearney Foreign Direct Investment Confidence Index, p. 1

Table III "Comparison of Doing Business Report ranking with GDP and investor confidence"

Subject matter / State	Ease of Doing Business Rank (DBR)	Starting a Business Rank (DBR)	Registering Property Rank (DBR)	Enforcing Contracts Rank (DBR)	GDP Rank (IMF)	2017 A.T. Kearney FDI Confidence Index Rank
Argentina	116	157	114	50	21	n/a
Austria	19	111	30	10	28	24
Belgium	42	17	131	52	25	22
Brazil	123	175	128	37	9	16
Bulgaria	39	82	60	49	79	n/a
China	78	127	42	5	2	3
Colombia	53	61	53	174	43	n/a
Congo, Dem Rep	184	96	156	171	89	n/a
Congo, Rep	177	178	171	155	142	n/a
Costa Rica	62	125	52	125	76	n/a
Croatia	43	95	62	7	81	n/a
Estonia	12	14	6	11	104	n/a
France	29	27	100	18	6	7
Georgia	16	8	3	16	118	n/a
Germany	17	114	79	17	4	2
Hungary	41	75	28	8	58	n/a
Italy	50	63	24	108	8	13
Japan	34	89	49	48	3	6
Korea, Rep	5	11	39	1	11	18
Latvia	14	22	23	23	99	n/a
Lithuania	21	29	2	6	87	n/a
Luxembourg	59	67	88	15	75	n/a
Mali	141	108	135	156	120	n/a
Mexico	47	93	101	40	15	17
Morocco	68	40	87	57	60	n/a
Netherlands	28	22	29	71	18	14
New Zealand	1	1	1	13	53	23
Poland	24	107	38	55	24	n/a
Portugal	25	32	27	19	47	n/a
Puerto Rico US	55	51	153	97	61	n/a
Russian Federation	40	26	9	12	12	n/a
Rwanda	56	76	4	95	140	n/a
Slovak Republic	33	68	7	82	64	n/a
South Africa	74	131	105	113	39	25
Spain	32	85	50	29	14	11
Switzerland	31	71	16	39	19	12
Turkey	69	79	54	33	17	n/a
United Kingdom	7	16	47	31	5	4
United States	8	51	36	20	1	1
Uruguay	90	60	110	111	78	n/a
Vietnam	82	121	59	69	48	n/a
Ukraine	80	20	63	81	66	n/a

Sources: Doing Business Report 2016 (available at http://www.doingbusiness.org/rankings); IMF-Estimation 2016 (available at http://www.imf.org); 2017 A.T.Kearney Foreign Direct Investment Confidence Index

Therefore, it is not surprising that other schools of economic thought, conventionally called 'new institutional economics' and 'behavioural economics', try to integrate economically important aspects or reality into its analysis, for instance by emphasizing the reality of information asymmetries, of unequal bargaining power, of strategies aimed at "the incomplete or distorted disclosure of information, in particular wilful attempts to mislead, distort, conceal, obfuscate or to otherwise confuse".[58] In the real world of markets, costs to establish, maintain and transfer property are unavoidable, and the function and economic pertinence of the public and neutral service of notaries appear in a completely different light.

The basic theoretical assumptions on self-interest and the pursuit of individual preferences on the market as tools to interpret market mechanisms are not challenged, but the mere model assumption of socially non-stratified, equally powerful/powerless, perfectly rational and perfectly informed *homines oeconomici* or 'Econs' who go about maximising their respective utilities in a (market) world without transaction costs. Over the last decades the realisation has dawned that such a constructed model world does not permit to make reliable predications about the real world. Despite divergence on specific issues,[59] 'new institutional economics' as well as 'behavioural economics' include empirical observations and reality into models: The fact that market participants are not fully informed and act from a point of uncertainty, that market power exists and is abused, that the rights of disposition over the goods exchanged in the market are structured differently, that individuals or 'Humans' are not only driven by a market-rational risk/reward calculation but act – under the conditions of a restrictive rationality – either in a co-operative or opportunistic manner, either in compliance or non-compliance with the law, and that the procurement of information, the production process and transactions themselves cost real money and take real time, all of which are now being acknowledged.[60] Formal and informal institutions, laws and regulations, legal advice by lawyers and notaries, trade practices, customs and their practical

[58] *O. E. Williamson,* The Economic Institutions of Capitalism, 1985, p. 47.

[59] From the large number of works dedicated to the evolution and differing approaches of institutional economics, I would like to cite *M. Erlei/ M. Leschke/D. Sauerland*, Neue Institutionenökonomik (New Institutional Economics), 1999; *R. Richter,* The New Institutional Economics: Its Start, its Meaning, its Prospects, in: European Business Organization Law Review, 6 (2005), pp. 161 et seq.; *E. Göbel*, loc. cit., part II in particular.

[60] For behavioural economics cf. R. H. Thaler, Misbehaving

implementation exist and develop in exchange with these realities and require an understanding.

Empirical studies on the quantum of transaction costs are rare. That is partly due to the complexity of the endeavor and partly to the lack of consensus of the exact definition of their content.[61] In one of the widely used studies, the authors, of whom Nobel laureate D. North, describe them as follows: “Not all of the transaction costs, for either the buyer or seller, occur at the point of exchange. Some costs occur before the exchange. These include gathering information about prices and alternatives, ascertaining the quality of the goods and the buyer's or seller's credibility, and so on. Other costs occur at the point of exchange. These include waiting in lines, paying notaries, purchasing title insurance, etc. Finally, some transaction costs occur after the exchange. These include the cost of ensuring that the contract is enforced, monitoring performance, inspecting quality, obtaining payment, and so on. The terms "coordinating," "enacting," and “monitoring" costs refer to the time dimension of transaction costs, whether the costs occur pre, during, or post exchange.”[62]

Wallis and North have measured that transaction services have increased from 25 % to 40% of the US economy between 1870 and 1970. They have attributed this growth in good part to the specification and enforcement of property rights and to the increase of impersonal exchange as opposed to personal exchange of goods and services, which is characterized by the intimate knowledge of the persons involved and the circumstances of the transactions, causing a reduction on costs of contracting.[63]

Another attempt to directly measure transaction costs has been more selective and tried to evaluate these costs in naval shipyard contracts. It was found that total organization costs amounted to 14%. However, when contractual agreements were incomplete, they would increase to up to 70% of the value of the contract.[64] The important point here is that the quality of a contract reduces transaction costs.

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[61] Cf. D.W. Allen, Transaction Costs; also S.Voigt/H. Engerer, Institutions and Transition – Possible Policy Implications of the New Institutional Economics, 2000, pp. 146/147

[62] J. Wallis/D.C. North, Measuring the Transaction Sector in the American Economy, 1870-1970, in: Engerman/Galman (eds.), Long Term Factors in American Economic Growth, 1986, pp. 95-148/98

[63] Wallis/North, op. cit., p. 122, Benito Arruñada, Institutional Foundations of Impersonal Exchange

[64] Allen, op. cit., p. 912

We learn from these studies that transaction costs exist, that they are difficult to measure, that they can increase or decrease depending on the social fabric and homogeneity, the degree of information of market actors and on the quality of legal services. In this respect, Wallis and North insist that some transaction costs can reduce or offset others. In the case of the purchase of a house, they list indiscriminately costs for legal services, title insurance and costs for establishing the credibility of the seller (his position as owner). That is an understandable perspective in the US-context. We will try to measure how the services and costs of notaries fit into this picture.

7 Digitization?[65]

No profession has remained untouched by the impact of digitization and this is also true for the notarial profession. Notaries had to cope with a changing landscape and increasing demands since the nineties, when changes started to appear in companies' and land register procedures, increasingly shifting to electronic formats and online transmissions. Notaries have readily embraced these challenges and helped to achieve significant gains in speed and quality of the services provided while retaining the core tenets of their role in the process, interacting directly with citizens, providing secure legal structures for transactions and necessary supervision of the process. In many countries, notaries have even been the driving force in adapting new technologies, making large investments and building an infrastructure that provides an appropriate level of privacy and security to fit the sensitive data handled within their processes. These technological advances allowed notaries to assume new roles and responsibilities, for instance by supporting authorities in detecting and handling cases of money laundering. One of the core technologies embraced and established by notaries are advanced electronic signatures, widely regarded as one of the best answers to secure identification of participants in electronic transactions.

While the technological advances of the last two decades had a great impact on the way notaries conduct transactions and interact with courts, public authorities and financial institutions, their role as a provider of mutual trust and of required legal expertise in planning, structuring and handling transactions has not seriously been questioned. Recently emerging technologies, primarily "Blockchain"-based systems for data storage and new approaches to automated procedures ("Smart Contracts") are however currently posing new questions regarding the functions that notaries traditionally provide.

Blockchain has been described as a technology capable of creating trust in circumstances that have previously been lacking in that regard, especially in online environments. This may apply to the trust that a buyer has sufficient funds to meet his obligations and that these will be securely transferred to the seller in due time (usually provided by a bank) or the trust that a person actually owns a house that he is selling

[65] The Chapter on Digitization has been contributed by Dr. Dominik Gassen, Notary In Bonn/Germany

(usually provided by a land register entry). Blockchain systems provide an environment that makes it difficult to manipulate stored information and as a result offering factual certainty without having to include a trusted third party in the process. This is achieved by a system that combines elements of cryptography/signature technology with the shared distribution and hosting of data.

“Smart Contracts” are a separate idea from that. Their basic concept is that in a business environment that is completely digitized, transactions can be structured like computer programs, executing automatically once certain preconditions have been met - completely controlled by distributed autonomous systems communicating on the internet. One example that is frequently mentioned is the execution of a house sale and the accompanying coordination with banks, financial and other public authorities and land register institutions.

Both ideas presume the existence of a reliable system of securely identifying participants in online transactions (“e-ID”).

These concepts seem to question the continuing role of the notary in a completely digitized business environment. But as with every innovation that is part of the digital “hype cycle”, a modicum of sober reflection is necessary. Up to now there is very little evidence that the proposed technology can actually produce the promised results in an environment that reflects the complexity of everyday transactions. Up to now we have only seen demonstrations or studies in laboratory environments, cherry-picking cases with sharply reduced complexities that do not come close to the reality of real estate markets. But apart from the lacking maturity of the technology there are quite a lot of fundamental questions that challenge the assumption that notaries or traditional land register administration will be expendable any time soon.

The necessity to establish a system of “manufactured trust” (which Blockchain offers) is primarily interesting in legal systems which suffer of a significant lack of trust to begin with, as is the case in common law jurisdictions, where one has to take out an insurance policy to protect oneself against transaction risks. On the other hand, established traditional trust systems such as stable land registers in a well-governed system of administration of justice are considered very low-risk to begin with. A change to these well-functioning systems which have already been digitized to a good degree

does not so much solve a problem but create new risks by replacing reliable structures with untested ones for unclear benefits.

Sometimes the case is made that Blockchain-based systems could be helpful in countries where State authorities themselves cannot be wholly trusted - by democratizing trust via Blockchain. This epitomizes a single-minded trust into the ability of technology to solve societal problems that borders on naiveté. There is always a whole host of other problems on many social levels that produce such a situation and they will not be solved by simply introducing a piece of new technology as a cure-all. While Blockchain will make certain types of manipulation more difficult, there are enough other avenues for interested parties with access to the system to exert undue influence - the current pratfalls of Bitcoin and other virtual currencies should be a cautionary tale.

As every practitioner knows, real estate transactions are a complicated area of law that produces mostly particular cases that require the intervention of an experienced legal professional to help less experienced parties with the process. Different forms of ownership, multitudes of property rights, diverging structures of property, complexities connected to financing - all make for a legal terrain that is very difficult to adequately represent in an automated environment. As of now it is doubtful if an all-encompassing system can be implemented technically and if such an undertaking is feasible economically.

In such cases there is regularly a call for simplification and reduction of complexity in favor of more streamlined processes - which would make the programmers' jobs a lot easier. However, in this case complexity is a feature rather than a bug. Mature societies with well-developed legal systems actualize freedom of their citizens by giving them more options and choices - to adequately address a host of different situations and challenges. There are good reasons for introducing most if not all variations in rights and procedures. A "dumbing down" of a legal system to facilitate the transfer to an automated/digital environment is not a good trade-off for society if a (disputable) reduction of transaction costs is paid for with the loss of necessary and well established legal options. Notaries excel in making citizens aware of available legal options and enabling them to choose the best for their situation.

There is also a good case to be made that the long-term goal of streamlining and acceleration of real estate transactions is only desirable up to a point - both from the perspective of consumer protection and society economics. For the average citizen, the sale and acquisition of a house or a piece of land should be a decision not to be taken easily in the spur of a moment but only after careful consideration and input from competent advisors. It is not a boon for the consumer if s/he can close a contract on a property at a moment's notice online only to regret it later without remedy. There is good reason that legal systems all over the world make additional requirements to make sure that decisions that will impact the future of the individual on a major scale cannot be made on a spurious whim.

