



Institute of Notarial Studies

(A Division of the Faculty of Notaries Public in Ireland)

THE COMMON LAW AND CIVIL LAW NOTARY IN THE EUROPEAN UNION: A SHARED HERITAGE AND AN INFLUENTIAL FUTURE?

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Dr Eamonn G Hall
Notary Public
Director
Institute of Notarial Studies
22 Belgrove Lawn
Chapelizod
Dublin 20
Ireland

Email: info@ehall.ie
Web: www.ehall.ie and www.notaryinstitute.ie

Index to paper

Epigraphs.....	3
Introduction.....	4
Historical Background.....	4
The Common Law Notary within the European Union.....	6
Functions of a Common Law Professional Notary.....	7
The Civil Law Notary.....	7
Authentic Instruments.....	9
The Status of the Notary in European Law.....	10
Seminal Legal Development on the Status of the Notary.....	14
European Union Mutual Recognition of Professional Qualifications.....	17
Efficient Legal Systems and Prosperity.....	21
Legal Reform in Continental Civil Law Member States.....	23
Conclusion.....	26

‘When Christopher Columbus set foot on American soil in October 1492 he called his notary Rodrigo de Escobedo to bear witness and make declarations that were required and at more length contained in written testimonials.’

See *The Diario of Christopher Columbus’s First Voyage to America, (1492-1493*, recounted by Kathryn Burns, ‘Notaries, Truth and Consequences’, *The American Historical Review*, Vol 110, No 2 (April 2005) pp. 350-379

‘[T]he court will take judicial notice of the seals of notaries public, for they are officers recognised by the commercial law of the world.’

United States Supreme Court (1883)
Pierce v. Indseth, 106 U.S. 546, 549 (1883)

‘I would sooner trust the smallest slip of paper for truth than the strongest and most retentive memory ever bestowed on mortal man.’

Miller v. Cotton, 5 Ga.341, 349 (1848) per Justice Lumpkin.

‘[W]e are contemplating creating a special category for admission of a notarial organisation which has some but not all the characteristics of the Civil Law Notary Model;
Should this be achieved and I hope it will, then clearly most common law notarial organisations would be welcome to join, if they

wish. In fact, I personally see no reason why a Civil Law Notariat or even the Union of Notaries could not have some special status with the Common Law family.’

Mr Daniel-Sedar Senghor, President of the International Union of Notaries (UINL) in his paper ‘A New Relationship between Civil Law and Common Law Notaries – From a Civil Law Perspective’ at the Australian and New Zealand College of Notaries (ANZC) Conference, October 2014.

INTRODUCTION

Lawyers, in one guise or another, have been on this earth for millennia. There are two principal types of lawyer. There is the jurist – the writer lawyer and legal adviser. There is also the advocate lawyer. Notaries have more in common with the jurist-writer lawyer. Mankind has an instinctive desire to regulate human behaviour and to record events and agreements. The profession of notary grew out of this instinctive desire and need to record events and agreements.

The profession of notary in the form of the civil law and common law notary in the European Union will be considered in this paper. The thesis here is that the profession of civil law notary and the lawyer common-law law notary within the European Union is a single profession recognised in each Member State subject to and with the benefit of the laws of the European Union including freedom of establishment.

HISTORICAL BACKGROUND

The profession of notary dates back to Roman times. It is considered by scholars that the Roman orators (advocates) and jurists emerged as a recognisable profession during the last two centuries of the Republic – c. 200 years before the common era (BCE). Although lawyers did not gain much recognition in the societies of ancient Greece, in Rome the lawyer was highly regarded in the centuries before the common era.¹

¹ See generally, James A Brundage, *The Medieval Origins of the Legal Profession*, (2008)

² See the definition of ‘authentic instrument’ and its significance later in this paper.

The recording of the decisions of the judges, official business and commercial transactions, facilitated the emergence of a class of legal scribes – sometimes called *notarii*. In time, the *notarii* became familiar with the legal process and engaged in the composition of legal documents themselves – as well as the process of recording decisions and agreements and proving legal documents. These specialists later became known in Rome as *tabelliones* or *tabularii*. By the fourth century in the time of Constantine the Great (272 AD-337 AD) judges considered that *tabelliones* produced authentic records of transactions - a forerunner of the modern authentic instrument.²

The fall of the Western Roman Empire heralded the period of the early Middle Ages (c.500-1050 AD) - an era when there was law but little regard for the lawyer. The revival of an interest in Roman law, the study of Justinian's *Digest* and *Institutes* and the collections of later imperial law which came to be known as *Corpus Iuris Civilis* in the universities of Northern Italy (Bologna being the most celebrated) and elsewhere³ heralded a new age and a new legal science where the notarial profession was 're-discovered'.

Few members of a learned profession - as distinct from those associated with the sword - can claim to have affected the course of history. The notary positively affected the course of history. In this context, one commentator wrote:⁴

‘Nearly all the earliest civic chronicles were begun and maintained by notaries who had the requisite verbal skills and access to the highest levels of government and society. This advanced the civic identity and pride that led directly to the ‘civic humanism’ of the late fourteenth century and its foundation in accurate historical reconstructions.’

One of the reasons why scholars and historians refer to the eminent role played by notaries in civilisation was not because, *per se*, notaries were more honest or persons of greater integrity than others but, principally, because notaries were ‘professional’ writers. The notary recorded history - from the minor events of everyday life to matters associated with statecraft. In this regard, in medieval times, the notary's early exposure to

‘and continual use of classical rhetoric sometimes developed into literary interests in Roman writers ... The emphasis on facts rather than fantasy, on lay civic culture rather than courtly or ecclesiastical culture, and on

² See the definition of ‘authentic instrument’ and its significance later in this paper.

³ John Maurice Kelly, *A Short History of Western Legal Theory*, Oxford, 1992, p 159

⁴ Christopher Kleinhenz (ed) *Medieval Italy: An Encyclopaedia*,(2004) Vol 2, 782.

classical rhetoric rather than scholastic philosophy led directly to the renaissance.⁵

Out of all of this, the notary has grown into a significant profession today.

