



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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**Comparative Study on  
Authentic Instruments  
UK, FR, DE, PL, RO, SW**

JURI





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

**COMPARATIVE STUDY ON AUTHENTIC  
INSTRUMENTS NATIONAL PROVISIONS  
OF PRIVATE LAW, CIRCULATION,  
MUTUAL RECOGNITION AND  
ENFORCEMENT, POSSIBLE LEGISLATIVE  
INITIATIVE BY THE EUROPEAN UNION**

**UNITED KINGDOM, FRANCE, GERMANY,  
POLAND, ROMANIA, SWEDEN**

**STUDY**

Abstract:

This study provides an in-depth and objective comparative analysis of the national provisions of private law and private international law in the field of authentic instruments with special focus on their mutual recognition and enforcement within selected EU Member States. The results of this comparative analysis serve as a basis for evaluating if a legislative initiative of the European Union in this field is worthwhile or necessary. For that purpose, the study contains some proposals on the legal basis and the form as well as on the scope and the content of a possible regulatory intervention by the European Union.

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## EXECUTIVE SUMMARY

### 1. Introductory remark

#### 1.1. Aim of the study

The aim of this study is to provide an in-depth and objective **comparative analysis** of the national provisions of private law and private international law in the field of **authentic instruments** (or authentic acts) with special focus on their mutual recognition and enforcement within selected EU Member States in order to evaluate if a legislative initiative of the EU in this field is worthwhile or necessary.

#### 1.2. Geographic scope of the study

This study examines authentic instruments in six EU Member States, chosen as examples of different legal systems coexisting within the EU, namely:

- **England** (as an example of the common law legal system);
- **France** (as an example of the civil law or roman legal system, subtype of Code Napoleon);
- **Germany** (as an example of the civil law or roman legal system, subtype of the Germanic system);
- **Poland and Romania** (as examples of the civil law or roman legal system, subtype new Member States); and
- **Sweden** (as an example of the Nordic or Scandinavian legal system).

In making this selection, preference has been given to countries, which are generally regarded as typical within each legal system.

### 2. Authentic instruments as the cornerstone of preventive justice limited to Civil Law countries

#### 2.1. No authentic instruments for contracts in the Common Law and in the Nordic legal systems

Examining the examples of England and Sweden, this study reinforces the traditional view, that the concept of authentic instruments for contracts or other declarations is **not recognised in the Common Law and Nordic legal systems**. In particular, the functions of the English general notaries can be compared to the certification of signatures rather than to the issue of authentic instruments.

#### 2.2. Authentic instruments as the cornerstone of preventive justice in Civil Law countries

The concept of authentic instruments is based on the Civil Law concept of preventive justice. In fact, authentic instruments are the cornerstones of the concept of “**preventive justice**” (FR *justice préventive*; DE *vorsorgende Rechtspflege*; PL *jurysdykcja prewencyjna*; RO *justiție preventivă*).

- Under the concept of preventive justice, the state does not just become involved in deciding legal disputes ex post (“contentious jurisdiction”; FR *jurisdiction contentieuse*; DE *streitige Gerichtsbarkeit*). Instead, it provides for a **preventive legal control through authentication** by authentication authorities (in particular by civil law notaries as external holders of a public office) for transactions with a particular economic and/or personal importance to the public interest or to the parties concerned.
- Obligated by law to be as neutral as a judge, the authenticating official has to ensure that contractual provisions fully comply with the law (**preventive legality control**), that the parties have full (mental and legal) capacity to enter into their intended agreement and that they have fully understood the legal implications of their commitments. Otherwise, the official is required by law to refuse to complete the transaction.
- The idea underlying this system is to establish **legal certainty and legal security** by means of authentic instruments in order to avoid costly and time-consuming litigation about the validity and meaning of contractual provisions after the transaction has been concluded.