From a societal point of view, land is one of the central resources of a national economy and often subject to public interests and policies that supersede the individuals' rights. An overheating market in which real estate is bought and sold as a commodity in large volume and in the space of minutes or seconds will not be in the country's best interests when establishing new digital procedures.

Finally, there is reason to doubt if the online environment that is necessary for and conductive to the establishment of automated procedures like Smart Contracts will evolve any time soon with regards to real estate transactions. Up to now there are no successful examples for creating an ecosystem with this number of different participants - mostly from the public sphere - that will have to overhaul and invest in their systems, agree on common standards and procedures and implement them to make this a viable option. Experiences with past advances in digitization suggest that the challenges are much bigger that imagined at the start of the project.

There is no way to predict the changes that new technologies will bring in the next decades and how they will impact traditional transactions and the role of legal professionals like notaries. Still, the proposals about Blockchain-based data processing and Smart Contract that are currently engaging the public leave a lot of unanswered questions and fundamental doubts that will certainly require a long process of evaluation before it is prudent to consider a widespread adoption of these techniques in favor of established systems that are working without any major issues.

8 Alternative Production of Legal Certainty

8.1 Different concepts

Be that as it may. In present times, transaction costs are practically unavoidable. The unchanged necessity to secure property titles and to set a frame for cost-effective transactions on the market impose on any jurisdiction to develop institutions which provide for these prerequisites for social welfare and economic efficiency. Credible commitments, the protection of trust and the empowerment of good faith are crucial criteria both for real estate transactions, dealings with companies and other spheres where notaries intervene prominently.

Trust is the key term. Its presence can increase interaction efficiency, while significantly reducing the costs across all phases of the contractual relationship. However, trust must be established, it is risky and it can neither be assumed nor even recommended.[66] Of course, both formal and non-formal institutions can reduce the effects of asymmetrical information and establish trust. One possible alternative is the creation of hierarchical relationships, replacing trust with obedience. This structure may be organised in the form of a company[67], but in principle applies just as much to families or clans that demand absolute loyalty and are able to enforce such loyalty if need be. However, the scope for the organisation of economic relations via personal loyalties is very limited within developed monetary economies and has little use in a globalised world. To organise "impersonal exchange", a third-party impartial enforcer with coercive power and a corpus of rules applied by an effective jurisdiction are considered indispensable.[68]

In this perspective, sustained economic and social development is based on formal and secured title of property, the incorporation of business entities and definitions of their liability.[69] It is appropriate and welcome that also Doing Business Reports start to

[66] *Williamson*, loc. cit., pp. 47, 64 et seq.; *North*, loc. cit., pp. 27 et seq., pp. 125 et seq.; *id.*: Institutions and Credible Commitment, in: Journal of Institutional and Theoretical Economics 149/1(1993), pp. 11 et seq.; *Schäfer/Ott*, loc. cit., pp. 499 et seq.; *Göbel*, op. cit., pp. 6 et seq., pp. 118 et seq.

[67] This is a major topic in *Williamson's* and *Coase's* writings on the nature of the firm

[68] *North*, loc. cit., pp. 35.

[69] O. Steiger, Property Economics versus New Institutional Economics: Alternative Foundations of How to Trigger Economic Development, in: Journal of Economic Issues XL/1 (2006), pp. 183-208; H. de Soto, The Mystery of Capital, 2000

recognize that societies need regulation to correct imbalances of power and asymmetries of information.[70]

However, while the criteria, functions and necessities with respect to the protection of property and the facilitation of transactions cross common law and civil law lines, legal institutions and organizations, which are meant to serve these purposes, vary widely.

With some exceptions, common law jurisdictions trust private initiatives: Buyers and sellers of a house collect information by each hiring a realtor/broker, and a solicitor/lawyer and/or a conveyancer, by conducting a formal title search, by executing a title insurance. Business partners of companies rely on certificates of good standing and legal opinions.

Again with some exceptions, civil law jurisdictions have created, mostly together with their Civil Codes, systems of notaries holding a public office and establishing public, authenticated instruments and/or public registers whose correctness and completeness is publicly guaranteed. The civil law notary is not an agent of either party but a neutral intermediary with an obligation to give dis-interested advice to both parties. The recommendation of British scholars to divide cross-border real estate transactions by having the notary acting for the seller and the newly created conveyancer for the purchaser[71] is not only based on a complete misunderstanding of the role and deontology of the civil law notary, it even outlines a new job profile of a – probably chartered – conveyancer, which will most certainly add to transaction costs.

Civil law notaries are exposed to liability when they fail to advise the parties correctly before authentication. In most countries, the liability is triggered when the notary acts in fault; strict liability is the exception. Courts have been instrumental to specify and concretise the contours of obligations and liability of breach of duty. I quote a number of judgments by the German Supreme Court (Bundesgerichtshof), which would most probably find parallels in other jurisdictions. In general terms, the Court has determined that civil law notaries are under no obligation to instruct the parties as to the economic consequences and the economic feasibility of the transaction being contemplated.[72] It

[70] Doing Business Report, 2016, p. 1

[71] Sparkes EU Study, p. 167

[72] Bundesgerichtshof (BGH) in Deutsche Notarzeitung (DNotZ) 2005, p. 847; BGH in DNotZ 2008, pp. 376, 378.

is up to the market participants to articulate their preferences and to realise their personal expectations as to the potential benefit and utility. However and more specifically, it is the civil law notary's duty to discuss the risks of safeguarding the synallagma of the obligations agreed that may arise from a unilateral advance performance without security[73] or from a complex increase in capital by way of contributions in kind, for example. Civil law notaries must keep in mind that the parties may not recognise material issues that are of paramount importance for the legal transactions or that parties misunderstand legal terms which are also commonly used among non-lawyers and which the parties assert as facts. In all of these cases, civil law notaries must inform the parties accordingly. Civil law notaries must not be satisfied with the parties' assurance that ”everything has been clarified with the banks and our tax advisers”, but are required to determine, in an unbiased manner, to what extent legally relevant information is available to the parties and, where necessary, raise this level of information.[74]

The personal liability for negligent and intentional breach of obligations in all jurisdictions is regularly reinforced by a mandatory insurance with the exception of Colombia, Costa Rica, Guatemala, Korea and Luxembourg. The insurance is reinforced by a guarantee fund in some jurisdictions such as Austria, Belgium, Bulgaria, Colombia, France, Georgia, Germany, Italy, Mali, Morocco, Portugal, Russia and Turkey but not in Congo, Costa Rica, Croatia, Estonia, Guatemala, Hungary, Korea, Kosovo, Lithuania, Luxembourg, Portugal and Slovakia.

[73] BGH in DNotZ 2005, p. 847.

[74] BGH in DNotZ 2008, pp. 376/377, p. 378.

Table IV "Liability"

Subject matter / State	personal liability	limitable liability	strict liability	compulsory insurance	guarantee fund
Andorra	yes	no	no	no, but all notaries are voluntarily insured	no
Argentina	yes	no	no	not mandatory in all provinces	depends on the province
Austria	yes	partly	no	yes	yes
Belgium	yes	no	no	yes	yes
Bulgaria	yes	no	n/a	yes	yes
China	yes	no	n/a	yes	yes
Colombia	yes	no	no	no	yes
Congo, Rep	yes	no	no	yes	no
Costa Rica	yes	n/a	n/a	no	no
Croatia	partly	n/a	no	yes	no
Estonia	yes	no	no	yes	no
France	yes	n/a	no	yes	yes
Georgia	yes	no	no	yes	yes
Germany	yes	no	no	yes	yes
Guatemala	yes	n/a	n/a	no	no
Hungary	yes	no	no	yes	no
Italy	yes	no	no	yes	yes
Korea	yes	no	no	no	no
Kosovo	yes	no	yes	yes	no
Lithuania	yes	no	no	yes	no
Luxembourg	yes	no	no	no	no
Mali	yes	no	no	yes	yes
Morocco	yes	no	no	yes	yes
Portugal	yes	no	no	yes	yes
Russian Federation	yes	n/a	no	yes	yes
Slovak Republic	yes	yes	no	yes	no
Turkey	yes	no	no	yes	yes
Uruguay	yes	n/a	n/a	no	no

Source: Questionnaire

The institutional setting provides regularly that the civil law notaries hold a public office even if they exercise a private profession, that they are independent from other state organs, that they are held to neutrality and impartiality, that there is an operational guarantee of the territorial coverage allowing all citizens to have access to their services, that they have a duty to exercise their profession and authenticate instruments as lawfully requested by clients, and that a combination of regulated tariffs and a *numerus clausus* assures both cost effectiveness and acceptable material living conditions for the notary.

Civil law notaries operate under a system of public supervision and disciplinary sanctions which reach from simple warnings to the revocation of the accreditation. The supervision is independent of the fact that in many jurisdictions notaries have a public office but exercise a private profession. Regularly, disciplinary bodies are the professional Association/Chamber/Council of Notaries, with the exception of Hungary, Guatemala and Uruguay, where the disciplinary power is exercised directly by the courts. In most jurisdictions, as documented by the Table on the institutional setting, there is a combined regime of supervision, exercised by the Chambers of Notaries and the Ministers of Justice. In Morocco, also the Minister of Finance is associated. Disciplinary sanctions can regularly be challenged in court.

The combination of professional qualification and public appointment, private profession and public office, private liability and public supervision, private interest and public determination of tariffs, of duties to exercise and of geographical coverage, in other words a combination of regulation and market mechanisms assure the efficiency of the preventive justice exercised by the notary. It is an ongoing challenge for each legislator but also for legal culture to find and maintain the proper mix of institutional setting.

Table V "Institutional Setting" Source: Questionnaire

Subject matter / State	Public office	private profession	Authority of supervision	disciplinary means	neutrality/impartiality	coverage of the territory	fixed tariffs	duty to authenticate	numerus clausus
Andorra	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	x	x	x
Argentina	x	x	Chamber of Notaries, Courts	x	x	x	depends on province	x	x
Austria	x	x	Courts, Chamber of Notaries, Ministry of Justice	x	x	x	x	x	x
Belgium	x	x	Chambers of Notaries	x	x	x	x	x	x
Bulgaria	x	x	Chamber of Notaries, Ministry of Justice	x	x	x		x	x
China	x	n/a	Association of Notaries, Ministry of Justice	x	x	x	x	x	x
Colombia	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	x	x	x
Congo, Rep	n/a	x	Chamber of Notaries, Ministry of Justice	x	x	no	partly	x	no
Costa Rica	x	x	Ministry of Justice	x	x	no	x	x	no
Croatia	x	x	Chamber of Notaries, Ministry of Justice, Courts	x	x	x	x	x	x
Estonia	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	x	x	x
France	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	partly	x	no
Georgia	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	partly	x	x
Germany	x	x	State Ministries of Justice seconded by Chambers of Notaries	x	x	x	x	x	x
Guatemala	x	x	Courts	x	x	no	no	no	no
Hungary	x	x	Ministry of Justice, Courts, Chambers of Notaries	x	x	x	x	x	x
Italy	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	no	x	x
Korea	x	x	n/a	x	x	x	x	x	x
Kosovo	n/a	n/a	Chamber of Notaries, Ministry of Justice		x	x	x	x	x
Lithuania	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	x	x	x
Luxembourg	x	x	Chamber of Notaries, Ministry of Justice	x	x	no	x	x	x
Mali	x	x	Chamber of Notaries, Ministry of Justice	x	x	no	x	x	no
Morocco	x	x	Chamber of Notaries, Ministry of Justice, Ministry of Finance	x	x	x	no	x	no
Portugal	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	partly	x	x
Russian Federation	no	x	Chamber of Notaries, Ministry of Justice	x	x	x	x	partly	x
Slovak Republic	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	x	x	x
Turkey	x	x	Chamber of Notaries, Ministry of Justice	x	x	x	x	x	x
Uruguay	x	x	Supreme Court, Supervision Authority of notarial registers	x	x	no	x	x	no

The authenticated documents evidence the authenticated facts and circumstances. Everybody, the contracting parties as well as third parties, the general public and the State are entitled to rely on the correctness of the authenticated document. Through the presumption of correctness, the document creates certainty. As to trust, it actually does not create but replaces it: the content of the notarial act provides proof of the statements made, even if the person making the relevant statement is not trustworthy. The authority of the instrument and the presumption of its correctness can certainly be rebutted but it takes special efforts and procedures to do so.[75] In principle, opportunistic negotiation strategies of actors on the market, as described by Williamson[76], are thwarted by the existence of a notarial act.