THE COMMON LAW NOTARY WITHIN THE EUROPEAN UNION

The notary in the common law jurisdictions within the European Union is a professional lawyer. In England and Wales, a candidate notary who seeks to become a general notary must be a solicitor (professional lawyer) of the Senior Courts of England and Wales, a barrister or hold a law degree. The prospective notary must have followed and obtained a satisfactory standard in a course of study in relation to eleven 'core' legal subjects such as law of property, law of contract, law of the European Union, wills probate and administration, Roman law, private international law and notarial practice.⁶ Further, in practical terms, the candidate notary who is either a solicitor, barrister or holds a law degree and has satisfactorily studied all relevant 'core' legal subjects, spends a period of two years of part-time study at University College London on the Notarial Practice Course.

In relation to entering the profession of scrivener notary in London, a person must first qualify as a general notary. There are then further educational requirements by the Society of Scrivener Notaries.⁷ The Society of Scrivener Notaries of London has been admitted to membership of the International Union of Notaries.

In Scotland, the responsibility for the admission and registration of notaries lies with the Council of the Law Society of Scotland.⁸ Since 2007 only solicitors/notaries in possession of a practising certificate can act as notaries in Scotland.⁹

In Ireland, a candidate notary must be a solicitor (professional lawyer) of the Superior Courts or a barrister with at least five years post-qualification experience in the general practice of law, have attended the postgraduate Notarial Professional Course and passed the postgraduate examination of the Faculty of Notaries Public in Ireland/Institute of Notarial Studies which is

⁵ Above, p. 783.

⁶ See, generally, *Notaries (Qualifications) Rules 2013*.

⁷ See, generally, *Brooke's Notary*, Nigel Ready, London (2013), pages 71 to 74.

⁸ *Solicitors (Scotland) Act 1980* and the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*.

⁹ *Legal Profession and Legal Aid (Scotland) Act 2007*, section 62.

aligned with the Diploma in Notarial Law and Practice.¹⁰ The postgraduate course of studies is conducted by the Institute of Notarial Studies based in Dublin.¹¹ It is envisaged that the course of study will be extended from one academic year as at present to two academic years. Following completion of all his or her studies, the candidate notary (who is already a professional lawyer with at least five years post-qualification as a professional lawyer) makes a formal petition pursuant to a notice of motion to the Chief Justice of Ireland in open court.

Functions of a common-law professional notary

A notary public in Ireland and the United Kingdom is stated to be a duly appointed officer whose public office it is, amongst other matters, to draw, attest or certify, usually under his or her official seal, for use anywhere in the world:

- deeds and other documents including conveyances of real and personal property;
- powers of attorney relating to real and personal property situate [domestically] or in foreign countries;

Further, the notary is authorised to:

- note or certify transactions relating to negotiable instruments;
- prepare wills or other testamentary documents and
- draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the carriage of cargo in ships.

One of the functions of the common-law professional notary is the well-known function of verifying, authenticating and attesting the execution of deeds or other documents including powers of attorney. Further, from an early period, common-law professional notaries have exercised the right of administering oaths and taking declarations for use in proceedings domestically and elsewhere.

THE CIVIL LAW NOTARY

The fundamental characteristics of the Latin Notary whom I shall describe here as the civil law notary - as considered by the International Union of Notaries -

¹⁰ See the Notaries Public, Education, Training and Examination Regulations 2007-2014 at www.notarypublic.ie and www.notaryinstitute.ie.

¹¹ See above.

is that the notary (like his common law counterpart) is a professional lawyer and a public official appointed by the State to confer authenticity on legal deeds and contracts drafted by the notary and to advise persons who call upon his or her services.¹² The notarial function extends to legal activities in non-contentious matters affording legal certainty to clients.

It is appropriate here to refer to the civil law notary and his or her functions in three civil law jurisdictions, France, Germany and Belgium.¹³

A central feature of the work of the notary in France is the authentication of instruments and contracts submitted by parties to the notary; the intervention of the notary confers probative value and enforceability on the instrument or contract. The French notary acts on the instructions of the parties.

The authentic instrument produced by the notary in France has conclusive probative value although this is rebuttable by means of special proceedings in which the *tribunal de grande instance* (Regional Court) has exclusive jurisdiction. The notarial instrument in France does not require judicial intervention for the purposes of its enforcement.¹⁴

Notaries in France are State officials, although they practise as independent professionals. Sometimes their function is described as falling within the designation of ‘preventative jurisdiction’.

In Germany, the notary is an independent public official whose principal function (in general terms) is to authenticate instruments. As in France, once executed, a notarial instrument is enforceable and has special probative value. The notary acts in accordance with the instructions of the parties and ensures the parties have full legal capacity to act in the particular transaction. The German notary also advises the parties of their rights and obligation in connection with the instrument at issue.¹⁵

The probative effect of the notarial instrument in Germany is rebuttable under defined conditions laid down by law. Notaries in Germany carry out other activities in connection with the certification of documents, the grant of powers of attorney and witnessing sworn statements. Depending on the region of Germany, notaries exercise their profession on an exclusive basis or together with the practice of the profession of lawyer.

¹² See generally, www.uinl.org [The Notary and its function]

¹³ In the cases cited as the *Notary Cases* below, Advocate General Cruz Villalón described the functions of the notary in Belgium, France, Luxembourg, Austria, Germany and Greece upon which I have relied on here.

¹⁴ See generally [2011] 3 C.M.L.R. 19 at pages 495-496, Opinion of Advocate General Villalón.

¹⁵ See above pages 498 and 499, Opinion of Advocate General Villalón.

In Belgium, the principal task of the notary (in general) is to establish authentic instruments. The services of a notary in Belgium may be mandatory or optional, depending on the nature of the instrument. The notary confirms that all the conditions required by law in relation to the relevant instrument are satisfied, and the parties have legal personality and capacity to enter into legal transactions. Under Belgian law, a notarial act is enforceable throughout Belgium.

