

SUMMARY

- ❑ Authentic instruments in France
- ❑ Authentic instruments under EU law
- ❑ The notarial profession in France
- ❑ The role of the notarial profession in Europe

Authentic instruments in France

1 - Definition

An authentic instrument is a document executed and recorded by a member of the legal profession who is authorised to prepare an officially recorded document in the place where the document was drafted subject to the requisite formalities.

The specific nature and consequently the force of an authentic instrument (in comparison to a unauthentic instrument) is that it is good evidence up until civil proceedings are launched to challenge the authenticity of facts, which the member of the legal profession states therein that he accomplished himself or as being entered into in his presence in the practice of this office.

With the exception of legislative documents, which are only of secondary interest in relation to evidence, **authentic instruments can be separated into three categories:**

- voluntary jurisdiction documents;
- administrative authentic instruments;
- judicial and extrajudicial documents.

2 - Voluntary jurisdiction documents: notarial documents

Voluntary jurisdiction documents relating to authenticity are drawn up by a competent member of the legal profession, on the initiative of the parties, to record a legal document or fact. Among these documents, **notarial documents** have significant importance due to notaries' monopoly to execute and record all documents and contracts on which the parties wish to bestow the authenticity linked to documents issued by the public authorities.

Authentic instruments are consequently the result of complex work during which the notary must in particular inform and advise clients on the legal, financial and taxation consequences of their plans and the best adapted legal documents to be implemented, while refuting abusive, unbalanced, illegal or immoral arguments.

By affixing the State's seal on the document drawn up, the notary is responsible for the content and the form.

Notaries are referred to as judges in out-of-court proceedings as they issue documents with the force of a judgment upon the parties' request and in order to guarantee any future disputes.

Authentic instruments are the most well-known notarial documents, which are drawn up to record a property sale in order to ensure its enforceability against third parties by means of land registration.

3 - Administrative documents

Documents drawn up by a competent civil servant within the limits of his powers and in the scope of his jurisdiction are generally authentic. The same applies to **public registers drawn up by prefects, deputy prefects, mayors and deputy mayors** in the performance of their offices.

As regards private law, documents recorded in the civil status registers are authentic instruments.

4 - Judicial and extrajudicial documents

- ❑ **Judicial documents drawn up by judges** in the performance of their offices are authentic. In particular, judgments irrespective of the court which handed them down have authentic instruments' probative force.
- ❑ **Expert reports** drawn up pursuant to a delegation of justice are authentic instruments and are good evidence up until civil proceedings to challenge the authenticity of the expert's personal findings within the limit of his powers. However, the same does not apply where the report contains observations which are not connected to his role.
- ❑ **Documents drawn up by registrars** (civil servants, members of the legal profession or officials at the *Tribunal de commerce* (Commercial Court)) within the limits of their powers.
- ❑ **Acts of court officials** drawn up pursuant to a delegation of the law are also authentic instruments. The same applies to writs issued by these officials. However, where the official makes distinct findings, they are only treated as authentic instruments if the official report was drawn up at the request of an individual or if the official was appointed by a court decision.

Authentic instruments under EU law

Authentic instruments obviously do not only exist in France. Many Member States have this category of document, drawn up under conditions specific to each Member State's national legislation.

An authentic instrument is treated as such under EU law insofar as it is drawn up by a public authority in accordance with the law of the Member State in the territory in which it is executed.

However, the concept of authentic instrument under EU law has been clarified. The existence of such a document implies that three conditions are satisfied: its authenticity must be established by the public authorities in relation not only to the signature but also the content of the document and finally the document must be enforceable by itself in the State in which it was drawn up. These conditions are covered notably by EU case law: the Unibank ruling of 17 June 1999 (case C-260-99) refused authentic instrument status for Danish debt securities, where no public authority intervened upon their signature.

At present, EU legislation is only interested in authentic instruments, which record an enforceable legal document and which are consequently taken into consideration for enforcement purposes and are assimilated to court decisions.

In this respect,

- ❑ **Regulation No. 44/2001, referred to as “Brussels I”, relating to the jurisdiction, recognition and enforcement of judgments in civil and commercial matters**, provides in Article 57 that the implemented simplified exequatur procedure in the Member State of execution, for court decisions by a Member State, also applies to authentic instruments that are executed, recorded and enforceable in a Member State.
- ❑ **Regulation No. 805/2004 creating a European Enforcement Order for uncontested claims** enables a certificate constituting a form of European “passport” to be issued for all enforcement orders issued by a Member State: this enables the recognition and enforcement of the order without any exequatur procedures in the Member State of enforcement, i.e., movement of the order is the same as for a national order. An authentic instrument – for which the Regulation provides the definition contained in the Unibank ruling – relating to such a claim is entitled to benefit from the measures in the same way as a court decision.
- ❑ **In a regulation in the process of being negotiated on jurisdiction, recognition, enforcement and cooperation in relation to maintenance obligations**, the definition of an authentic instrument is repeated again and such a document, if it provides for a maintenance obligation and is enforceable in the Member State in which it is issued – which implies that this Member State accepts this method of laying down the obligation in question – will move exactly according to the same rules as a court decision with the same purpose.