With respect to the interrelation between the authentic instruments and a subsequent registration in the context of the transfer of title, broadly described, two approaches have developed in different jurisdictions and are codified. In one approach, the instrument authenticates the agreement and consensus and benefits from a presumption of correctness, while at the same time constituting the transfer of title. Andorra, Argentina, Belgium, Bulgaria, Congo and France represent jurisdictions which practice this 'consensus principle'. A subsequent registration has but a declaratory character, albeit important since it can be evoked against third parties. In the other approach, the instrument authenticates the agreement as well. However, the authenticated consensus represents but the initiation of the transfer of title which is completed by the real act of registration, which has therefore a constitutive character. This 'real act principle' is practiced by jurisdictions such as Austria, China, Colombia, Croatia, Germany, Hungary, Russia and Slovakia.[77] Irrespective of the historically grown difference the authentication is the decisive prerequisite for the presumption of correctness and truthfulness which justifies the protection of the good faith acquirer. Systems which base the protection of the acquirer's good faith on the registration alone, without preceding authentication, as seems to be the case in some jurisdictions such as Georgia, would severely violate the balance of interests and a fair distribution of risks between the acquirer, the mistakenly registered seller and a potential real but

[75] Cf. for more details: P. Beaumont et al., The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions, Study for the JURI Committee of the European Parliament, 2016.

[76] *O. E. Williamson*, The Economic Institutions of Capitalism, 1985, p. 47.

[77] For more details cf. R. Cierpial, Gutgläubiger Eigentumserwerb an Immobilien in Mittel- und Osteuropa, in: A. Trunk (ed.), Die Transformation dinglicher Rechte an Immobilien in Russland und anderen Staaten Mittel- und Osteuropas, 2010, pp. 19 ss.

mistakenly unregistered owner, if the registration officer did not have the same level of qualification and independence as a notary and did not deploy the same efforts in the process of verification, information and advice that is deployed by the notary.

In a group of jurisdictions such as Argentina, Austria, China, Colombia, Estonia, Germany, Guatemala, Italy, Kosovo, Lithuania, Luxembourg, Mali, Morocco, Russian Federation, Uruguay, entries into the public registers rely on authenticated documents. The correctness and the content of the documents and the registers are presumed. Civil Codes or ancillary statutes provide for the protection of good faith. Any person's trust in the correctness of the documents and the registers is protected.

With respect to real estate transactions, the registered owner is presumed to be the owner, neither a title search nor a title insurance are needed. An excerpt from the real estate register is sufficient to provide the evidence required for secure and efficient transactions. As documented in Chapter 8.3, these excerpts are generally inexpensive and easy to procure.

Conversely, in jurisdictions without notarial intervention and the presumption of correctness of public documents such as the UK and the USA, no good faith acquisition is legally protected, leading to the necessity of conducting a thorough title search and of concluding title insurances.

In the context of company law, where notaries authenticate central documents for the establishment and ongoing activities of legal persons, the registered company with a registered capital and registered holders of powers of attorney are presumed to be the company, the capital, the representative. Legal opinions, certificates of good standing or other devices of due diligence are superfluous under this system. Practices such as the hijacking of companies or false allegations as to the existence of the company or of statutory representation are easily detected and extremely rare.

Conversely, in non-notarial systems such as the UK and the USA, costly legal opinions and certificates of good standing are needed to assure potential business partners and create in part conditions of trust by private means of due diligence, which pursue objectives similar to those which are reached by the authentic instruments and public registration.

8.2 Preventive v. Curative Justice: Frequency of Litigation

These are mechanisms by which the notary as an agent of preventive justice pursues the public interest in creating and maintaining legal certainty. One of their effects should be to reduce the amount of disputes between parties and alleviate the burden of curative justice and thus save time and expenses. In fact, the assumption that the caseload of litigation over property or mortgage rights before courts is very low where notaries intervene is verifiable. Already in 1996, B. Arruñada assessed that in Spain the notary's involvement in transactions "reduces the litigiousness […] and produces a positive externality by reducing the demand for judicial services and contributing to the "legal peace" which lawyers normally consider to be a desirable public value". Arruñada quotes from an unpublished study which concludes that litigation increases in areas of law where notaries are not involved.[78]

However, empirical evidence is sketchy. We present the Answers to Questionnaire that have been provided and some secondary literature. Andorra reports that litigation with respect to real estate concerns exclusively the period of relations preceding the notarial intervention and that once the notary has authenticated the documents, no litigation is known; in Germany, the Supreme Court received 6,531 new civil law applications in 2015 of which 213 concerned real estate (140 cases concerned contracts, 45 problems of possession and property of real estate, and 28 other *iura in rem),* which is 3.26% in total and 0.69% for possession and title; in Italy, court proceedings with respect to property rights in real estate are "close to zero"; in Lithuania, courts of first instance heard 212 cases concerning the transfer of property of real estate in 2015, out of a total of 208,852 cases, which is 0.1%. Georgia indicates, through its Supreme Court statistics[79], that out of a total of 87,254 civil cases in 2016, 1767 were related to immovable property, which is 2%. The case of Georgia is special to the extent that notarial intervention in real estate transactions is no longer mandatory, whereas in the other four reporting countries real estate transactions are authenticated. Given these figures, it is safe to assume that, indeed, the effect of mandatory preventive justice exercised by the notary keeps the necessity of curative justice and litigation in check.

[78] B. Arruñada, The Economics of Notaries, European Journal of Law and Economics, 3/1996, pp. 5ss./ 7

[79] www.supremecourt.ge/files/upload-file/pdf/2016

The situation is different in the USA, where real estate transactions are in the hands of lawyers and realtors and no register protecting good faith exists. In a Special Report on “Civil Bench and Jury Trials in State Courts, 2005”, dated 9 April 2009, the Bureau of Justice Statistics listed 1,633 real property cases out of a total of civil trials of 26,948, which is 6.1%. It is remarkable that of these 1,633 cases 963 cases, i.e. 3.6% of the total, are related to “title or boundary disputes”, which do not play any significant role in jurisdictions with reliable cadastre and registers, which protect the good faith of the acquirer.

Further and as said, the profession of the notary is regulated. That starts with high professional entry requirements and a duty to ongoing training. In addition, notaries are supervised by their professional associations as well as by State institutions. Finally, clients are protected by the notary’s liability but also by mandatory insurance and guarantee fund schemes. One of the effects of these combined requirements is a low number of disputes involving notaries.

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[80]. 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)”[81]; 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.

[80] European Commission for the Efficiency of Justice (CEPEJ), European judicial systems – Efficiency and quality of justice, Edition 2016, Chapter 14 – Notaries, p. 9

[81] CEPEJ Study, p. 9

A study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, although mostly critical towards notaries, quotes two authors,[82] of whom one confirms that only one authentic instrument out of thousand becomes subject to a court dispute in Germany,[83] 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.[84]

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."[85]

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."[86]

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.[87] That is the second most important category of malpractice claims, behind personal injuries claims. Real estate law

[82] P. Sparkes EU Study, "Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens" Study commissioned by the European Parliament Policy Department of Citizens' Rights and Constitutional Affairs, 2016, p. 160

[83] R. Geimer, The Circulation of Notarial Acts (XXIII International Congress of Latin Notaries) p. 7/29

[84] H. Dyson, French Property and Inheritance Law, 2nd ed, 2003, p. 8

[85] CEPEJ Study, p. 9

[86] D. Silva, Legal Ease, San Jose Mercury News (California), 27 March 2009

[87] American Bar Association (ABA), Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims 2012-2015, September 2016, pp. 11-13

"includes legal activities dealing with all aspects of real property transactions including, but not limited to, real estate conveyances, title searches and property transfers…"[88].

"32.66% of all errors reported relate to the preparation, filing and transmittal of documents."[89] A commentator explains that "[t]hese errors do 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."[90]

The comments read like a pleading in favour of preventive justice and notarial professionalism.

8.3 Costs of Conveyancing

Both the approaches of the common law to rely on private initiative to create legal certainty and of the civil law to rely on authentic instruments and public registers target the protection of private interests of participants on the market. The public character of the latter approach points to a policy conviction that the creation and protection of trust and good faith in private transactions through legal certainty is also a public and societal responsibility and not a hidden agenda of public state bureaucracies. The authentic instrument is part of social infrastructure.

Both the common law and the civil law approaches are path dependent. However, they are not locked-in and persist despite proven inefficiency but seem to be considered efficient in their specific historical contexts with respect to their objective, i.e. to create credibility, reliability and legal certainty. This is the quality aspect which had been neglected in the first editions of the Doing Business Report in favour of a purely procedural efficiency and which starts to be taken into account now.

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[88] ABA Study 2016, p. 29

[89] ABA Study 2016, p. 27

[90] D. Chandler, ABA 2015 Study on Legal Malpractice Claims – Numbers don't Lie: http://www.chandlermoorelaw.com/legal-malpractice/aba-2015-study-legal-malpractice-claims-numbers-dont-lie

As to the important aspect of procedural efficiency, which evaluates costs and time spent for a transaction, it seems evident that all elements have to be taken into account which are considered necessary to reach the goal of legal certainty. That includes – in the words of Wallis/North – all "coordinating," "enacting," and “monitoring" costs of transactions. Even when legally not mandatory, costs that are factually imposed by the necessity to keep uncertainty in check.

Title search and title insurance in real estate conveyancing are both integral parts of them. These costs exist in common law jurisdictions but not in civil law jurisdictions using authentic instruments. It is not admissible to define them away and to restrict the elements of transaction costs to different fees for technical and legal services thereby hoping to arrive at results more favourable to the common law system and to be able to discredit the notarial system and regulation. This is exactly what a recent Study on the Conveyancing Services Market did. It described transaction costs as to “comprise fees to professionals, such as real estate agents, for technical services (surveyor etc.) and for legal services (lawyers, notaries, licensed conveyers), and, in addition, fees for land registration and taxes”. Fees for title search and for title insurances, which are absent in notarial systems and which are incurred systematically in common law systems to arrive at some type of legal certainty as a functional equivalent to the authentic instrument, were simply neglected.[91] However, it is worth noting that despite the inadmissible neglect the Study does not fully succeed to draw a clear line of cost effectiveness between the jurisdictions with a notarial and without a non-notarial system. It cannot fail to notice that transaction costs in any jurisdiction are “dominated by fees to real estate agents” that account for at least 70% of the total[92] and that the legal fees of conveyance are higher in England and Wales than in Germany, the Netherlands, Poland, Portugal, Slovakia and Spain.[93] The polemics against the notary[94] are not backed by its own empirical findings.

By this token, it was also neglected to consider a difference of protection, which is of utmost importance for purchasers for homes but also of other real estate: the title insurance leads to monetary compensation, whereas the purchase of land based on

[91] ZERP-Study, pp. 112-137

[92] ZERP Study, p.112

[93] ZERP Study, Figure V-3 on p. 116

[94] Cf. ZERP Study, pp. 49 ss.

authentic instruments and registration guarantees the finality of the acquisition, i.e. the primary objective of the buyer. One of the general distinctions between most common law and civil law jurisdictions finds a specific application: While the general obligation of sellers in civil law jurisdictions is primary and specific performance, the common law normally orients to monetary compensation.

Already in 1996, B. Arruñada compared legal costs associated with real estate transactions and found that they "appear to be *substantially cheaper* in countries with Civil Law notaries than in countries with Common Law notaries. Although no general conclusions can be extracted from this data due to its fragmentary character, both the direction and amount of the differences in favour of the Civil Law system are remarkable".[95] He has presented calculations according to which the legal costs for the purchase of real estate valued at 75,000 USD in the USA and in Spain – including an average of title insurance and lawyers' fees in the USA and notary's fees in Spain and land registry fees in both countries – were 437 USD in Spain against 1,156 USD in the USA.[96]

P. Murray has compared these costs in 2007 for four civil law and three common law States.[97] We present his findings for transfer costs for real estate of a value of 100,000 € (land) and of 250,000 € (land and house). Murray's complete Tables are reproduced in Annexes to this Study.

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 9.16% of total costs.[98]

[95] B. Arruñada, The Economics of Notaries, European Journal of Law and Economics, 3/1996, pp. 5ss./33

[96] B. Arruñada, op. cit., Table I on page 44

[97] P.L. Murray, Real Estate Conveyancing in 5 European Union Member States: A Comparative Study, 2007 – for the USA, the term 'State' has to be taken literally because it refers to the States of Maine and New York.

[98] Murray, Condensed Report, Table C-1 on page 18

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.[99]

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 notarial conveyance fees , 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.[100]

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

[99] Murray, Condensed Report, Table C-2 on page 20

[100] Murray, Condensed Report, Table C-3 on page 21

broker's fees amounted to 50.77% of total costs.[101] 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.[103]

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

[101] Murray, Condensed Report, Table C-5 on page 24

[102] Dual Conseil, Etude sur la Pertinence Economique du Notariat, p. 38; http:/www.isisconveyancing.co.uk./news. Dual Conseil has also presented average legal costs for buyers and sellers in the UK which are slightly higher than those presented by Murray. Without contesting the method of calculation, we have preferred to stick to the Murray figures that are based on a much larger sample

[103] Murray, Condensed Report, Table C-5 on page 26

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"[104].