The Judicial Code in Belgium stipulates the notary is responsible for drawing up the inventory of a deceased's estate or of property in joint ownership or co-ownership. The notary in Belgium also has a role in relation to sales of immovable property. In addition, certain transactions must be concluded by a notarial act if they are not to be void. These include gifts *inter vivos*, wills, marriage contracts and statutory cohabitation agreements. Notaries in Belgium also have a role in company law transactions.¹⁶

AUTHENTIC INSTRUMENTS

The difference between the common law notary and the civil law notary is sometimes explained with reference to the effect in the different jurisdictions of the European Union of what is termed the 'authentic act' or 'public instrument'. I find this distinction misleading if this is put forward as the basis for submitting the law pertaining to the authentic act constitutes an irreconcilable difference between the civil law notary and the professional common law notary.

An 'authentic instrument' is known as '*acte authentique*' in France, an '*atto pubblico*' in Italy, '*documento público*' in Spain and '*öffentliche Beurkundung*' in Germany. A document drafted by the civil law notary in certain circumstances may become an authentic instrument. The authentic act may be defined as a document formally drawn up by a public official or registered as such. Under the law of certain member States of the European Union, the instrument takes effect as a conclusive and enforceable statement of, for example, the indebtedness of a person party to the document, whose enforceability status is obtained without the institution of court proceedings. However, the civil law notary does not have a monopoly on the creation of a authentic act or public instrument.¹⁷

¹⁶ See generally the judgment of the Court of Justice in *Case C-47/08, European Commission v. Belgium*, judgment of 24 May 2011.

¹⁷ See Dicey, Morris and Collins, *The Conflict of Laws*, 15th edition, London, vol 1 p.783.

Recognition of an authentic instrument within the common law jurisdictions of the European Union (Ireland and the United Kingdom) has been a feature of Irish and UK law since 1978.¹⁸ The current law on the recognition of the ‘authentic act’ of one Member State in the context of enforcement in another Member State is set out in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) known as the ‘Recast Brussels Regulation’. The expression ‘authentic instrument’ is defined in the Recast Brussels Regulation as meaning:

‘a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:
(i) relates to the signature and content of the instrument; and
(ii) has been established by a public authority or other authority empowered for that purpose.’

Article 58 of the Recast Brussels Regulation provides that an authentic instrument which is enforceable in the Member of origin shall be enforceable in the other Member States without any declaration of enforceability being required. Enforcement of the authentic instrument may be refused only if such enforcement is manifestly contrary to public policy (*ordre public*) in the Member State addressed.¹⁹

In the *Notary Cases* (2011)²⁰ the Court of Justice in the context of the enforceability of notarial acts (authentic instruments) emphasised that the relevant agreements and documents are freely entered into by the parties:

‘[The parties] decide themselves, within the limits laid down by law, the extent of their rights and obligations and choose freely the conditions which they wish to be subject to when they produce a document or agreement to the notary for authentication. The notary’s intervention presupposes the prior existence of an agreement or consensus of the parties.’

THE STATUS OF THE NOTARY IN EUROPEAN LAW

¹⁸ Convention on the association of Denmark, Ireland and the United Kingdom to the Convention of jurisdiction and enforcement of judgments in civil and commercial matters, Luxembourg, 9 October 1978.

¹⁹ Article 58 of the Recast Brussels Regulation, Regulation (EU) No 1215/2012.

²⁰ *Re Nationality of Notaries: European Commission v. Germany*, [2011] 3 C.M.L.R. 19 and *Case C-47/08 European Commission v. Belgium* (2011).

One of the cornerstones of European Union law is the prohibition on any restrictions on freedom of establishment and freedom to provide cross-border services by nationals of a Member State in the territory of another Member State.²¹ However, these freedoms are subject to the proviso which exempts activities - from the principles of freedom of establishment and the freedom to provide cross-border services - which are 'even occasionally connected with the exercise of official authority'.²²

At its most basic, Mr A or Ms B is a professional person in a Member State of the European Union. According to the European Treaty, Mr A or Ms B has a right to move and practise his or her self-employed profession in another Member State of the Union or to provide cross-border services. But if Mr A or Ms B's profession is connected 'with the exercise of official authority' then the rules on freedom of establishment and freedom to provide cross-border services do not apply.²³ So a notary duly qualified in one Member State could not practise in another Member State if the notary's activities were held to be associated with 'the exercise of official authority'.

Since the inception of the European Community and until the relatively recent decisions of the Court of Justice in the *Notary Cases*²⁴ (2011), notaries on the continent of Europe escaped the consequences of market integration that applied to other professionals. The notaries in continental Europe constantly maintained they were connected with 'official authority' and, accordingly, the provisions of the Treaty did not apply to them. Previously in 1987, notaries in the Netherlands had asserted they were not subject to any VAT obligations based on their exercise of 'official authority'. The Court of Justice, while holding that the notaries exercised their functions in the form of an economic activity carried out in the exercise of a liberal profession and so were liable to VAT obligations, did not determine or decide the issue whether notaries exercise their functions in the context of 'official authority'.²⁵

The notaries of continental Europe anticipated a 'battle' with the European Commission - determined to create more competition among notaries - long before the 'battle' crystallised in litigation. So, the notaries mounted a campaign - a campaign they nearly won. Several campaigns were mounted in national fora as well as a very effective campaign in the European Parliament.

²¹ Article 49 (ex Article 43 TEC) ((freedom of establishment); Article 51 (ex Article 45 EC) and Article 56 (ex Article 49 TEC) (freedom to provide cross-border services) of the Treaty on the Functioning of the European Union (TFEU) with the exceptions set out in Articles 51 and 62 of TFEU.

²² See Articles 51 and 62 of TFEU above,

²³ Above.

²⁴ See footnote 20 above.

²⁵ *ECJ, Case 235.85, Commission v Netherlands* [1987] ECR 1471

The notaries influenced the passing of resolutions in the European Parliament in effect emphasising the importance of the profession of the notary in Europe but with constant energetic assertions on the connection of the notary with State sovereignty – ‘the exercise of official authority’. For example, a resolution of the European Parliament in 1994 recited that the implementation of Community rules on freedom of establishment and the completion of the internal market had implications for the work of notaries whose responsibilities were stated to be ‘the provision of advice and authentication activities’.²⁶ The next recital in the resolution undoubtedly expressed the determined view of the continental notaries:

‘[O]ne feature of notarial work is the partial delegation of State sovereignty to carry out in particular the public service of drawing up, authenticating and legalising contracts and ensuring that they are enforceable and having evidentiary force, and providing preventive and impartial advice to interested parties so as to ease the burdens of the courts.’