### 3. Definition of authentic instruments

**Present EC Law:** authentic instruments have been defined by the European Court of Justice in the **Unibank decision**<sup>1</sup>, following the Jenard-Möller Report, and by the EC legislator in **Article 4 (3) (a) Regulation (EC) No 805/2004** on the European Enforcement Order<sup>2</sup>:

- An authentic instrument is an instrument which has been established by a **public authority** or other authority empowered for that purpose by the Member State in which it originates;
- in the required **form**;
- and the authenticity must relate not only to the signatures, but also to the **content** of the instrument.

Thus, EC law looks to national laws concerning authenticating authorities and authentication procedures.

**National Law:** This definition is consistent with the existing definitions in the national laws of the four civil law systems examined in this study (France, Germany, Poland and Romania). In those systems of law, authentic instruments are defined as follows:

- The instrument has to be issued by a **public authority** or an official.
- The authenticating authority or official has to be **empowered to authenticate** the type of act in question.
- The authenticating authority or official has to act within its **competence** in issuing authentic instruments.
- The authenticating authority or official must follow a specific **authentication procedure**.

<sup>1</sup> European Court of Justice (ECJ), Judgement of 17 June 1999 - C-260/97, *Unibank*, ECR 1999, p. I-3715.

<sup>2</sup> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15.

- It must also follow the relevant rules on the **formalities** for drawing up and issuing authentic instruments.
- The resulting legal effect is that the authentic instrument provides conclusive **proof of the content** of the instrument.
- Generally, obligations arising from authentic instruments are **enforceable** (in some States by operation of law; in other States if a specific submission to enforcement is contained in a declaration in the authentic instrument).

**Proposal:** There is **no need to change** the existing definitions (although their wording might be formulated more precisely).

## 4. Recognition of authentic instruments

The concept of recognition, in the narrow sense of *res judicata* (or binding effect without the possibility of further judicial review), does not make sense for most authentic instruments. So, in this study, we speak of **recognition in a broader sense**, meaning the requirements, in particular the procedural requirements, which must be met for a foreign authentic instrument to be used in another state.

### 4.1. Abolition of apostille

Present situation:

- In order for its core legal effects – heightened probative value and enforceability – to be recognised, an authentic instrument needs to be authentic (or "genuine") in the sense that it has been established by the public official from whom it appears to originate. While under national law the four civil law systems examined in this study there is a legal presumption of authenticity for domestic authentic instruments, authenticity usually needs to be positively proven where instruments are used cross-border. This has traditionally been done by following the procedure known as **legalisation**.
- The Hague Convention of 5 October 1961 which is applicable to all EU Member States has replaced legalisation with the **apostille procedure**.
- There are some general **bilateral agreements** between Member States abolishing the need for an apostille and some **multilateral agreements** (mostly on specific subject matters), which some Member States have ratified. However, these are far from being universally applicable within the EU. In particular, a European Convention abolishing legalisation of documents in the Member States of the European Communities<sup>3</sup> has never come into force.
- The apostille procedure is an **obstacle** both in terms of time and money to the unhindered circulation of authentic instruments within the EU.
- Under EC Regulations already in force concerning the free circulation and enforceability of certain types of authentic instruments (Brussels I Regulation<sup>4</sup>, Brussels II bis

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<sup>3</sup> Convention Abolishing the Legalisation of Documents in the Member States of the European Communities, done at Brussels on the 25th May 1987.

<sup>4</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

Regulation<sup>5</sup> and the Regulation on the European Enforcement Order), the need for an apostille has already been abolished.

We propose to **abolish the requirement for an apostille** completely between all EU Member States. In a European Area for Justice, there should generally be no procedural conditions to be fulfilled before an authentic instrument created in one Member State can effectively be used in another.

## 4.2. Probative value

Presently, the national laws of the civil law systems studied makes authentic instruments **conclusive proof** of their contents.

**Proposal:** We propose that an authentic instrument issued in one EU Member States should enjoy the **same probative value** as an authentic instrument issued in the Member State in which the instrument may later be used (receiving Member State or Member State of destination).