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[105], and he based his findings for the upstate New York market on precise information of which he formed averages.[106] 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.[107]

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[108], and Murray in a book of 2010, co-authored with Stürner.[109] 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

[104] Murray, Condensed Report, p. 25; confirmed in P.L. Murray/R. Stürner, The Civil Law Notary – Neutral Lawyer for the Situation, 2010, p. 67

[105] Murray, Study of November 2007, pp. 335 s.

[106] Murray, Study, pp. 393 ss.

[107] ZERP Study, pp. 187 ss. (part of the Study on England and Wales conducted by P. Sparkes)

[108] P. Sparkes EU Study, pp. 134 ss.

[109] P.L. Murray/R. Stürner, The Civil Law Notary – Neutral Lawyer for the Situation, 2010, Table1(page 55) for Germany; Table 2 (page 68) for England and Wales; Table 3 (page 87) for France; Table 5 (page 101) for Estonia; Table 6 (page 143) for upstate New York/USA

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.[110]

[110] Dual Conseil, Etude sur la Pertinence Economique du Notariat, pp. 39 ss.

In all countries that have submitted Answers to the Questionnaire the respective amounts and percentages of notarial fees and registration fees vary widely. It is impossible to draw clear conclusions and comparisons as to cost effectiveness in notarial systems and non-notarial systems. We present some of the reported figures and percentages in the text and a more complete set of figures in the Table.

In **Andorra**, notarial fees are 550 € for the 100,000 € scenario which corresponds to 0.55% of the sales price, and 870 € for the 250,000 € scenario, which corresponds to 0.35 of the sales price. There is no registration fee. An extract of the register costs 30.05 €.

In **Argentina**, suggested notarial fees represent in principle 2% of the sales price, which would lead to up to 2,000 € in the 100,000 € scenario and up to 5,000 € in the 250,000 € scenario. The registration fee amounts to 2 ‰, leading to 200 € in both cases. An extract of the register costs 30 €.

In **Belgium**, notarial fees amount to 1,593.66 €, which corresponds to 1.59% of the sales price, and registration fees to 220 €, which corresponds to 0.22% for the 100,000 € scenario, and notarial fees amount to 2,448.66 €, which corresponds to 0.98% of the sales price, and the registration fees to 220 €, which corresponds to 0.22% of the sales price, for the 250,000 € scenario. An extract of the register costs between 6.94 € and 14.84 € per page.

In **China**, notarial fees are calculated as a digressive percentage of the sales price. For prices under 500,000 €, they are 0.3 %, leading to fees of 300 € in the 100,000 € scenario, and of 750 € in the 250,000 € scenario.

In **Colombia**, notarial fees amount to roughly 400 € in the 100,000 € scenario, which corresponds to 0.4% of the sales price, and to 1,015 € in the 250,000 € scenario, which corresponds to also to 0.4% of the sales price. Registration fees are 500 € for the 100,000 € scenario and 1,250 € for the 250,000 € scenario, i.e. 0.5% in both cases. An extract of the register costs 4.50 €.

In **Congo**, notarial fees amount, in accordance with the tariff established by the General Assembly of the Chamber of Noatries, to 3,524.49 € in the 100,000 € scenario, which corresponds to 3.52% of the sales price, and to 3,689.18 € in the 250,000 €

scenario, which corresponds to 1.48% of the sales price. No figures are reported for the registration. An extract of the register costs 45 €.

In **Croatia**, notarial fees amount to roughly 410 € the 100,000 € scenario, which corresponds to 0.41% of the sales price, and 440 € for the 250,000 € scenario, which corresponds to 0.18% of the sales price. Registration fees amount to 33 € regardless of the value of the transaction, i.e. 0.013% for the 250,000 € scenario. Costs for an extract of the register is calculated in accordance with the number of pages requested.

In **Georgia**, notarial fees amount to 265 € for the 100,000 € scenario, which corresponds to 0.27% of the sales price, and 510 € for the 250,000 € scenario, which corresponds to 0.2% of the sales price. Registration fees vary between 20 € and 80 €, depending on the requested speed of the registration, i.e. 0.008% and 0.03% in the 250,000 € scenario. The extract of the register costs 5.90 €.

Italy reports that after the abolition of notarial tariffs negotiated fees turn around 0.5 of the sales price, which would lead to an amount of roughly 500 € in the 100,000 € scenario and 1,250 € in the 250,000 € scenario. Registration fees are 2% of the value, leading to 2,000 € in the 100,000 € scenario and to 5,000 € in the 250,000 € scenario. There are no costs for an extract of the register.

Korea reports that for the voluntary authentication notarial fees are around 1% to 3% of the sales price and for the mandatory registration 2% of the value plus 300 USD service fee. An extract of the register costs 1 US$.

In **Kosovo**, notarial fees amount to 120 € for the 100,000 € scenario, which corresponds to 0.12% of the sales price, and 280 € for the 250,000 € scenario, which corresponds to 0.1% of the sales price. Registration fees are 50 € for the 100,000 € scenario and 140 € for the 250,000 € scenario, i.e. 0.05% and 0.06% respectively. The extract of the register costs 4 €.

In **Lithuania**, notarial fees represent 0.45% of the sales price in both cases, leading to 450 € in the 100,000 € scenario, and 1,125 € for the 250,000 € scenario. Registration fees vary between 5.79 and 289.62 €. The extract of the register costs between 1.74 and 3.19 €.

In **Mali**, notarial fees represent around 1.75% of the sales price in both cases, leading to 1,750 € in the 100,000 € scenario, and 4,375 € for the 250,000 € scenario. Registration fees represent 0.9% of the sales price, leading to 900 € in the 100,000 € scenario and 2,250 € in the 250,000 € scenario. The extract of the register costs 16,000 FCFA, i.e. roughly 24.40 €.

In **Morocco** the notarial fees are 1% of the transaction value, leading to 1,000 € in the 100,000 € scenario, and 2,500 € for the 250,000 € scenario. The extract of the register costs less than 10 €.

In **Slovakia**, notarial fees amount to 691 € for the 100,000 € scenario, which corresponds to 0.69% of the sales price, and 766 € for the 250,000 € scenario, which corresponds to 0.3% of the sales price. Registration fees are between 33 € and 66 € in both cases, i.e. 0.03% and 0.026% in the 250,000 € scenario. The extract of the register costs 8 €.

In **Uruguay**, notarial fees represent 3% of the sales price, leading to 3,000 € for the 100,000 € scenario and 7,500 € for the 250,000 € scenario, which corresponds to 0.3% of the sales price. Registration fees amount to roughly 219 € cases, i.e. 0.22% in the 100,000 € scenario and 0.09% in the 250,000 € scenario. The extract of the register costs around 40 €.

In all systems with notarial authentication, fees for title search and title insurance do not exist. Fees for lawyers are superfluous. All Answers to the Questionnaire confirm that by far the highest amounts of fees are paid to brokers.

From what we have extracted from the Questionnaire and other studies, we can state with confidence that conveyance costs exist in all jurisdictions and must be considered necessary transaction costs in light of uncertainty and information asymmetries. The intervention of notaries is one of the possible forms to create certainty efficiently. Where they are absent, they are replaced by lawyers/solicitors who act in the interest of the seller and the buyer respectively, whereas the neutral notary acts for both sides. Where the certainty of title is not assured by the authenticated act and registration, cost for relevant title search and title insurance are functional equivalents.

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".[111]

We have extended the research to other jurisdictions. The results are presented in Table VI under Annex C. The figures reveal the following:

Firstly, we have not found that cost effectiveness is an inherent element in one or the other system. The majority of States demonstrates that the public policy objective of legal certainty by the administration of preventive justice is reconcilable with cost effectiveness by a regulated, tariff-based fee system. There is no indication that tariffs lead structurally to unmeritorious rents and that de-regulation rhymes systematically with cost-effectiveness. However, in a number of jurisdictions conveyance fees and costs are high as compared to others. To our mind, this is neither a systemic problem nor one of professional abuse but of legal policy and the concrete determination of tariffs. Governments and the legislator must take the objective of accessible preventive justice into account when formulating their tariff structure.

Secondly and in support of the above, conveyance costs, be they caused by notaries or functional equivalents and registration fees, are regularly minimal when compared to the costs and fees of realtors/brokers. Keeping in mind that the notarial profession is regulated in most countries and realtors are not regulated, it is impossible to maintain

[111] P. Murray/R. Stürner, The Civil Law Notary – Neutral Lawyer for the Situation, 2010, p. 150

that the fact of regulation of a profession has a significant upward impact on their fees and costs.

Thirdly, real estate transactions are accompanied by a variety of taxes, as listed in Table VI. These taxes are part of the general tax policy as formulated and implemented by sovereign States. They represent additional costs that are not systemically connected to one or the other concept of conveyance. Thus, they cannot be factored into its (lack of) cost effectiveness. We believe, however, that taxes need to be collected for the common good and tax evasion should be combatted. In this perspective, notaries as holders of public offices do have a function, which is absent in non-notarial systems: they are either obligated to collect the taxes in the name of the State and transfer them to the public budgets, as is the case in France, or to control the effective acquittal of the tax, as is the case in Germany and other jurisdictions. In either system, the possibility of tax evasion is seriously reduced.

8.4 Means and Costs of Due Diligence in Corporation Matters

Corporations are artificial persons. Their ‘birth’/incorporation, existence and ‘death’/liquidation must be manifested to the outside world in one way or another. The reason is not linked to an authorization to do business but to the external effects of an incorporation. Founders and partners wish to separate their personal assets from the assets of the corporation and to limit the liability with third parties to these separate assets. In addition, the corporation acts in its own name. For being able to do so, it needs physical persons to act, to negotiate contracts, to go to court, with these actions having an immediate effect on the corporation.

It would be unsustainable if these effects could be realized by a simple internal expression of will of one or several persons. Both potential partners in the corporation and third parties need to be assured with whom they contract. Without publicly available legal certainty on the identity of the corporation as well as the physical persons behind it, on the assets and liabilities and on the existence and extent of the power of representation exercised in the name of the corporation, nobody could be reasonably expected to do business with an amorphous entity. It goes without saying that the lack of transparency with respect to both the corporation and the physical persons behind them facilitates money laundering and tax evasion.

I recall these basic aspects in order to lift a misunderstanding. In its 2016 edition, the Doing Business Report presents a “Case Study” on ‘Starting a Business’ and asserts that third party participation such as lawyers and/or notaries drives costs up and start-ups into the informal sector and to bribery and corruption.[112] The statement is wrong. Where notaries intervene, their target groups are corporations such as Limited Liability Companies and/or Joint Stock Companies. Their incorporation must not be confused with “starting a business”. Start-ups are free to begin their business as an individual entrepreneur or – together with others – as a partnership. Both forms of doing business are perfectly legal and part of the formal sector. A notarial participation is not mandatory. The authentication is not concerned with starting a business but with legal certainty as to the incorporation as a legal person, the limitation of its liability and to the existence of the statutory or consented power of its representation.

However, the fact that Croatia, France, Georgia, Morocco and Turkey report in their Answers to the Questionnaire that notarial help is voluntarily asked for during the incorporation of companies although not mandatory, and that Germany reports the same for the creation of partnerships, defies the Doing Business Report’s sweeping allegation of a “strong negative association between the third party involvement in business start-ups and both the accessibility of laws and regulations and the efficiency of the civil justice system”[113].

There is a whole number of concepts and approaches to establish legal certainty around corporations. In most jurisdictions of the world, some form of registration documents the existence of the corporation. The registers may be held publicly or privately, the registration may have a declaratory or constitutive significance but some manifestation to the external world exists.

In most of the civil law jurisdictions, the registration constitutes the legal personality of the corporation. The registration is preceded by authentication of the statutes of association or comparable documents and by the statutory or convened powers of representation of directors or other physical persons. The authenticating notary has to identify the acting physical persons (shareholders as well as directors or other holders

[112] Doing Business Report, 2016, p. 54 ss.

[113] Doing Business Report, 2016, p. 56

of powers of attorney) and to verify the legality and reality of the statutes, including the statutory capital and the liability regime. As already stated, this process is mandatory in many civil law jurisdictions. Of the UINL members that have submitted Answers to the Questionnaire, this is the case in Andorra, Argentina, Belgium, Bulgaria, Colombia, Congo, Costa Rica, Germany, Guatemala, Italy, Luxembourg and Mali.

In jurisdictions where the authentication is mandatory, the legislative motivation is based on the fact that the incorporation creates artificial persons that act on the market. Both the extent of the liability and the authority to negotiate and execute contracts do not flow naturally from the sheer existence of the person or from internal arrangements as in the cases of individual entrepreneurs and partnerships but they have to be established by publicly available statutes. It is well understandable that legislators consider it to be in the public interest that instruments with probative value document the existence of the artificial person, its extent of liability and the way it is represented in its market relations. These are the aims of the authentication of instruments in company law. Not differently from real estate transactions, they create legal certainty and contribute to the ease and sustainability of market relations.