The recitals enabled the European Parliament to resolve in 1994 in the following terms:

‘[The European Parliament] wishes to point out that, while being organised differently in the 12 Member States of the Community and also within certain Member States, the profession of notary has a number of basic, virtually common characteristics, the most important being: a partial delegation of state sovereignty to carry out a public service in respect of the authenticity of contracts and evidence; independent public-service activity exercised within a liberal profession (except in Portugal, one German Land and in the particular system operated in the United Kingdom), but subject to supervision by the State – or by the statutory body to which this responsibility is delegated by the public authorities – as regards compliance with requirements governing notarial acts; regulated scales of fees imposed in the interests of clients, access to the profession or the organisation thereof; a preventive role in relation to judicial proceedings, by eliminating or reducing the risk of litigation; an impartial advisory function.’

The European Parliament considered the existence of a partial delegation of the authority of the state - as an element inherent in the exercise of the profession of notary - constituted valid grounds for stating that the activities of the notary were ‘connected, even occasionally, with the exercise of official authority’ but

²⁶ Resolution of the European Parliament. ‘Profession of notary in the Community’, OJEC No 44/36 18 January 1994.

the Parliament nevertheless called for the removal of the nationality requirement where most Member States confined the profession of notary to their own nationals.²⁷

One will come to the conclusion that the European Parliament did not draft the resolution without the most active involvement of the European notariat.

Notaries succeeded in having the European Parliament pass another resolution in 2006.²⁸ This resolution was subsequently described by the Court of Justice in the *Notary Cases* as a ‘purely political act’ whose terms were ‘ambiguous’.²⁹ As in the previous resolution, one can clearly discern the influence of the learned members of the notariat, for example, in the following recital:

‘[A]ny reform of the legal professions has far-reaching consequences going beyond competition law into the fields of freedom, security and justice, and, more broadly, into the protection of the rule of law in the European Union.’³⁰

The notary as a public official with the authentic act functions is emphasised by the European Parliament:

‘[C]ivil-law notaries are appointed by Member States as public officials whose tasks include the drawing up of official documents with special value as evidence and immediate enforceability’.³¹

There was a determined effort on the part of the continental notaries in the 2006 European Parliament Resolution to equate the self-employed notary with the judge and civil servant of the Member State:

‘[C]ivil-law notaries take on extensive investigation and scrutiny work on behalf of the State in matters relating to non-judicial legal protection, particularly in connection with company law – under Community law in some cases – and as part of this work they are subject to disciplinary supervision by the relevant Member State that is comparable to that applicable to judges and civil servants.’³²

The association of the notary with the State was made abundantly clear:

²⁷ See above; paras 4 and 6 of the 1994 Resolution.

²⁸ Resolution of the European Parliament of 23 March 2006 [2006] OJ C 292E/105.

²⁹ See note 19 above.

³⁰ Recital B of Resolution of the European Parliament of 23 March 2006 [2006] OJ C 292E/105

³¹ Recital I above.

³² Recital J above.

‘[T]he partial delegation of the authority of the State is an original element inherent in the exercise of the profession of civil-law notary; and whereas it is currently exercised on a regular basis and represents a major part of the activities of the civil-law notary.’³³

Finally, without any doubt whatever, the European Parliament in its 2006 resolution reminded the European Commission that the Parliament considered

‘[A]rticle 45 of the Treaty (then containing the derogation in the context of freedom of establishment for ‘activities’ connected with the exercise of official authority’ and now Article 51 of the Treaty on the Functioning of the European Union) must be fully applied to the profession of civil law notary, as such.’³⁴

By the time this resolution was passed by the European Parliament, the European Commission had instituted proceedings against several Member States on the grounds they failed to fulfil obligations under the Treaty in relation to freedom of establishment by imposing through the enactment of national legislation a requirement that only nationals of the relevant Member States could be appointed to the position of notary and that the relevant Member States had failed to transpose (in relation to the profession of notary) the relevant Directive on the recognition of higher-education qualifications. These cases known as the *Notary Cases* are considered in the next part of this paper.

SEMINAL LEGAL DEVELOPEMNT ON STATUS OF THE NOTARY

Law within each Member State in the European Union is comprised of domestic constitutional provisions, domestic legislation, European Union legislation, domestic case law and the case law of the European Court of Justice and the European Court of Human Rights. The most significant legal development on the status of the notary in a period of years has been a seminal series of cases – that have gone unnoticed by many. The leading case is *Re Nationality of Notaries: European Commission v. Germany*, (but there are related cases) decided by the Court of Justice in 2011³⁵ which I cite in this paper as the *Notary Cases* as there were several cases on the same issues against various Member States.

³³ Recital K above.

³⁴ Para 17 of the Resolution above.

³⁵ *Re Nationality of Notaries: Case C-54/08, Commission v. Germany*, [2011] 3 C.M.L.R 19; *ECJ, Case C-47/08. Commission v. Belgium*; *ECJ, Case C-50/08, Commission v. France*; *ECJ, Case 51/08, Commission v. Luxembourg*; *ECJ, Case-53/08 Commission v Austria*; *ECJ Case-61/08 Commission v. Greece*; *ECJ, Case 565/08, Commission v. Italy*; *ECJ, Case 89/09. Commission v. France*.

The decisions of the Court of Justice in the *Notary Cases* are of considerable significance in the legal order concerning the legal status and standing of the notary. The Court of Justice having examined in detail the role and function of the notary in several Member States and having made no distinction whatever between the civil law notary and the lawyer notary of the common law altered (or clarified) the status in law of the notary within the European Union by (in effect) applying the freedom of establishment provisions of the Treaty to the profession of notary. [As stated, the application of the rules on freedom of establishment had been resisted by notaries and their governments since the foundation of the Union.]