However, the probative value of an instrument being used in another Member State **should never be greater than** that accorded to that instrument **in the State in which it was issued** (“double limit”).

Since the **Common Law** and **Nordic legal systems** do not recognise authentic instruments, documents issued in states with those systems will not enjoy the probative value of national authentic instruments originating in Member States that do recognise authentic instruments.

## 5. Enforcement of authentic instruments

Present EC Law:

- Presently, an authentic instrument concerning a claim for payment of a specific sum of **money** which is enforceable in its originating Member State, which has been certified as a **European Enforcement Order** in that Member State, can be enforced in another Member State without the need for a declaration of enforceability and without any possibility of its enforceability being challenged (Article 25 Regulation (EC) No 805/2004). This is a very fast and efficient procedure.
- Other authentic instruments in civil and commercial matters which are enforceable in one Member State can be **declared enforceable** in another Member State, on application made in accordance with the procedures provided for in Articles 57, 38, et seq. **Brussels I Regulation**).

**Proposal:** In order to introduce a general rule that harmonises existing rules on the enforcement of authentic instruments, we would currently **propose making the Brussels I Regulation rules** applicable to any category of authentic instrument not yet covered by specific regulations. If in the process of reforming the Brussels I Regulation, within the Hague

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<sup>5</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L 338, 23.12.2003, p. 1.



process, the requirement of exequatur is completely abolished for court decisions, then authentic instruments should also generally be enforced without any exequatur.

## 6. Amending Brussels I Regulation or adopting a new horizontal Regulation

Thus, in our study, we have identified several gaps in and obstacles to the recognition and enforcement of authentic instruments among EU Member States, which we propose to address with a legislative initiative on behalf of the EC:

- As to the type of legislative act, we propose a **regulation**. Soft law or a coordination of national legislation does not seem sufficient.
- A **new all-encompassing horizontal regulation** might be preferable, although an amendment to the Brussels I Regulation might also be feasible.
- Any legislative measure would have to be based on **Articles 61 (c), 65 and 67 (5) EC Treaty**. The European Union should regulate only the mutual procedural recognition and enforcement.
- Conflict of law rules of **private international law** should **not be changed** by the proposed new regulation. (This should be left to sectoral regulation).

## 7. Substantive scope of the Regulation

- The proposed regulation should encompass all authentic instruments in **civil and commercial matters**.
- The **exceptions** of Article 1(2) (b)-(d) of the Brussels I Regulation and the Regulation on the European Enforcement Order should also apply to the new regulation.

Mirroring the exclusive jurisdiction under Article 22 of the Brussels I Regulation, authentic instruments concerning **immovables**, which are **registered** or which are the basis of a registration in a public register should also be **excluded**.

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## INTRODUCTION

### 1. Aim, scope and structure of the study

#### 1.1. Aim of the study

The **European Parliament** has commissioned this study by the Council of the Notariats of the European Union (CNUE). Its purpose is to provide an in-depth and objective **comparative analysis** of the national legal provisions of private law and private international law in the field of **authentic instruments** (or authentic acts) with special focus on their circulation, mutual recognition and enforcement within selected EU Member States in order to evaluate if a legislative initiative of the European Union in this field is worthwhile or necessary.

#### 1.2. Geographic scope of the study

The study examines authentic instruments in six EU Member States, chosen as examples for the different legal systems coexisting within the EU, namely:

- **England** (as an example of the common law legal system);
- **France** (as an example of the civil law or roman legal system, subtype of Code Napoleon);
- **Germany** (as an example of the civil law or roman legal system, subtype of the Germanic system);
- **Poland and Romania** (as examples of the civil law or roman legal system, subtype new Member States); and
- **Sweden** (as an example of the Nordic or Scandinavian legal system).

Preference has been given to countries, which are generally regarded as typical within each legal system.