The professional preparation of the underlying documents plus their additional scrutiny by the registration officers lead to a high level of quality of the register. This quality justifies the legislative decision in the quoted jurisdictions to attribute the presumption of correctness to the content of the register. The good faith of any person that wants to acquire shares of the corporation or that wants to do business with it is protected. What is registered is presumed to exist and what is not registered is presumed not to exist. The legal certainty that goes with the public faith of the register is considered to be in the public interest.

The legislator has further decided that the costs of the authentication and registration are borne by the founders and the corporations that are established with a view to enter the market and do business, and not by the general public or by potential business parties. There is some economic rationality behind this legislative choice: the costs are more closely connected to the sphere of the person that wants to sell its products than in the sphere of potential business partners. At the same time, the public interest in legal certainty does not necessarily concern the tax paying population at large but the business community.

Costs of authentication and registration vary. As examples, we quote the following countries. In Andorra, notary fees amount to 450.76 € and the costs of registration to 957.77 €; in Argentina, the notary fees in the context of the incorporation of a joint stock company are roughly 500 € and the registration also 500 €; in Belgium, the total costs for the incorporation of a SPRL (LLC) are 1,408 € of which 120 € for the notary, 962 € for different fees and special tax, and the registration with different bodies costs 50 + 265.47 + 82.50 €; in Germany, notary fees for the incorporation of a GmbH (LLC) amount to 225 €, and for registration fees to 125 €; in Italy, the notarial intervention for simplified LLCs (with a capital of 1 €) is free of charge and for a standard LLC it costs 300 to 400 €, while the different registrations cost 200 + 156 + 90 €.

Everybody has access to the registers and can rely on their correctness. They can be consulted at no or mostly derisory costs: in Austria, the extract of a register costs 13.70 €, in Colombia 1.50 €, in Costa Rica 6 $, in Estonia 3.20 €, in France 4.50 €, in Georgia 5.90 €, in Germany 4.50 €, in Portugal 20 €, in Russia 3 € and in Slovakia 3 €. In Andorra, China, Italy, Kosovo and Mali access to information is free of charge. Only exceptionally costs are high. Congo must be considered an outlier, where an excerpt of the register costs between 76 and 152 €, as much so as Uruguay where an excerpt costs 84 €.

A detailed Table on the costs in corporation matters is presented in Annex D.

The protection of good faith is based on the quality of the register and the legal certainty, which it provides, thanks to the preceding authentication of documents. In legal systems such as the common law systems where authentication is not known, the necessity to arrive at some type of legal certainty does not disappear. It has to be organized differently.

In the UK, the registration is executed by Companies House. However, in the absence of the double notarial filters of identification of actors and verification of legality, Companies House is unable to guarantee the correctness and viability of its content. It declares on its website: “The information available on this site is not intended to be comprehensive, and many details which may be relevant to particular circumstances have been omitted. Accordingly, it must not be regarded as being a complete source of company law and information, and readers are advised to seek independent

professional advice before acting on anything contained herein. Companies House cannot take any responsibility for the consequences and omissions."[114] Indeed, the disclaimer acknowledges the low quality of registration services and affirms the very limited usefulness of the register for the protection of good faith business partners and the ease of doing business. It does not prevent the hijacking of companies nor the theft of identities nor the 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.[115]

Companies House refers parties that wish and need to collect information on a corporation in the course of its normal business to independent professional advice. That is as pertinent under the circumstances as it is unsatisfactory for a body that is meant to assure some type of transparency. In a way, it is an admission of failure.

Evidently, the professional advice costs money. Contrarily to the legal systems where the costs for authentication and thereby legal certainty are imposed on the persons that wish to enter the market and offer their goods and services, Companies House's advice leads to the consequence that private third parties have to pay when they want to be protected against misrepresentations and lack of legal certainty and wish to do business with a company that pretends to exist legally, to dispose of its own assets and to be correctly represented. It is to the potential business partners to have information collected by professional advisors and to verify whether their partners' assertion as to their identity, legal existence and validity of powers of representation are correct. They have no choice and have to ask for certificates of good standing, legal opinions and other means of due diligence. These documents are not established once and for all but need to be re-established each time a relevant transaction is at stake, each times at renewed fees, while in notarial systems the consultation of the register at derisory costs suffices to establish certainty.

Although we do not dispose of exact numbers, especially in the absence of tariffs, anecdotal evidence indicates that in the UK legal opinions may cost between 2,000

[114] Cf. http://resources.companieshouse.gov.uk/serviceinformation.shtml

[115] https://www.gov.uk/guidance/protect-your-company-from-corporate-identity-theft

and 5,000 GBP and a certificate of good standing between 15 and 50 GBP. A simple verification of the power of attorney seems to cost between 150 and 300 GBP.[116] Apparently, the immediate costs of incorporation are very low. They amount to 15 GBP for the search of availability of a company name and filing with Companies House. Solicitors' costs must certainly be added but we have no information on them. But costs are very high for the going concern in relation to most civil law systems, where a simple and normally very cost-efficient excerpt of the register suffices to give the information which has to be asked each time again before major transactions in the UK.

In another major common law jurisdiction, the USA, expenses vary from State to State. It seems, however, that in no State the registration is of a high enough quality to protect the good faith of potential business partners. Not differently from the UK, the legal existence of a company, the identity and power of representation of its directors must be established by legal opinions, "which can easily reach five digit Dollar amounts".[117] We have found that the costs for legal opinions vary between 3,000 and 10,000 USD and costs for certificates of good standing between 50 and 100 USD. In the State of New York, the filing fees of the articles of association amount to 275 USD and the publication of notice of a LLC costs 475 USD.[118] Conversely to the UK, these amount are not insignificant at all and comparable to the costs in many of the civil law jurisdictions.

The Doing Business Report takes these costs into account when it determines the ease of starting a business. It is not understandable why it refuses to take into account that the quality of a registration preceded by the authentication of documents decreases the costs of a going concern considerably.

[116] J. Bormann/S. Apfelbaum, Handelsregister und GmbH-Gründung in Deutschland als „best practice" im Vergleich zum anglo-amerikanischen Rechtskreis, in: Zeitschrift für Wirtschaftsrecht, 2007, pp. 946-952

[117] J. Bormann/S. Apfelbaum, op. cit.

[118] Information found under www.doingbusiness.org

9 Conclusion

The sustainability, dynamics and fairness of market relations depend to a large extent on legal certainty and legal peace. Their production is path dependent and linked to the practiced interrelation between the public and the private sectors of a given society and jurisdiction. Although the principle of such necessary interrelation is not in question, their practice and evolution are.

On a very abstract level, its seems fair to say that jurisdictions which practice the authentication of instruments lay emphasis on preventive justice and the avoidance of litigation and they define the creation and maintenance of legal certainty as being in the public interest. Conversely, jurisdictions which do not practice the authentication of documents define the creation and maintenance of legal certainty more as the private duty of market participants and rely more on curative justice and litigation. Efforts to use these distinctions to formulate the supremacy of the common law by way of legal origin do not stand the test of serious historical research.

In both systems transaction costs are unavoidable. In notarial systems they emerge to a larger extent *ex ante*, while in non-notarial systems they emerge *ex post*. In the first alternative they are borne to a greater extent by parties engaged in a transaction or in the incorporation of a company, while in non-notarial systems they are borne to a greater extent by third parties such as potential business partners. It is to the legislator to decide what type of imposition is fairer.

In both systems there are certain trade-offs between the types of costs. In notarial systems authentication costs *ante* registration exist which render costs for title search, title insurance, legal opinions and/or certificates of good standing superfluous. These latter *ex post* costs are unavoidable in non-notarial systems, without, however, eliminating *ex ante* costs completely, since often the notary is replaced by solicitors/lawyers that have to be engaged by both parties.

When adding *ex ante* and *ex post* costs up, it seems that in their majority notarial systems fare better, both in cost efficiency and in the production of legal certainty and consumer protection, although cost efficiency is not inherent in one or the other system but depends on the individual jurisdiction’s legislation on tariffs. However, the

advantages do not seem significant enough to incite jurisdictions to break off the path and introduce a system with better economic efficiency. This is all the more so because a high quality of registers as guaranteed by authentication would render some of the well paid services of lawyers and others such as title insurances and legal opinions redundant and would most certainly be stiffly resisted.

However, it cannot be excluded that the subprime crisis which started in the USA may have been an awakening event, at least for real estate transactions. First of all "[c]osts for real estate conveyancing in the United States appear to be unnecessarily increased by the absence of a modern title registration system and the widespread use of title insurance as a substitute." [119]Secondly, the social and the economic costs were and are tremendous. At the time, borrowers were not made aware of the legal implications and risks of mortgages, lenders and intermediary institutions were not called to respect the law.[120] Nobody can write alternative history but it seems fair to say that the cumulating effects of abuse of market power and the exploitation of information asymmetry might have been tempered in a well-developed notarial system.

It is not excluded that we will see a convergence between the different types of creating legal certainty. There are good reasons and historical experience to suggest that that preventive justice through the authentication of important documents creates legal certainty and legal peace at individual and social costs lower than ex post protection strategies and litigation. However, the convergence should not be pushed through under the pretext of a necessity of unification as tried in the European Union but must be the result of reflection and informed comparison. Unification in conveyance is not decisive to enhance the mechanisms of a common market. France is a perfect example that different systems of real estate conveyance in different regions can coexist without friction for long periods of time.

This being said, it is appropriate and timely to insist that this is also true for the inverse course of politics. Repeated attacks on the notarial system by different European bodies want to do away with mandatory authentication of instruments by notaries and with the high quality of registers, which allows the protection of good faith in their

[119] Murray, Study, p. 25 and 87; Murray and Stürner, op. cit., pp. 144 ss.

[120] For a detailed account cf. Shiller, op. cit.

correctness, in favour of low quality registers such as Companies House. These policy goals are inappropriate.

Circumstances are different in States that are not locked in tradition and durability but that have only recently started to open up to market relations, private property of real estate and privately held capital companies. That is true for China, the post-soviet newly independent States and the Balkans. All countries witness a lack of legal certainty and legal peace which hinders a sustainable domestic development and a secure accumulation of wealth, particularly for low and middle income classes. As documented in their Answers to Questionnaire, Bulgaria, China, Croatia, Estonia, Georgia, Hungary, Kosovo, Lithuania, the Russian Federation and Slovakia are all in a process of reforming their legal institutions with a view to improve legal certainty. Registration of real estate as well as of corporations are as much part of it as the authentication of instruments by notaries.

The reforms are based on an understanding that the creation and maintenance of legal certainty by preventive justice are in the public interest and go beyond purely private initiatives. I have accompanied these systemic approaches in practice over more than two decades and analysed them in more detail on different occasions[121]. One of the important lessons in these reforms, which are obviously sometimes of an experimental character, lies in the understanding that the most coherent reason to justify the protection of good faith in the correctness of the registers results from a close interrelation between the authentication of instruments and the succeeding registration. The authentication guarantees the correctness of the register. It could only be replaced if the registration officers were ready and competent to take over the notarial duties of identification, verification and advice. That is apparently not the case. That is why registers that cannot guarantee their correctness must not serve for a presumption of correctness. The opposite approach would necessarily lead to manipulation and violation of trust.

The latter example as well as the significant differences with respect to cost efficiency document that reforms of any system and any institutions are ongoing duties of the

[121] Cf. for instance R. Knieper, Judicial Cooperation, Universality and Context, 2004; R. Knieper, Rechtsreformen entlang der Seidenstraße, 2006

legislator and legal practice. They are constantly necessary in both notarial and non-notarial systems. Convergence may be one viable solution if the efficiency of one system is proven to be higher than the other system. We reiterate our conviction that the production and maintenance of legal certainty is in the public interest and is better protected by preventive justice and regulation than by the market.

Appendix A: Questionnaire

Questionnaire on the economic efficiency of the notariat

The purpose of the questionnaire is to examine whether legal certainty increases as a result of the notary's involvement in the Member States of the UINL, whether this high level of legal certainty reduces the costs to the economy and everyone and if the high initial costs of notarial legal services and the additional time they require can be justified economically.

The first section addresses the specificities of the organisation of the notarial profession in the different Member States as well as the key functions (preservation of evidence, gathering of facts, information of clients, legality control) of notaries which contribute to legal certainty.

I. Organisation of the notariat in your Member State

1. Does the notary[122] hold a public office, irrespective of the private organisation of his practice?
2. Is the notary independent and impartial?
3. Is the organisation of the office by the notary subject to professional supervision (Chamber governed by public law or other)?
4. Is the work of the notary subject to professional supervision and to disciplinary authority organised by the Chamber of notaries as well as by the State?
5. Are notariats divided up into districts which guarantee notarial services across the national territory?
6. Does the notary have the duty to carry out his activities (duty to draw up authentic instruments)?
7. Is the number of notaries fixed by the State (numerus clausus)?
8. Are notarial fees freely negotiable or is there a fixed fee (scale of notarial fees)?
9. How is training organised (legal studies or separate notary course)?
10. Is there an obligation of continuing professional training?
11. Is the notary liable for all violations of his professional duties committed intentionally/ negligently/ without fault on his part without/with the possibility to limit liability?
12. Does the notary have to subscribe to professional liability insurance?
13. Is there a collective fund for damages caused by notaries?