In any litigation, (in general) there are at least two adversarial parties. In the *Notary Cases*, on one side was the European Commission with one Member State intervening, the United Kingdom. The European Commission and the United Kingdom stood against the might of continental Europe, (either as defendants or intervening parties) - Germany, France, Austria, Hungary, Poland, Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Slovenia, Slovak Republic, Luxembourg and Greece. Epic battles like this battle rarely reach the Court of Justice.

As stated above, the actions related, in part, to the claim by the European Commission that the requirement in the various Member States reserving the profession of notary to their own nationals constituted a form of discrimination. Further, the Commission claimed the Member States in question failed to transpose the Directive on the mutual recognition of professional qualifications.³⁶ Many consider that these issues were only peripheral to one core fundamental issue of considerable importance.

At the heart of the cases was the core issue of the utmost significance – whether notaries were so connected with the State that they exercised ‘official authority’ - criteria that would exempt notaries from the Treaty provisions on freedom of establishment and freedom to provide services within the European Union.³⁷ Advocate General Cruz Villalón stated that the cases brought before the Court of Justice what was possibly ‘the most sensitive issue’ concerning the interpretation of the significant expression of the European Treaty - ‘the exercise of official authority’.³⁸

The European Commission had not been persuaded by the arguments of Member States that the notary was connected with ‘official authority’ and

³⁶ Directive 89/48 now codified by Directive 2005/36 on the recognition of professional qualifications.

³⁷ See previous footnotes and below.

³⁸ Articles 43 and 45 of the Treaty Establishing the European Community (TEC) now Articles 49 and 51 of the Treaty on the functioning of the European Union (TFEU).

therefore exempt from the provisions on freedom of establishment and services. The legal process by the European Commission commenced c. 2000 and reasoned opinions were sent c. 2006 to relevant Member States. The Opinion of Advocate General Cruz Villalón was delivered on 14 December 2010 with the judgment of the Court of Justice delivered on 24 May 2011. Advocate General Cruz Villalón agreed with the notaries that ‘authentication’ was an ‘activity’ connected directly and specifically with the ‘exercise of official authority’.³⁹ The Court of Justice took a different view from the Advocate General.

In the *Notary Cases*, the Court of Justice ‘demystified’ the legal functions of the civil law notaries.

In relation to the authentication of documents and agreements in the Belgian case judgment, the notary ‘merely’ (the precise word used by the Commission and repeated by the Court of Justice was ‘merely’) attests the wishes of the parties, after advising them and gives legal effect to their wishes. The Commission had submitted that in carrying out that activity, the notary has no decision-making powers with respect to the parties. Thus, authentication by a notary ‘merely’ confirms an agreement previously entered into by the parties. The Commission submitted the fact that authentication was mandatory for certain acts was not relevant, since numerous procedures are mandatory without being manifestations of the exercise of official authority.⁴⁰ The Court of Justice agreed.⁴¹

In relation to German notaries, the Court stated the overriding consideration was that the notary has no decision-making powers with respect to the parties in the context of the authentication activity by notaries. So, even if the authentication activity of the notary is being regarded as belonging to the ‘preventive administration of justice’ that does not alter the position. In this matter also, notaries are not connected with ‘the exercise of official authority’ because they do not have power to impose sanctions.⁴²

The Court in the German *Notary Case* noted that in the context of ‘the exercise of official authority’, the fact that particular features of the rules of evidence apply regarding notarial acts is not relevant since similar ‘probative

³⁹ [2011] 3 C.M.L.R. 19 p. 484 at p.514

⁴⁰ *Case-47/08, European Commission v. Belgium (United Kingdom Intervening)*, 483 at 535

⁴¹ See above and *Re Nationality of Notaries: European Commission v Germany (United Kingdom Intervening)* [2011] 3 C.M.L.R 19

⁴² [2011] 3 C.M.L.R. 19 at 529-530.

force' is also enjoyed by other documents that do not fall within 'the exercise of official authority'.⁴³

In the context of the enforceability of notarial acts (in Belgium) the Commission (and repeated by the Court) submitted that the endorsement of a document with the authority to enforce was not proof of 'the exercise of official authority' because, *inter alia*, any dispute that may arise would be decided not by the notary but by the court.

In the context of the attachment of immovable property in the Belgian *Notary Case*, the Court of Justice held that it is the court responsible for the attachment proceedings which appoints the notary and entrusts him or her with carrying out relevant functions. If disputes arise, the decision is for the relevant court to take, the notary being obliged to draw up a statement of objections, suspend all actions and refer the question to the court.⁴⁴

The notary's part in drawing up the inventory of a deceased person's estate or of property in joint ownership in the Belgian *Notary Case* was (according to the Commission) 'limited to preparing that inventory under the supervision of the court'. The notary's involvement in the 'judicial division of estates' was also submitted to be 'circumscribed by decisions of the court'. The Court of Justice agreed.⁴⁵

In relation to other notary-related matters in Belgium such as legal transactions pertaining to gifts, marriage contracts, statutory cohabitation agreements, wills, company law and the law of associations, 'the notary does no more than endorse the wishes of the parties in accordance with law' - according to the European Commission submissions. The Court of Justice agreed.⁴⁶

The Court of Justice concluded firmly that the activities of notaries in the Belgian and German legal systems (and in effect the activities of the civil law notary elsewhere in the European Union) are not connected with 'the exercise of official authority'. The door was thus open for freedom of establishment and freedom to provide cross-border in the context of notarial services.

⁴³ Above, p .530.

⁴⁴ *C-47/08 Commission v Belgium*, (2011), para 106

⁴⁵ Above, para 109.

⁴⁶ Above, para 113.

EUROPEAN UNION MUTUAL RECOGNITION OF QUALIFICATIONS

The European Commission published a proposal for a ‘Directive of the European Parliament and the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System’ (COM(2011) 883 final) on 19 December 2011. For the purposes of this paper, the initial proposal will be described as ‘the proposed EC Directive’ as distinct from the final and definitive text of that Directive.