As the United Kingdom comprises three different jurisdictions (England and Wales, Scotland, Northern Ireland), each with its own, distinctive private law, the findings in this study on England (and Wales) do not necessarily also apply to Scotland and Northern Ireland, unless the text expressly refers to the United Kingdom as a whole.

#### 1.3. Structure of the study

The study is structured in **three main parts**:

- Part one examines the **national provisions on authentic instruments** in the six EU Member States studied. Particular emphasis is given to the question whether England and Sweden, as examples of the Common Law and the Nordic legal systems respectively, have any type of document comparable in function to authentic instruments. We also compare common structures of authentic instruments in the four civil law countries studied (France, Germany, Poland and Romania).

- Part Two is dedicated to the existing rules on the **circulation** (recognition and enforcement) of authentic instruments within the European Union. Part Two starts with a description of the implementation of the three main existing EC Regulations on the subject. These are: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>6</sup> (hereinafter called “Brussels I Regulation”); Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility<sup>7</sup> (hereinafter called “Brussels II bis Regulation”); and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims<sup>8</sup> (hereinafter called EEO Regulation). We then analyse existing multilateral and bilateral agreements among Member States, and conclude by describing the national rules.
- In Part Three we conclude by asking whether the existing situation requires action by the **European legislator**. In doing so we look at existing EC Regulations and ask what practical problems could be solved by European legislation – and how this could be achieved.

## 2. Terminology

English law, and therefore **English legal terminology**, does not recognise some of the main legal concepts, which this study covers. So we start by introducing (just briefly)<sup>9</sup> the main legal terms, which we will use in this study:

The subject of this study is **authentic instruments**:

- In the English language, we prefer the term “**instrument**” rather than “act” or “document”, because it distinguishes from the legal act (which is recorded in the instrument) on the one hand and from other, not authentic, but still genuine documents on the other hand.
- In the languages of the studied civil law countries the term would be: FR *acte authentique*, DE *öffentliche Urkunde*, PL *dokument urzędowy*, RO *act autentic*.
- There is no equivalent in the Swedish language (as there is no concept of authentic instruments in Swedish law).

In this study, we will distinguish between **three types** of authentic instrument:

- authentic instruments which record **contracts and other declarations** (unilateral legal declarations/declarations of intention – FR *déclaration de volonté*; DE *Willenserklärung*; RO *declarații de voință* - as well as other declarations), which are made by other persons than the authenticating authority itself;
- authentic instruments about **facts**; and
- finally authentic instruments on decisions or other **official acts** by the authenticating authority itself.

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<sup>6</sup> OJ L 12, 16.1.2001, p. 1.

<sup>7</sup> OJ L 338, 23.12.2003, p. 1.

<sup>8</sup> OJ L 143, 30.4.2004, p. 15.

<sup>9</sup> The precise definition will be one of the subjects of this study; see Part One, par. 1. and Part Three, Chapter I, par. 2.

Other terms:

- An **authenticating authority** (FR *officier public ayant le droit d'instrumenter*, DE *Urkundsperson*, PL *organ władzy publicznej*, RO *autoritate notarială* or *autoritate de certificare* or *ofițer public având dreptul de instrumentare – de autentificare*), is the person or authority who drafts and issues the authentic instrument on the basis of the declarations and agreements of the parties (e.g. a civil law notary).
- We call the procedure for drawing up and issuing an authentic instrument, **authentication** (FR *authentication*, DE *Beurkundung*, PL *stwierdzenie urzędowe*, RO *autentificare*) or – used as a verb – **authenticating** or issuing of an instrument (FR *authentifier* or *établir un acte* or *instrumenter*; DE *beurkunden*, or *Urkunde errichten*; PL *sporządzenie dokumentu urzędowego*, RO *a autentifica*).

The authentication procedure has to be distinguished from a mere **certification of signature** (FR *certification de signature*, DE *Unterschriftsbeglaubigung*, PL *uwierzytelnienie podpisu*, RO *legalizare de semnătură*).