II. Tasks of the notary in your Member State

14. Does the notary draw up authentic instruments which are endowed with probative value concerning the facts set out in the instrument?
15. Does the notary draw up authentic instruments which are enforceable?
16. What is the number of authentic instruments in absolute numbers as well as their proportion in all transactions in areas where the authentic instrument is not mandatory (in Germany for example, last wills do not have to be authenticated. They can be written in the hand of the testator, in Austria and Georgia, real estate transactions do not have to be authenticated. Nevertheless, these legal transactions are normally laid down in authentic instruments)?
17. Does the notary have the duty to advise the parties and to draw up authentic instruments
    a) as far as real estate transactions are concerned
    b) for the formation of a company and throughout its commercial activity depending on the type of company (partnerships, limited liability companies, stock companies etc.)
    c) to draw up last wills and / or their execute them
    d) for matters of family patrimonial law?
    e) for matters of extrapatrimonial family law (adoption, filiation, lasting powers of attorney)?
    f) for all entries in registers endowed with public faith?
18. Does the notary have the duty to verify the truth and the existence of the facts to be authenticated (physical existence and legal status, including limited rights *in rem* of and

[122] Or, in countries without notariat, the profession mandated to perform the corresponding tasks.

in immovable property, identity of the parties, existence of companies, powers of representation etc.)?

19. Does the notary have the duty to find out the will of the parties, clarify the facts, inform the parties about the legal consequences of the transaction and include their statements clearly and unambiguously in the instrument?
20. Does the notary have to discuss the contents of the transaction with the parties and, if necessary, influence the contractual design?
21. Does the notary have to explain the risks related to the execution of the contract?
22. Does the notary complete other formalities consequent upon the authentication? yes/on a regular basis/no
23. Does the notary have the obligation to explain the consequences of the declaration of enforceability?

This section examines to what extent the notary is involved in real estate transactions. The aim is to compare the costs and the duration of real estate transactions on the one hand and the number of disputes on the other hand. Does the involvement of the notary increase legal certainty, thus reducing the number of subsequent disputes? Is it therefore economically profitable?

III. Questions on real estate law

24. Which authority is competent for keeping the real estate register in your Member State?
25. Is there a presumption of correctness and completeness for register entries and do they form the basis for acquisition in good faith?
26. If yes, what is covered by the guarantee of correctness?
27. Do the registrars verify the data provided by the applicant and /or
    a) the legality of the legal transaction
    b) the legal capacity of the parties,
    c) other aspects?
28. If there is a guarantee of correctness, is it based on investigations done by the registrars on their own or on the reliability of the notarial act or on information given by third parties (real estate agents, lawyers, banks)?
29. Is the involvement of the notary in a real estate transaction in your Member State
    a) mandatory
    b) non mandatory, but requested by the market?
30. What are the tasks performed by the notary during a real estate transaction? What is the object of the authentication?
    a) preliminary contract
    b) sale and purchase agreement
    c) charges on immovable properties
    d) other; if yes what?
31. Which costs does a private person have to cover in a real estate transaction (including property charges) if the purchase price amounts to 100.000, 250.000, 500.000 and 2.000.000 euros respectively for
    a) the register
    b) the notary
    c) the lawyers
    d) the real estate agents and other intermediaries?
    e) Which are the acquisition-related taxes in these cases?
32. How much does a register extract cost?
33. Are there any additional costs besides the authentication in the context of negotiation and conclusion of contracts?
34. What is the proportion (percentage) of costs for the notarial authentication in the total value of a real estate transaction if the purchase price amounts to 100.000, 250.000, 500.000 and 2.000.000 euros respectively? Please distinguish between the transfer of ownership and charges for the immovable property.
35. What is the proportion (percentage) of costs for the registration in the total value of a real estate transaction if the purchase price amounts to 100.000, 250.000, 500.000 and 2.000.000 euros respectively? Please distinguish between the transfer of ownership and the charges on the immovable property.
36. Which are the costs per capita and as a fraction of the GDP in your Member State
    a) for the cadaster

b) for the land registers?

37. What are the additional costs due to the absence of a register or the absence of guarantee of correctness of the register? Conversely, which of the following elements are not indispensable thanks to the reliability of the register?
    a) Title search
    b) Title insurance
    c) Costs for the potential mortgage holders (banks)
    d) Other?
38. How long does the entry of a real estate transaction in the register take from the moment of the conclusion of the contract to the registration of the right or an equivalent which anticipates the effect of full registration? Does the notary's involvement accelerate or delay the registration?
39. What is the number of court proceedings against
    a) notaries
    b) lawyers
    c) real estate agents

    in real estate matters? Please indicate (if possible) the number of cases in which the notary, the lawyer or the real estate agent was held responsible.

40. How frequent are court proceedings with respect to property rights, in absolute numbers and in relation to all other proceedings?

This section examines to what extent the notary is involved in the framework of company law in the different Member States. Here, too, the main focus is on the increase of legal certainty thanks to the notary's involvement, the estimation of costs incurred in preventive administration of justice as well as the prevention of subsequent disputes.

IV. Questions related to company law

41. Which is the competent authority for the keeping of commercial registers in your Member State?
42. Is there a presumption of correctness and completeness for register entries?
43. If yes, what is covered by the guarantee of correctness?
44. In case of guarantee of correctness, do the registrars verify the data provided by the applicant and /or
    a) the legality of the legal transaction
    b) the legal capacity of the parties,
    c) other aspects?
45. In case of a guarantee of correctness, is it based on investigations done by the registrars on their own, on the reliability of the notarial act or on information given by third parties (real estate agents, lawyers, banks)?
46. Is the involvement of the notary in the formation of a company and/or in the continuation of a company carrying on a business
    a) mandatory
    b) non mandatory, but requested by the market?
47. What are the tasks performed by the notary in the context of a formation of a company and/or the continuation of a company carrying on a business. What is the object of the authentication?
    a) the articles of association,
    b) the identity of the members,
    c) the power of representation of the managers and other persons entitled to represent the company,
    d) the existence of the company?
48. What are the legal costs for the formation of a company and what is the proportion of costs for
    a) the notary
    b) other providers of legal services (please indicate which)
    c) the registration?
    d) Which taxes are due in these cases?
49. How much does a register extract cost?
50. Are there any additional costs besides the authentication in the context of negotiation and conclusion of contracts?

51. What is the proportion of costs for the notarial authentication
    a) in the total costs associated with the formation / the turnover of a limited liability company with minimum capital provided for by law?
    b) in the total costs associated with the formation / the turnover of a limited liability company according to the criteria fixed by the Doing Business Report of the World Bank?
52. What is the percentage of the costs associated with the entry in the register
    a) in the total costs associated with the formation / the turnover of a limited liability company with minimum capital provided for by law?
    b) in the total costs associated with the formation / the turnover of a limited liability company according to the criteria fixed by the Doing Business Report of the World Bank?
53. What are the costs per capita for the commercial register and as a fraction of the GDP in your Member State?
54. What are the additional costs due to the absence of a register or the absence of guarantee of correctness of the register? Conversely, which of the following elements are not indispensable thanks to the reliability of the register?
    a) legal opinion,
    b) proof of the powers of representation,
    c) certificate of good standing,
    d) due diligence
    e) other?
55. What is the total time necessary to create a company (transaction in the field of company law)? Does the notary's involvement accelerate or delay the process?
56. How many court proceedings in the field of company law are opened against
    a) Notaries?
    b) Laywers?
57. How frequent are court proceedings dealing with the formation of a company or the continuation of a company carrying on a business, in absolute numbers and in relation to all other proceedings?

V. Questions related to succession law and family law

58. Is the notary involved in the opening of successions? What are the tasks of the notary under the succession regulation? Is he involved in the European Certificate of Succession?
59. Is there a central register of wills kept by
    a) the notaries?
    b) the State?
60. How much does the registration cost?
61. What are the costs due to the absence of a register in order to
    a) identify the heirs?
    b) find documents related to last wills?

Last but not least, a general comparison shall be made between notarial fees and legal fees.

VI. Fees incurred in the context of administration of preventive justice

62. What are the costs due to the notary's involvement in the negotiation and conclusion of contracts? (approximate percentage of the transaction's value)?
63. What are the notarial fees in areas where the involvement of the notary is not prescribed by law (involvement requested by the parties)?
64. What are the costs incurred by the State for the administration of justice – per capita and as a fraction of the GDP?
65. What are the costs incurred by each individual for legal services (legal fees, lawyers, notaries, and also for real estate agents in case of real estate transactions)?

Appendix B: Table of Study by Murray on Real Estate Transfers

TABLE C – COSTS FOR REAL ESTATE TRANSFERS IN 5 EUROPEAN MEMBER STATES AND 2 STATES OF THE UNITED STATES

			Sale of Land for 100,000	Sale of Land for 100,000 with new mortgage for 75,000	Sale of House for 250,000	Sale of House for 250,000 with new mortgage for 150,000	Sale of House for 500,000	Sale of House for 500,000 with new mortgage for 400,000	Sake of House for 1,000,000	Sale of house for 1,000,000 with new mortgage for 750,000
Estonia	Costs	Broker's Commission	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Mortgage Amount	-€	74,996€	-€	187,511€	-€	400,000€	-€	750,000€
		Notary Fee - Contract	379€	-€	922€	-€	1,827€	-€	3,620€	-€
		Notary Fee Combined Contract & Mortgage	-€	446€	-€	967€	-€	2,143€	-€	4,170€
		Recording/Registration Fee	110€	136€	294€	304€	754€	909€	1,600€	1,977€
	Total Transfer Costs		4,488€	4,582€	11,215€	11,271€	22,581€	23,052€	45,220€	46,147€
	Total Conveyancing Fees		379€	446€	922€	967€	1,827€	2,143€	3,620€	4,170€
	Convenancing Fees as percent of Total Costs		8.43%	9.74%	8.22%	8.58%	8.09%	9.30%	8.01%	9.04%
	Conveyancing Fees as percent of Purchase Price		0.38%	0.45%	0.37%	0.39%	0.37%	0.43%	0.36%	0.42%
	Broker's Commission as percent of Total Cost		89.12%	87.29%	89.16%	88.72%	88.57%	86.76%	88.46%	86.68%
France	Costs	Broker's Commission	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Notary Fee - Contract	1,154€	1,154€	2,391€	2,391€	4,454€	4,454€	8,579€	8,579€
		Notary Fee - Mortgage	-€	316€	-€	522€	-€	1,210€	-€	2,172€
		Notary's Overheads Charge	200€	200€	300€	300€	300€	300€	300€	300€
		Real Estate Transfer Tax	5,090€	5,090€	12,725€	12,725€	25,450€	25,450€	50,900€	50,900€
		Recording/Registration Fee	100€	100€	250€	250€	500€	500€	1,000€	1,000€
		Mortgage Registration Fee	-€	45€	-€	90€	-€	240€	-€	450€
	Total Transfer Costs		12,544€	12,905€	30,666€	31,278€	60,704€	62,154€	120,779€	123,401€
	Total Conveyancing Fees		1,354€	1,670€	2,691€	3,213€	4,754€	5,964€	8,879€	11,051€
	Convenancing Fees as percent of Total Costs		10.79%	12.94%	8.78%	10.27%	7.83%	9.60%	7.35%	8.96%
	Conveyancing Fees as percent of Purchase Price		1.35%	1.67%	1.08%	1.29%	0.95%	1.19%	0.89%	1.11%
	Broker's Commission as percent of Total Cost		47.83%	46.49%	48.91%	47.96%	49.42%	48.27%	49.68%	48.62%
Germany	Costs	Broker's Commission	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Notary Fee - Contract	454€	454€	904€	904€	1,654€	1,654€	3,154€	3,154€
		Notary Fee Contract Effectuation	105€	105€	205€	205€	333€	333€	588€	588€
		Notary Fee - Mortgage	-€	187€	-€	292€	-€	667€	-€	1,192€