The proposed EC Directive was drafted in the context of the European Commission’s stated policy to promote, *inter alia*, the intra-European Union mobility of professional persons. Recognition of professional qualifications is considered to be essential to making the fundamental ‘Internal Market’ freedoms work effectively for EU citizens. The proposed EC Directive sought to amend Directive 2005/36/EC on the recognition of professional qualifications as a modernisation and up-dating measure.

The European Commission stated that the decision of the Court of Justice in the EU *Notary Cases*⁴⁷ made it possible for the European authorities to proceed to open up the profession of notary in one Member State to nationals from another Member State.

The profession of notary was specifically included in early versions of the proposed EC Directive. The stated objective of the proposed Directive included, among many others, the specific measure of ‘offering a legal framework ... for notaries’.⁴⁸ It was intended originally, *inter alia*, to include notaries in the Directive at least in relation to freedom of establishment.

Significantly it was proposed that Article 5 of Directive 2005/36/EC was to be amended by the insertion of the following paragraph 4 which, if enacted, would constitute a constraint on EU notaries providing a temporary or occasional notarial service in a host Member State.

‘4. In the case of notaries, the authentic instruments and other activities of authentication which require the seal of the host Member State shall be excluded from the provision of services.’

It is submitted by the present writer that the general principles of law in relation to the right of establishment and freedom to provide cross-border

⁴⁷ See note 11 above.

⁴⁸ Para 1.2 of the Explanatory Memorandum of the proposed Directive.

services should apply to notaries. In particular, it is submitted that the notary from an ‘established’ Member State would appreciate fully the legal requirements of a host Member State before he or she engaged in a notarial activity in a host Member State. Otherwise, such a notary would risk incurring civil liability if he or she were negligent.

It is important again to re-state that all notaries in common law jurisdictions within the European Union are qualified lawyers at postgraduate level.

The UK and Ireland Notarial Forum considered that the proposed restriction on notaries (in the context of the temporary or occasional provision of notarial services) in relation to the drawing up of authentic instruments and other activities of authentication which required the seal of the host Member State was not justified by European law and contravened the jurisprudence of the European Court of Justice as set out in the *EU Notary Cases*. Accordingly, the UK and Ireland Notarial Forum submitted that paragraph 4 of the proposed amendment to Article 5 of Directive 2005/36/EC ought to be deleted from the then proposed EC Directive.

In relation to a right of establishment (in the nature of the provision of notarial services, for example), which is not of an occasional or temporary basis, Directive 2005/36 would entitle Member States to impose ‘aptitude tests’ (to be held twice a year) or impose an ‘adaptation period’ of up to three years on the notary seeking to establish himself/herself in the host Member State.

An ‘adaptation period’ (pursuant to Article 3 of Directive 2005/36/EC) means a period of up to three years of ‘supervised practice possibly being accompanied by further training’.

An ‘aptitude test’ (pursuant to Article 3 of Directive 2005/36/EC) means a test (examination) of the professional knowledge of the applicant with the objective of assessing the ability of the applicant to pursue a regulated profession in a host Member State. The aptitude test must take account of the fact that the applicant is a qualified professional (for example, a notary) in the home Member State or the Member state from which he or she comes.

The proposed small measure of ‘liberalisation’ – bringing the notaries within the United Kingdom and Ireland closer to their mainland continental colleagues - met with opposition from some notaries on the continent of Europe. Following representations, the European Parliament and the Council reached agreement on what I describe as the ‘contentious’ issue in relation to the notarial profession. The notary was to be excluded altogether from the proposed

Directive. Commissioner Michel Barnier announced the broad agreement in a press release on 12 June 2013.⁴⁹

Subsequently, the European Parliament amended the then proposed Directive by providing that the Directive was not to apply to notaries who are appointed by ‘an official act of government’ and the justification for this exclusion of the notary from the Recognition of Professional Qualifications Directive was ‘in view of the specific and differing regimes applicable to [notaries] in individual Member States for accessing and pursuing the [Notarial] profession’.⁵⁰ This justification lacks credibility and if taken to its logical conclusion would prevent the Union’s institutions from making progress on many matters affecting the citizens of the Union because of the (understandable) ‘differing’ legal ‘regimes’ in individual Member States.

In 2014, José Freitas, a notary from Portugal, instituted proceedings against the Council of the European Union and the European Parliament.⁵¹ Notary Freitas claimed the Court should annul Article 1(2)(b) of Directive 2013/55/EU of the European Parliament and the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’). He did so alleging infringement of Article 49 TFEU (ex Article 43 TEC) on the basis the profession of notary falls within the scope of the application of Article 49 TFEU (ex Article 43 TEC) regarding freedom of establishment and does not fall within the exercise of official authority within the meaning of Article 51 TFEU (ex Article 45 TEC). Notary Freitas also alleged breach of the principle of proportionality as notaries were being excluded in a general and absolute manner from the scope of Directive 2005/36/EC on the recognition of professional qualifications.

There were applications from Spain, France, Portugal, Romania, the European Commission, the Conseil national des bureaux (French National Bar Council, the Orde dos Notários (Portuguese notarial professional body) to intervene in the *Frietas* case. The *Frietas* case came before the General Court and on 7 January 2015, the case was dismissed on the grounds of being inadmissible. It appears that the plaintiff should have instituted his action in the domestic courts first – in the context of an action for annulment of a Directive.

⁴⁹ See Commissioner Michel Barnier welcomes the trilogue agreement on the modernisation of the Professional Press Release Database Qualifications Directive, Brussels, 12 June 2013.

⁵⁰ European Parliament Legislative Resolution of 9 October 2013; Recital 3 and Article 2(b) 4 being amendments .

⁵¹ *José Freitas v. Council of the European Union and European Parliament* (Case T-185/14)

In the circumstances, the General Court considered there was no need to adjudicate on the applications of those who sought to intervene in the action.

It is considered that Frietas had a good cause of action but should have instituted his action in the domestic courts having first applied to become a notary in another Member State and having been refused. The domestic court could have referred the case to the Court of Justice.