The purposes of an authentic instrument other than conferring enforceability on a legal document is for example: its value in formally recording a legal document or fact, its probative force or the fact that it enables to determine the enforceability of a document against third parties – are not presently taken into account in any EU legislation.

The notarial profession in France

Members of the legal profession (*Officiers publics ou ministériels*), such as court officials, lawyers at the *Conseil d'Etat* (highest administrative court and government legal adviser) and *Cour de cassation* (highest court of appeal), appellate lawyers, registrars of *Tribunaux de commerce* (Commercial Courts) and auctioneers, i.e., professional holders of an office, who are appointed by the government and perform certain professions linked to the judicial public service as a monopoly.

Not quite a civil servant or self-employed practitioners, officially appointed members of the legal profession are invested by the government with the powers required to perform a public service as they participate in providing a public service. Officially appointed members of the legal profession are consequently **appointed in an order issued by the Minister of Justice**. For all that, they practice their professions in a liberal framework either individually or within a company (civil-law partnership or company formed by self-employed practitioners).

An Order issued by the *Conseil d'Etat* (highest administrative court and government legal adviser) fixes their remuneration.

They are invested with the power **to issue enforceable authentic instruments**. They also provide **advisory services** to individuals and businesses on drafting documents or other matters and may manage property and negotiate on property matters as a secondary activity.

Notaries mainly provide assistance in relation to family law (marital agreements, inheritance, donations, adoptions), property law and civil and commercial contracts.

The authentication of documents is of particular importance in the legal organisation since it ensures the probative force and enforceability whilst guaranteeing the security of transactions and the effectiveness of the law without the intervention of a judge.

The representative body for the profession vis-à-vis the public authorities is the ***Conseil supérieur du notariat*** (High Council for the Notarial Profession). The *Conseil supérieur du notariat* performs a preventative and conciliatory role for professional disputes between notaries who do not fall within the jurisdiction of the same regional council.

As officially appointed members of the legal profession, notaries are subject to **strict rules of conduct**. Disregard for these rules may be sanctioned either by the regional council sitting as a disciplinary board or by the *Tribunal de grande instance* (regional court).

At present there are approximately 8,200 notaries holding 4,500 offices and this number should increase in the near future.

The role of the notarial profession in Europe

Notaries form an integral part of the legal system in 21 of the 27 Member States of the European Union. Its representatives are members of the Council of Notariats of the European Union. The role of notaries is the same in all European countries with a notarial profession:

➤ **Notaries are in the service of justice**

The main role of notaries in Europe is to authenticate legal documents and contracts which they draw up for their clients in wide-ranging areas of law: property transactions, marital agreements, companies' Articles of Association, wills, etc.

In European countries, as in France, authenticating a document involves, for the notary, recording and expressing fully, impartially and in accordance with the law, the intention of the parties. As authentic instruments have the same force in many respects as a court decision, they may no longer be contested unless via legal proceedings.

The status and organisation of the notarial profession ensure that notaries provide quality and local judicial services, which are available to all.

Several European regulatory provisions already deal with the recognition and execution of authentic instruments in the European Union, by assimilating these documents to court decisions.

➤ **Notaries are in the service of citizens, consumers and families**

As the legal advisor for families, notaries provide families with information and advice on laws governing their day-to-day life, which often appear to be complex.

- ✓ notaries are often involved in preparing, drafting and keeping marital agreements, ensuring that they comply with the law and balance of the spouses' interest;
- ✓ in the scope of new forms of family life increasingly developing in Europe, they provide them with a framework of specific rules relating to property and taxation;
- ✓ as regards succession, based on the rules specific to each State, they implement divisions and donations by ensuring that they are carried out indisputably for the heirs and any other person.

Spurred on by the Council of Notariats of the European Union, a European network of registers of wills interconnecting national files of wills is gradually being implemented.

In relation to persons at risk, Spanish and German notaries and now French notaries since the reform of guardianship, play a specific role in the protection process.

Notaries now need to integrate the growing mobility of persons in Europe to solve new legal issues, which arise in relation to applicable law and jurisdiction.

➤ **Notaries are in the service of property**

The law generally grants exclusive authority to notaries to draft sale agreements for property. They then perform the subsequent formalities: registration with public registers, collection and then payment of taxes to the tax authorities, issuance of the title deeds to purchasers, etc. In many countries, notaries act as a one-stop shop in this area.

Furthermore, Europeans are purchasing property outside of their country of origin on an increasing scale. Notaries facilitate these cross-border transactions.

➤ **Notaries are in the service of businesses**

In many countries, the legislator wanted to provide the utmost security for economic transactions by conferring notaries with exclusive authority to draft incorporating documents and amendments thereto for businesses and many documents confirming their activities.

In Belgium and Spain, notaries are able to form a company in less than 48 hours. In Germany, a network was implemented between notaries and the trade registries. In the Czech Republic and Italy, notaries are in charge of the registration of documents with the trade registries.