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		Real Estate Transfer Tax	3,500€	3,500€	8,750€	8,750€	17,500€	17,500€	35,000€	35,000€
		Recording/Registration Fee	311€	311€	648€	648€	1,211€	1,211€	2,336€	2,336€
		Mortgage Registration Fee	-€	177€	-€	282€	-€	657€	-€	1,182€
	Total Transfer Costs		8,370€	8,734€	20,507€	21,081€	40,698€	42,022€	81,078€	83,452€
	Total Conveyancing Fees		559€	746€	1,109€	1,401€	1,987€	2,654€	3,742€	4,934€
	Convenancing Fees as percent of Total Costs		6.68%	8.54%	5.41%	6.65%	4.88%	6.32%	4.62%	5.91%
	Conveyancing Fees as percent of Purchase Price		0.56%	0.75%	0.44%	0.56%	0.40%	0.53%	0.37%	0.49%
	Broker's Commission as percent of Total Cost		47.79%	45.80%	48.76%	47.44%	49.14%	47.59%	49.34%	47.93%
Sweden	Costs	Broker's Commission	3,000€	3,000€	7,500€	7,500€	15,000€	15,000€	30,000€	30,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Mortgage Amount	-€	75,000€	-€	150,000€	-€	400,000€	-€	750,000€
		Inspection/Engineer Fee	500€	500€	500€	500€	500€	500€	500€	500€
		Real Estate Transfer Tax	1,500€	1,500€	3,750€	3,750€	7,500€	7,500€	15,000€	15,000€
		Mortgage Tax	-€	1,500€	-€	3,000€	-€	8,000€	-€	15,000€
		Recording/Registration Fee	89€	89€	89€	89€	89€	89€	89€	89€
		Mortgage Registration Fee	-€	41€	-€	41€	-€	41€	-€	41€
		Broker Contract and Implementation Charge	900€	900€	2,250€	2,250€	4,500€	4,500€	9,000€	9,000€
	Total Transfer Costs		5,989€	7,530€	14,089€	17,130€	27,589€	35,630€	54,589€	69,630€
	Total Conveyancing Fees		900€	900€	2,250€	2,250€	4,500€	4,500€	9,000€	9,000€
	Convenancing Fees as percent of Total Costs		15.03%	11.95%	15.97%	13.13%	16.31%	12.63%	16.49%	12.93%
	Conveyancing Fees as percent of Purchase Price		0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%
	Broker's Commission as percent of Total Cost		50.09%	39.84%	53.23%	43.78%	54.37%	42.10%	54.96%	43.09%
United Kingdom	Costs	Broker's Commission	2,000€	2,000€	5,000€	5,000€	10,000€	10,000€	20,000€	20,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Searches Fees	304€	304€	304€	304€	304€	304€	304€	304€
		Buyer's Lawyer's Fee	608€	608€	676€	676€	815€	815€	1,183€	1,183€
		Seller's Lawyer's Fee	571€	571€	635€	635€	768€	768€	1,116€	1,116€
		Bank Lawyer's Fee	-€	100€	-€	250€	-€	499€	-€	999€
		Inspection/Engineer Fee	441€	441€	514€	514€	705€	705€	1,102€	1,102€
		Real Estate Transfer Tax	-€	-€	2,499€	2,499€	15,000€	15,000€	39,999€	39,999€
		Recording/Registration Fee	88€	88€	220€	220€	323€	323€	617€	617€
	Total Transfer Costs		4,013€	4,112€	9,848€	10,097€	27,916€	28,415€	64,321€	65,320€
	Total Conveyancing Fees		1,484€	1,584€	1,614€	1,864€	1,888€	2,387€	2,603€	3,602€
	Convenancing Fees as percent of Total Costs		36.98%	38.51%	16.39%	18.46%	6.76%	8.40%	4.05%	5.51%
	Conveyancing Fees as percent of Purchase Price		1.48%	1.58%	0.65%	0.75%	0.38%	0.48%	0.26%	0.36%
	Broker's Commission as percent of Total Cost		49.84%	48.63%	50.77%	49.52%	35.82%	35.19%	31.09%	30.62%
U. S. - Maine	Costs	Broker's Commission	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Title Examination Fee	228€	228€	228€	228€	228€	228€	228€	228€
		Buyer's Lawyer's Fee	148€	-€	148€	-€	148€	-€	148€	-€

		Seller's Lawyer's Fee	103€	103€	103€	103€	103€	103€	103€	103€
		Bank Lawyer's Fee	-€	148€	-€	148€	-€	148€	-€	148€
		Appraisal Fee	-€	266€	-€	266€	-€	266€	-€	266€
		Inspection/Engineer Fee	-€	152€	-€	152€	-€	171€	-€	171€
		Real Estate Transfer Tax	335€	335€	837€	837€	1,674€	1,674€	3,348€	3,348€
		Owners Title Insurance	228€	304€	628€	704€	1,256€	1,332€	2,511€	2,587€
		Title Company Fee	152€	152€	152€	152€	152€	152€	152€	152€
		Recording/Registration Fee	14€	14€	15€	15€	15€	15€	15€	15€
		Mortgage Registration Fee	-€	44€	-€	44€	-€	44€	-€	44€
	Total Transfer Costs		7,208€	7,747€	17,112€	17,651€	33,577€	34,135€	66,507€	67,064€
	Total Conveyancing Fees		860€	936€	1,259€	1,336€	1,887€	1,963€	3,143€	3,219€
	Convenancing Fees as percent of Total Costs		11.93%	12.08%	7.36%	7.57%	5.62%	5.75%	4.73%	4.80%
	Conveyancing Fees as percent of Purchase Price		0.86%	0.94%	0.50%	0.53%	0.38%	0.39%	0.31%	0.32%
	Broker's Commission as percent of Total Cost		83.24%	77.45%	87.66%	84.98%	89.35%	87.89%	90.22%	89.47%
U. S. - New York		Broker's Commission	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Buyer's Lawyer's Fee	342€	342€	342€	342€	342€	342€	342€	342€
		Seller's Lawyer's Fee	419€	419€	419€	419€	419€	419€	419€	419€
		Bank Lawyer's Fee	-€	304€	-€	304€	-€	304€	-€	-€
		Appraisal Fee	190€	190€	228€	228€	228€	228€	266€	266€
	Costs	Real Estate Transfer Tax	304€	304€	761€	761€	1,522€	1,522€	3,044€	3,044€
		Owners Title Insurance	467€	467€	853€	853€	1,496€	1,496€	2,649€	2,649€
		Mortgagee Title Insurance	-€	114€	-€	176€	-€	365€	-€	-€
		Recording/Registration Fee	27€	27€	27€	27€	27€	27€	27€	27€
		Mortgage Registration Fee	-€	64€	-€	64€	-€	64€	-€	64€
	Total Transfer Costs		7,750€	8,233€	17,631€	18,175€	34,035€	34,768€	66,748€	66,812€
	Total Conveyancing Fees		1,228€	1,647€	1,614€	2,094€	2,257€	2,926€	3,410€	3,410€
	Convenancing Fees as percent of Total Costs		15.85%	20.00%	9.15%	11.52%	6.63%	8.42%	5.11%	5.10%
	Conveyancing Fees as percent of Purchase Price		1.23%	1.65%	0.65%	0.84%	0.45%	0.59%	0.34%	0.34%
	Broker's Commission as percent of Total Cost		77.42%	72.88%	85.08%	82.53%	88.15%	86.29%	89.89%	89.80%

Appendix C: Table VI: Costs of conveyance and additional costs in real estate

Purchase price / State		100.000,00 €	250.000,00 €	500.000,00 €
Andorra	notary fees	550,00 €	870,00 €	1.170,00 €
	registration fees	0 €	0 €	0 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.55%	0.35%	0.23%
	broker fees	normally 5% of purchase price	normally 5% of purchase price	normally 5% of purchase price
	transfer taxes	4-4.5% (4% for natural person, 4.5% for legal person)	4-4.5% (4% for natural person, 4.5% for legal person)	4-4.5% (4% for natural person, 4.5% for legal person)
	additional costs as percent of purchase price	9-9.5%	9-9.5%	9-9.5%
Argentina	notary fees	Up to 2.000,00 €	Up to 5.000,00 €	Up to 10.000,00 €
	registration fees	200,00 €	500,00 €	1.000,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	2.2%	2.2%	2.2%
	broker fees	6-8% (not mandatory intervention of broker)	6-8% (not mandatory intervention of broker)	6-8% (not mandatory intervention of broker)
	transfer taxes	depends on province, 3.6%; in general 1.5% additional transfer tax + 3% if real estate of a subsidiary is transferred	depends on province, 3.6%; in general 1.5% additional transfer tax + 3% if real estate of a subsidiary is transferred	depends on province, 3.6%; in general 1.5% additional transfer tax + 3% if real estate of a subsidiary is transferred
	additional costs as percent of purchase price	9.6-11.6%	9.6-11.6%	9.6-11.6%
Austria	notary fees	n/a	n/a	n/a
	registration fees	1.100,00 €	2.750,00 €	5.500,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price			
	broker fees	n/a	n/a	n/a
	transfer taxes	1.000,00 € - 2.500,00 €	2.500,00 € - 6.250,00 €	5.000,00 € - 12.500,00 €

	additional costs as percent of purchase price	1 - 2.5%	1 - 2.5%	1 - 2.5%
Belgium	notary fees	1.593,66 €	2.448,66 €	2.591,65 €
	registration fees	220,00 €	220,00 €	220,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	1.81%	1.07%	0.56%
	broker fees			
	transfer taxes			
	additional costs as percent of purchase price			
Bulgaria	notary fees	n/a	n/a	n/a
	registration fees	n/a	n/a	n/a
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price			
	broker fees			
	transfer taxes	n/a	n/a	n/a
	additional costs as percent of purchase price			
China	notary fees	roughly 100,00 €	roughly 250,00 €	roughly 500,00 €
	registration fees	roughly 10,00 €	roughly 10,00 €	roughly 10,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.11%	0.1%	0.1%
	broker fees	2-3%	2-3%	2-3%
	transfer taxes	Busines tax: 5,5%; personal income tax: 2%; deed tax: 3-5%	Busines tax: 5,5%; personal income tax: 2%; deed tax: 3-5%	Busines tax: 5,5%; personal income tax: 2%; deed tax: 3-5%
	additional costs as percent of purchase price			
Colombia	notary fees	400,00 €	1.015,00 €	1.876,00 €
	registration fees	500,00 €	1.250,00 €	2.503,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.9%	0.91%	0.88%
	broker fees	normally no broker fees, if applicable 5%	normally no broker fees, if applicable 5%	normally no broker fees, if applicable 5%
	transfer taxes	16% + impuesto de renta anticipada de 1%	16% + impuesto de renta anticipada de 1%	16% + impuesto de renta anticipada de 1%

	additional costs as percent of purchase price	17-22%	17-22%	17-22%
Congo, Rep	notary fees	3.524,49 €	3.689,18 €	4.939,18 €
	registration fees	n/a	n/a	n/a
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price			
	broker fees	10.000,00 €	25.000,00 €	50.000,00 €
	transfer taxes	n/a	n/a	n/a
	additional costs as percent of purchase price			
Costa Rica	notary fees	1-2.5% of the value	1-2.5% of the value	1-2.5% of the value
	registration fees	2.5% (incl. transfer tax)	2.5% (incl. transfer tax)	2.5% (incl. transfer tax)
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	3.5-5%	3.5-5%	3.5-5%
	broker fees	n/a	n/a	n/a
	transfer taxes	2.5%	2.5%	2.5%
	additional costs as percent of purchase price	2.5%	2.5%	2.5%
Croatia	notary fees	410,00 €	440,00 €	490,00 €
	registration fees	33,00 €	33,00 €	33,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.44%	0.18%	0.18%
	broker fees	depends on their business policy	depends on their business policy	depends on their business policy
	transfer taxes	5%	5%	5%
	additional costs as percent of purchase price			
Estonia	notary fees	400,00 €	1.000,00 €	1.900,00 €
	registration fees	110,00 €	590,00 €	1.510,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.51%	1.59%	2.41%
	broker fees	agreed fee	agreed fee	agreed fee
	transfer taxes	/	/	/
	additional costs as percent of purchase price			