EFFICIENT LEGAL SYSTEMS AND PROSPERITY

Before considering legal reforms in the legal notarial systems of certain European continental Member States, it is appropriate to consider the background to these reforms and how some Member States fared in league tables of efficient legal systems.

There is more to an economy than purely fiscal measures. An economy's success or failure depends also on 'the nuts and bolts that hold the economy together and the plumbing that underlies the economy'.⁵² A compendium and ranking of the 'nuts and bolts' pertaining principally as to how laws and regulations work in 189 economies around the world are contained in the *Doing Business* - an annual publication of the World Bank. The Vice President and Chief Economist of the World Bank put the matter succinctly in *Doing Business 2015*:

'Creating an efficient and inclusive ethos for enterprise and business is in the interest of all societies. An economy with an efficient bureaucracy and rules of governance that facilitates entrepreneurship and creativity among individuals, and provides an enabling atmosphere for people to realise their full potential, can enhance living standards and promote growth and shares prosperity.'

Doing Business provides an evaluation in 189 economies of laws that determine how easily a business can be started and closed, the efficiency with which contracts are enforced and the rules of administration pertaining to a variety of activities. These are all examples of the 'nuts and bolts' that are rarely visible and in the limelight but play a critical role in the success of an economy. The World Bank states that the malfunctioning of these 'nuts and bolts' can thwart an economy's progress and render the more visible instruments, such as good and fiscal and monetary policies, less effective. In a perceptive foreword to

⁵² Kaushik Basu, Senior Vice President and Chief Economist, The World Bank, 'How to use 'Doing Business' indicators and how not to' in *Doing Business 2015: Going Beyond Efficiency*, World Bank Group.

Doing Business, Vice President Basu of the World Bank made an analogy with the Space Shuttle Challenger's catastrophic take off from Cape Canaveral, Florida on 28 January 1986. The problem was not a major flaw in the design of the Space Shuttle but a joint held together by a circular nut called the O-ring had failed; so an economy can be brought down or held back by the failure of its 'nuts and bolts'.⁵³

The *Doing Business* league-table considers the 'nuts and bolts' - various legal transactions - under several headings that include: starting a business; dealing with construction permits (planning permission); registering property, enforcing contracts and resolving insolvency.

Some of the principal Member States of Europe fared relatively badly in the league-tables:

Italy

Ease of doing business overall rank) **56 out of 189 economies;**

Starting a business (rank).....	46;
Dealing with construction permits, (rank).....	116;
Registering Property (rank).....	41;
Protecting minority investors.....	21;
Enforcing contracts (rank).....	147;
Resolving insolvency (rank).....	29;

Spain

(Ease of doing business overall rank) **33 out of 189 economies;**

Starting a business (rank).....	74;
Dealing with construction permits, (rank).....	105;
Registering Property (rank).....	66;
Protecting minority investors.....	30;
Enforcing contracts (rank).....	69;
Resolving insolvency (rank).....	23;

⁵³ Above, 'Foreword'.

France

(Ease of doing business overall rank) **31 out of 189 economies;**

Starting a business (rank).....	28;
Dealing with construction permits, (rank).....	86;
Registering Property (rank).....	126;
Protecting minority investors.....	17;
Enforcing contracts (rank).....	10;
Resolving insolvency (rank).....	22;

Germany

(Ease of doing business overall rank) **14 out of 189 economies;**

Starting a business (rank).....	114;
Dealing with construction permits, (rank).....	8;
Registering Property (rank).....	89;
Protecting minority investors.....	51;
Enforcing contracts (rank).....	13;
Resolving insolvency (rank).....	3;

Ireland

(Ease of doing business overall rank) **13 out of 189 economies;**

Starting a business (rank).....	19;
Dealing with construction permits, (rank).....	128;
Registering Property (rank).....	50;
Protecting minority investors.....	6;
Enforcing contracts (rank).....	18;
Resolving insolvency (rank).....	21;

United Kingdom

(Ease of doing business overall rank) **8 out of 189 economies;**

Starting a business (rank).....	45;
Dealing with construction permits, (rank).....	17;
Registering Property (rank).....	68;

Protecting minority investors.....	4;
Enforcing contracts (rank).....	36;
Resolving insolvency (rank).....	22;

[The top ten countries in the ‘Ease of Doing Business Rankings’ in *Doing Business 2015* are 1.Singapore; 2. New Zealand; 3. Hong Kong SAR China; 4. Denmark; 5. Korea Rep.; 6. Norway; 7.United States; 8.United Kingdom; 9. Finland and 10. Australia.]

LEGAL REFORM IN CONTINENTAL CIVIL LAW MEMBER STATES

In the previous section of this paper, some of the league tables on legal systems (over recent years) have indicated that reforms of the notariats (legal activities) in several countries on the continent of Europe may be warranted on the basis that the delay in finalising legal transactions hindered economic progress. These league tables acted as an incentive to governments to reform the notary profession.

The Netherlands was one of the first civil law notariats to be ‘deregulated’ within the European Union. The principal objective of the 1999 Dutch Notary Act was to increase competition. Previously, there had been a numerical restriction on the profession but pursuant to the 1999 Act, the total number of notaries in the Netherlands was no longer capped. There was also the significant development of changing from fixed to unregulated notary fees.⁵⁴

In 2008, the EU Commission published a study on the EU conveyancing services market.⁵⁵ The legal part of the study assessed the justifications for restrictive regulation in this market. The study came to the conclusion that, when put to the test, most of the arguments put forward by relevant national authorities do not appear to justify restrictions of the sort that feature in highly regulated legal systems. At that stage, the most highly regulated was the Latin notary system which existed in most continental EU Member States. The report described that notarial system as ‘characterised by mandatory involvement of notaries, quantitative restrictions on entry, fixed fees and strict market conduct regulation’.⁵⁶

⁵⁴ See *Competition Law and Policy*, OECD, ‘Competition Restrictions in Legal Professions’, 2007, DAF/COMP (2007)

⁵⁵ See ec.europa.eu/comm/competition/sectors/professional_services/studies/studies.html

⁵⁶ See above and also Press Release of European Commission IP/08/101, Brussels, 29 January 2008.