- With a certification of signature, the certifying authority certifies **only the genuineness of the signature**, but is not involved in drawing up the text.
- Thus the text remains a private, **written document** (FR *acte sous seing privé*; DE *(privat-) schriftliche Urkunde*; PL *document w formie zwykłej pisemnej*; RO *act sub semnătură privată*), and does not become an authentic instrument.

### 3. The legal concept of preventive justice underlying authentic instruments

The authentic instrument can only be fully understood if we first look at the underlying legal concept of “**preventive justice**” (FR *justice préventive*; DE *vorsorgende Rechtspflege*; PL *jurysdykcja prewencyjna*; RO *justiție preventivă*) and the underlying policies, which are attached to the authentic instrument within the concept of preventive justice.

#### 3.1. The two-tier system of administration of justice under the civil law approach

The EU Member States following the civil law approach have a **two-tier system** of the administration of justice.

- In contrast to the Anglo-American and Scandinavian legal systems, the state does not just become involved in deciding legal disputes *ex post* (“**contentious jurisdiction**”; FR *jurisdiction contentieuse*; DE *streitige Gerichtsbarkeit*; PL *rozstrzygnięcie sporu*; RO *jurisdicție contencioasă*).
- Instead, it provides for a **preventive legal control through authentication** by authentication authorities (in particular the civil law notaries as external holders of a public office) for important transactions with a particular economic and/or personal significance for the public interest or for the parties concerned (“preventive justice”, “*jurisdictio voluntaria*”).



The system of **preventive justice** complements the **contentious jurisdiction**, i.e. the administration of justice by the courts. The authentication official has to ensure that the contractual provisions governing a transaction are in full compliance with the law, that the parties have full (mental and legal) capacity to enter into the intended agreement and that they have fully understood the legal implications of their commitment. Otherwise, the official is required by law to refuse to complete the transaction. The idea underlying this system is to establish legal certainty by means of authentic instruments in order to avoid costly and time-consuming litigation about the validity and the meaning of contractual provisions in a transaction after it has been concluded.

### 3.2. The effects of authentic instruments

As will be later explained in greater detail, authentic instruments are vested with a binding effect for the courts as far as their **probative value** and the evaluation of evidence is concerned. Furthermore, an authentic instrument is equivalent to an **enforceable** court judgment for enforcement purposes (which, in some states, might require an explicit submission to enforcement). Based on an enforceable authentic instrument, the creditor can have the assets of the debtor seized and exploited. The probative value of authentic instruments and their enforceability are rooted in a particular public trust Member States place in their authentication officials.

### 3.3. The need for a sovereign structure

Within this concept of preventive justice, the authentication officials, above all civil law notaries, play a **complementary role to that of judges** within the conflictual jurisdiction. Their functions require a clear structure of preventive justice. Apart from high educational standards, it has to be ensured that the authentication officials have sufficient experience and act in a strictly neutral and objective manner when authenticating contracts or other legal acts. Both the binding effect of authentic instruments and their enforceability require that the instrument be established by a trustworthy, state-appointed person with sufficient experience and a clearly defined jurisdiction who is – although independent – subject to an effective disciplinary control like a judge.

In consequence, constitutional law requires that preventive justice functions must not be entrusted to mere private service companies. The core function of authenticating instruments is linked to the fundamental concept of **public pre-transaction control of the legality and the validity** of transactions of particular significance.

- In fulfilling these public duties, the authentication official has to advise all parties comprehensively and impartially of the legal significance of the envisaged transaction and has to see that no party is exploited by its counterparty. To fulfil this task properly, **neutrality** is required.
- A private servicing relationship that would expose the person responsible for setting up the authentic instrument to civil claims for performance, or even to instructions from the parties, would be incompatible with the requirement for strict objectivity and independence. Rather, according to the established constitutional case law in Member

States, the authentication official performs “original tasks of the state, (...) which under the established legal system must be of sovereign nature”<sup>10</sup>.