France	notary fees	2.140,00 €	3.352,00 €	5.387,00 €
	registration fees	400,00 €	400,00 €	400,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	2.54%	1.5%	1.16%
	broker fees	5.000,00 € - 10.000,00 €	12.500,00 € - 25.000,00 €	25.000,00 - 50.000,00 €
	transfer taxes	8.030,00 €	17.300,00 €	32.750,00 €
	additional costs as percent of purchase price	13.03% - 18.03%	11.72% - 16.92%	11.55% - 16.55%
Georgia	notary fees	265,00 €	510,00 €	705,00 €
	registration fees	from 20 € to 80 € depending on requested speed of registration	from 20 € to 80 € depending on requested speed of registration	from 20 € to 80 € depending on requested speed of registration
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.29% - 0.35%	0.21% - 0.24%	0.15% - 0.16%
	broker fees	2.000,00 € - 5.000,00 €	5.000,00 € - 12.500,00 €	10.000,00 € - 25.000,00 €
	transfer taxes	265,00 €	510,00 €	705,00 €
	additional costs as percent of purchase price	2.27% - 6.27%	2.2% - 5.2%	2.14% - 5.14%
Germany	notary fees	546,00 €	1.070,00 €	1.870,00 €
	registration fees	273,00 €	535,00 €	935,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.82%	0.64%	0.56%
	broker fees	7.140,00 €	17.850,00 €	35.700,00 €
	transfer taxes	1.500,00 €	3.750,00 €	7.500,00 €
	additional costs as percent of purchase price	8.14%	8.64%	8.64%
Guatemala	notary fees	2.184,78 €	n/a	n/a
	registration fees	184,49 €	n/a	n/a
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	2.37%	n/a	n/a
	broker fees	3,00%	3,00%	3,00%
	transfer taxes	3.174,74 €	n/a	n/a
	additional costs as percent of purchase price	3% Tax stamp duty or 12% VAT	3% Tax stamp duty or 12% VAT	3% Tax stamp duty or 12% VAT
Hungary	notary fees	n/a	n/a	n/a

	registration fees	n/a	n/a	n/a
	title search	n/a	n/a	n/a
	title insurance	n/a	n/a	n/a
	percentage of conveyance costs of purchase price	n/a	n/a	n/a
	broker fees			
	transfer taxes			
	additional costs as percent of purchase price			
Italy	notary fees	500,00 €	1.250,00 €	around 2.500,00 €
	registration fees	n/a	n/a	n/a
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	n/a	n/a	n/a
	broker fees	4.000,00 € - 10.000,00 €	10.000,00 € - 25.000,00 €	20.000,00 € - 50.000,00 €
	transfer taxes	2.100,00 €	5.100,00 €	10.100,00 €
	additional costs as percent of purchase price	6.1-12.1%	6.04-12.04%	6.02-12.02%
Korea	notary fees	1.500,00 € - 3.000,00 €; not mandatory	3.750,00 € - 7.500,00 €; not mandatory	7.500,00 € - 15.000,00 €; not mandatory
	registration fees	n/a	n/a	n/a
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	1.5-3%	1.5-3%	1.5-3%
	broker fees	900,00 €	2.250,00 €	4.500,00 €
	transfer taxes	1.500,00 € - 3.000,00 €	3.750,00 € - 7.500,00 €	7.500,00 € - 15.000,00 €
	additional costs as percent of purchase price	2.4% - 3.9%	2.4% - 3.9%	2.4% - 3.9%
Kosovo	notary fees	120,00 €	280,00 €	520,00 €
	registration fees	50,00 €	140,00 €	300,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.17%	0.17%	0.16%
	broker fees	/	/	/
	transfer taxes	50,00 €	140,00 €	300,00 €
	additional costs as percent of purchase price	0.05%	0.06%	0.06%
Lithuania	notary fees	450,00 €	1.125,00 €	2.250,00 €
	registration fees	5,79 € - 289,62 €	5,79 € - 289,62 €	5,79 € - 289,62 €
	title search	0 €	0 €	0 €

	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.46-0.74%	0.45-0.57%	0.45-0.51%
	broker fees	n/a	n/a	n/a
	transfer taxes	450,00 €	1.125,00 €	2.250,00 €
	additional costs as percent of purchase price	0.45%	0.45%	0.45%
Luxembourg	notary fees	856,00 €	1.400,00 €	1.650,00 €
	registration fees	n/a	n/a	n/a
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price			
	broker fees	n/a	n/a	n/a
	transfer taxes	n/a	n/a	n/a
	additional costs as percent of purchase price	n/a	n/a	n/a
Mali	notary fees	1.750,00 €	4.375,00 €	8.750,00 €
	registration fees	900,00 €	2.250,00 €	4.500,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	2.65%	2.65%	2.65%
	broker fees	5.000,00 €	12.500,00 €	25.000,00 €
	transfer taxes	18.000,00 €	45.000,00 €	90.000,00 €
	additional costs as percent of purchase price	23%	23%	23%
Morocco	notary fees	1.000,00 €	2.500,00 €	5.000,00 €
	registration fees	n/a	n/a	n/a
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price			
	broker fees	n/a	n/a	n/a
	transfer taxes	5.000,00 €	12.500,00 €	25.000,00 €
	additional costs as percent of purchase price	5%	5%	5%
Portugal	notary fees	no notarial competence	no notarial competence	no notarial competence
	registration fees	250,00 €	250,00 €	250,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.25%	0.1%	0.05%
	broker fees	5.000,00 €	12.500,00 €	25.000,00 €

	transfer taxes	0 - 6.500,00 €	0 - 16.250,00 €	0 - 32.500,00 €
	additional costs as percent of purchase price	5-11,5%	5-11,5%	5-11,5%
Russian Federation	notary fees	465,00 €	615,00 €	865,00 €
	registration fees	321,00 €	321,00 €	321,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.79%	0.37%	0.24%
	broker fees	n/a	n/a	n/a
	transfer taxes	270,00 €	425,00 €	700,00 €
	additional costs as percent of purchase price	0.27%	0.17%	0.14%
Slovak Republic	notary fees	691,00 €	766,00 €	891,00 €
	registration fees	registration within 30 days: between 33 - 66 €; registration within 15 days: between 133 - 266 €	registration within 30 days: between 33 - 66 €; registration within 15 days: between 133 - 266 €	registration within 30 days: between 33 - 66 €; registration within 15 days: between 133 - 266 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	0.72-9.57%	0.32-0.41%	0.18-0.23%
	broker fees	n/a	n/a	n/a
	transfer taxes	690,00 €	775,00 €	900,00 €
	additional costs as percent of purchase price	0.69%	0.31%	0.18%
Turkey	notary fees	1.130,00 € - 9.480,00 €	2.825,00 € - 23.700,00 €	5.650,00 € - 47.400,00 €
	registration fees	3.000,00 € - 4.000,00 €	7.500,00 € - 10.000,00 €	15.000,00 € - 20.000,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	4.13-13.48%	4.13-13.48%	4.13-13.48%
	broker fees	n/a	n/a	n/a
	transfer taxes	n/a	n/a	n/a
	additional costs as percent of purchase price	n/a	n/a	n/a
United Kingdom (England & Wales) - aus Murray	solicitor fees for seller	571,00 €	635,00 €	768,00 €
	solicitor fees for buyer	608,00 €	676,00 €	815,00 €
	registration fees	88,00 €	220,00 €	323,00 €
	title search	304,00 €	304,00 €	304,00 €
	title insurance	n/a	n/a	n/a
	percentage of conveyance costs of purchase price	1.57% (without title insurance)	0.73% (without title insurance)	0.44% (without title insurance)

	broker fees	1.300,00 € (+VAT)	3.250,00 € (+VAT)	6.500,00 € (+VAT)
	transfer taxes	/	5.000,00 €	25.000,00 €
	additional costs as percent of purchase price	1.3%	3.3%	6.3%
United States of America (New York)	lawyer fees for seller	419,00 €	419,00 €	419,00 €
	lawyer fees for buyer	342,00 €	342,00 €	342,00 €
	registration fees			
	title search	n/a	n/a	n/a
	title insurance	467,00 €	853,00 €	1.496,00 €
	percentage of conveyance costs of purchase price	1.23% (without title search)	0.66% (without title search)	0.45% (without title search)
	broker fees	6.000,00 €	15.000,00 €	30.000,00 €
	transfer taxes	400,00 €	1.000,00 €	2.000,00 €
	additional costs as percent of purchase price	6.4%	6.4%	6.4%
Uruguay	notary fees	3.000,00 €	7.500,00 €	15.000,00 €
	registration fees	219,00 €	219,00 €	219,00 €
	title search	0 €	0 €	0 €
	title insurance	0 €	0 €	0 €
	percentage of conveyance costs of purchase price	3.22%	3.09%	3.04%
	broker fees	3.000,00 € (+ VAT)	7500,00 € (+VAT)	15.000,00 € (+VAT)
	transfer taxes	2.000,00 €	5.000,00 €	10.000,00 €
	additional costs as percent of purchase price	5%	5%	5%

Sources: Questionnaire; Murray Study; CNUE Study; Dual Conseil Study

http://www.cvfirm.com/calculator/calculate.php
http://www.gazzettaufficiale.it/eli/id/2013/09/23/13G00149/sg
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https://www.gov.uk/buy-sell-your-home/tax
https://www.gov.uk/stamp-duty-land-tax
https://www.gov.uk/stamp-duty-land-tax/residential-property-rates

Appendix D: Table VII: Costs in Company Law

Subject matter / States		costs of incorporation of limited liability company	costs in a going concern
Andorra	notary fees	450,76 €	
	registration fees	30%	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	0 €	0 €
Argentina	notary fees	average 500,00 €	
	registration fees	500,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	50,00 €	50,00 €
Austria	notary fees	n/a	
	registration fees	n/a	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	13,70 € + 20 % VAT	13,70 € 20 % VAT
Belgium	notary fees	1.553,00 €	
	registration fees	1.490,50 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	between 9,92 € + 21 % VAT and 54,92 € + 21 % VAT	between 9,92 € + 21 % VAT and 54,92 € + 21 % VAT
China	notary fees	no notary necessary	
	registration fees	free	
	legal opinion	n/a	
	certificate of good standing	n/a	
	excerpt of register	regularly free	regularly free
Colombia	notary fees	depends on company value; 400,00 € for company value of 100.000,00 €	
	registration fees	depends on company value; 240,00 € for company value of 33.500,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	1,50 €	1,50 €
Congo, Rep	notary fees	depends on company: 259,16 € for Ltd; 762,25 € for plc	
	registration fees	free	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	76,22 € for Ltd; 152,45 € for corporations	76,22 € for Ltd; 152,45 € for corporations

Costa Rica	notary fees	percentage of the social capital	
	registration fees	166,04 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	4,98 €	4,98 €
Croatia	notary fees	265,00 € for Ltd	
	registration fees	50,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	depends on number of sheets	depends on number of sheets
Estonia	notary fees	n/a	
	registration fees	145,00 € - 190,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	3,20 € + VAT (20%)	3,20 € + VAT (20%)
France	notary fees	1.200,00 €	
	registration fees	500,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	4,50 €	4,50 €
Georgia	notary fees	max. 400,00 €	
	registration fees	40,00 € - 80,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	5,90 €	5,90 €
Germany	notary fees	225,00 €	
	registration fees	150,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	4,50 €	4,50 €
Guatemala	notary fees	According to the amount of the share capital 0,97 € per thousand of 34.122,08 € and above	
	registration fees	n/a	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	3,41 € + 0,11 € pro Blatt	3,41 € + 0,11 € pro Blatt
Italy	notary fees	300,00 € - 400,00 €	
	registration fees	446,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	

	excerpt of register	included in notarial service; free for basic online consultation by anyone (3,00 €)	included in notarial service; free for basic online consultation by anyone (3,00 €)
Korea	notary fees	82,91 €	
	registration fees	tax: 0.4%	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	0,83 €	0,83 €
Lithuania	notary fees	0.1 - 0.3 % of the authorsied capital of a legal person under incorporation (no less than 72,41 € and no more than 289,62 €)	
	registration fees	depends on type of company; varies from 8,69 € to 99,63 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	0,87 € - 15,06 €	0,87 € - 15,06 €
Luxembourg	notary fees	n/a	
	registration fees	105,91 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	10,43 €	10,43 €
Mali	notary fees	384,00 € (Ltd); 750,00 € (plc)	
	registration fees	9,00 € + Stempel	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	22,50 €	22,50 €
Morocco	notary fees	negotiable	
	registration fees	less than 35,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	0 €	0 €
Portugal	notary fees	freely set	
	registration fees	360,00 €	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	20,00 €	20,00 €
Russian Federation	notary fees	2,90 €	
	registration fees	58,10 €	
	legal opinion	Not needed	

	certificate of good standing	Not needed	
	excerpt of register	2,90 €	2,90 €
Slovak Republic	notary fees	Ltd: from 100,00 €; plc: from 250,00 €	
	registration fees	Ltd: 300,00 € (150,00 € in case of electronic application); plc: 800,00 € (400,00 € in case of electronic application)	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	court: 6,50 €; notary: from 3,70 €; post office: 4,50 €	notary: from 3,70 € (depends on number of pages)
United Kingdom (England & Wales)	solicitor fees	141,91 €	
	availability of company name	16,45 €	
	registration fees	online: 13,16 €; by post: 43,86 €	
	legal opinion		2.199,80 € - 5.499,50 €
	certificate of good standing		164,99 € - 329,97 €
	excerpt of register	depends on amount of information required	depends on amount of information required
United States of America (New York)	lawyer fees	n/a	
	other fees (publication etc.)	394,70 €	
	registration fees	228,51 €	
	legal opinion		2.503,23 € - 8.344,11 €
	certificate of good standing		41,72 € - 83,44 €
	excerpt of register	n/a	n/a
Uruguay	notary fees	58.33%	
	registration fees	17.8%	
	legal opinion	Not needed	
	certificate of good standing	Not needed	
	excerpt of register	84,00 €	84,00 €

Sources: Questionnaire; Circumstantial Evidence

https://www.jordans.co.uk/documents/10180/0/Formations+price+list/122bc051-5236-48cd-8c05-461ac93195b9

https://www.rcsl.lu/mjrcs/jsp/webapp/static/mjrcs/fr/mjrcs/tarifs.html