France is one of the world's five leading economies as measured by GDP. The OECD noted that France's leading position was in part owed to its strength in a number of knowledge-intensive sectors (for example, defence, high and medium technology manufacturing, aeronautics and the nuclear industry).⁵⁷ The OECD noted that several of France's industries have a secure technological advantage worldwide. France too has a highly developed social model. However, from c. 2011 onwards, conscious that growth in the economy remained weak several years after the onset of the economic crisis, the French government considered that, *inter alia*, reform of the notarial system was required. The French government sought to apply competition guidelines, *inter alia*, to the French notariat.

The proposals of the French government met with severe criticism from French notaries as well as from the Council of the Notariats of the European Union (CNUE).⁵⁸ CNUE's motion in support of the French notariat commenced with stark recitals:

- '[T]he French government's wish to apply competition guidelines to the notaries of France is damaging to the social dimensions of preventive justice that guarantees citizens' equal access to the law;
- [T]he proposed reforms, which carry many unevaluated risks, would have economically negative effects, particularly through the reduction in legal certainty, and would permanently destabilise a key profession for justice;
- [P]reventive justice is a public good that is not negotiable;
- [T]he proposed law on growth and employment is a source of weakening of the legal standard of continental law.

The presidents of the 22 member notariats of the Council of the Notariats of the European Union (CNUE) 'solemnly reiterated' the principle of legal certainty associated with the French notariat and criticised 'the calling into question of the founding principles of the French notariat, which has served as a model for the notarial function in Europe'. All this triggered 'the incomprehension of the European notariats'.⁵⁹

The French government reforms paved the way for an increase in the number of notaries in certain parts of France.⁶⁰ Notaries were to be allowed to open practices with others with the aim of lowering transaction costs.

⁵⁷ *Structural Reforms in France: Impact on Growth and Options for the Future*, OECD, 2014.

⁵⁸ See Motion in support of the French Notariat, CNUE, Notaries of Europe. December 2014.

⁵⁹ See above.

⁶⁰ See generally, 'The Princes of Paperwork' *The Economist*, 21 March 2015

In Italy in 2012 the Italian government abolished fixed minimum fees by notaries and provided for an increase in the number of notaries by lifting ‘caps’ on their numbers.

Some short time ago, in Portugal a client had to wait several months to see a notary. There has since been considerable reform in Portugal.

In the Netherlands, there too has been almost a mini-revolution by removing the ‘cap’ on the number of notaries and abolishing fixed fees.

Noting that notaries are most powerful in continental Europe, the influential publication, *The Economist* (2012) in a best and worst case description of continental notaries made no friends of civil law notaries by stating ‘at worst, [continental notaries] are overpaid bureaucrats who delay the passage of simple transactions’.⁶¹ This is an unfair criticism.

The Economist, in a provocative article, ‘The Princes of Paperwork’ in March 2015⁶² noted that ‘among the aggrieved parties who had taken to the barricades in recent months’ to protest about reforms intended to make France’s economy more competitive, perhaps the most unlikely were notaries.⁶³ *The Economist* claimed the notaries were objecting to ‘some modest pruning of the thicket of regulation surrounding their job’.⁶⁴

There were also protests in Italy. *The Economist* also referred to notaries in Germany who read aloud all documents in front of the parties concerned before signing them, tying the documents up with string and sealing them with wax. *The Economist* ungraciously added; ‘Once home, [the German notaries] apply leeches and read by candlelight.’⁶⁵

CONCLUSION

Within the European Union, freedom of establishment is guaranteed for nationals of a member State in the territory of another member State in accordance with Article 49 of the Treaty on the Functioning of the European Union (‘TFEU’).⁶⁶ Freedom of establishment includes the right to take up and

⁶¹ ‘Notaries: Breaking the Seals: A venerable profession is under pressure: about time’, *The Economist*, 11 August 2012.

⁶² ‘The Princes of paperwork’, *The Economist*, 21 March 2015.

⁶³ Above.

⁶⁴ Above.

⁶⁵ Above.

⁶⁶ Ex Article 43 Treaty European Community (‘TEC’)

pursue activities as self-employed persons.⁶⁷ Similarly, pursuant to Article 56 of TFEU, restrictions on freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

Pursuant to the decisions of the Court of Justice in the *Notary Cases* described above, in the context of the profession of notary within the European Union, any justifications on restrictions on freedom of establishment and freedom to provide services based on ‘the exercise of official authority’ are now without legal foundation. The provisions on freedom of establishment and freedom to provide services are directly applicable in the Member States.⁶⁸ It is submitted that both freedom of establishment and the freedom to provide services are capable of producing direct effect.⁶⁹ It is submitted there is no justification for ‘provisions laid down by law, regulation or administrative action providing for special treatment for foreign nations on grounds of public policy or public security’⁷⁰ in the case of fully qualified lawyer notaries within the European Union. It is submitted the non-application of the Directive on mutual recognition of professional qualifications (referred to above in this paper) to professional notaries within the European Union is unconstitutional.

The profession of notary is assured within the European Union. Notaries have a proud heritage and an influential future but it may pay us well to be conscious of the words of the celebrated judge of the US Supreme Court Joseph Story:

‘Eminence in [the law] can never be attained without the most laborious study; united with talents of a superior order. There is no royal road to guide us through its labyrinths. They are to be penetrated by skill, and mastered by a frequent survey of landmarks. It has almost passed into a proverb, that the lucubrations of twenty years will do little more than conduct us to the vestibule of the temple; and an equal period may well be devoted to exploring the recesses.’⁷¹

End.

⁶⁷ Article 49 of TFEU.

⁶⁸ *Case C-270/83 Commission v. France* [1986] ECR 273

⁶⁹ *Case C-6/64 Costa* [1964] ECR 585, p.596

⁷⁰ See generally the exemptions provided for in Article 52 of TFEU (ex Article 46 TEC) in relation to freedom of establishment and freedom to provide services.

⁷¹ Joseph Story, Discourse on John H Ashun, Apr 1833 in *Life and Letters of Joseph Story*.