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<sup>10</sup> Cf. for Germany BVerfG (*Bundesverfassungsgericht* - German Federal Constitutional Court), 5.5.1964 – 1 BvL 8/62 NJW 1964, 1516, BVerfGE 17, 371, 376 ss.; BVerfG, 18.6.1986 - 1 BvR 787/80, BVerfGE 73, 280, 294 = DNotZ 1987, 121 = NJW 1987, 887. Explicitly, the Federal Constitutional Court (BVerfG) in Germany emphasises “*the state (...) would have to fulfil them (i.e. the tasks of authentication) through its own public authorities, if it had not transferred them to the notaries*” (BVerfGE 17, 371, 379).

## Part One

### NATIONAL PROVISIONS OF PRIVATE LAW

## 1. Definition of authentic instrument in the civil law countries

### 1.1. Statutory provisions

The definition of an authentic instrument might be found:

- either in the substantive **civil law** (e.g. FR Article 1317 CC; RO Article 1171 CC); or
- in the law on **civil procedure** (DE § 415 ZPO; PL Article 244 CCP).

#### 1.1.1. France

In France, the definition of an authentic instrument (*acte authentique*) is contained in Article 1317 of the Civil Code (*Code civil*).

Article 1317 Code civil	Article 1317 French Civil Code
L'acte authentique est celui qui a été reçu par officiers publics ayant le droit d'instrumenter dans le lieu où l'acte a été rédigé, et avec les solennités requises. <sup>11</sup>	An authentic instrument is one which has been received by public officers empowered to draw up such instruments at the place where the instrument was received and with the requisite formalities <sup>12</sup> .

#### 1.1.2. Germany

In Germany, the definition of an authentic instrument (*öffentliche Urkunde*) is contained in § 415 (1) of the German Code on Civil Procedure (*Zivilprozessordnung*<sup>13</sup> - ZPO).

§ 415 ZPO Beweiskraft öffentlicher Urkunden über Erklärungen	§ 415 ZPO (German Code on Civil Procedure) Probative value of authentic instruments on declarations
(1) Urkunden, die von einer öffentlichen Behörde innerhalb der Grenzen ihrer Amtsbefugnisse oder von einer mit öffentlichem Glauben versehenen Person innerhalb des ihr zugewiesenen Geschäftskreises in der vorgeschriebenen Form aufgenommen sind (öffentliche Urkunden), begründen, wenn sie über eine vor der Behörde oder der Urkundsperson abgegebene Erklärung errichtet sind, vollen Beweis des durch die Behörde oder	(1) Instruments which have been issued by a public authority within the limits of its competences, or have been authenticated by a person empowered with public faith within his functions in the form required (authentic instruments), enjoy, insofar as they concern a declaration stated to the authority or the authenticating person full proof of the act recorded by the authority or the authenticating person. <sup>14</sup>

<sup>11</sup> The text of the French Civil Code may be found in the internet at: [www.legifrance.org](http://www.legifrance.org)

<sup>12</sup> English translation quoted from Legifrance – in internet: <http://195.83.177.9/code/liste.phtml?lang=uk&c=22>

<sup>13</sup> The German text of the statute is published in internet (edited by the German Ministry of Justice, *Bundesjustizministerium*): <http://bundesrecht.juris.de/zpo/index.html>; own translation for the study.

<sup>14</sup> Own translation.

die Urkundsperson beurkundeten Vorganges.	
(2) ...	(2) ...

### 1.1.3. Poland

In Poland, the definition of the authentic instrument is contained in Article 244 of the Polish Code of Civil Procedure of 17 November 1964 (kpc):

Art. 244 Kodeks postępowania cywilnego (kpc)	Article 244 Polish Code of Civil Procedure
§ 1. Dokumenty urzędowe, sporządzone w przepisanej formie przez powołane do tego organy władzy publicznej i inne organy państwowe w zakresie ich działania, stanowią dowód tego, co zostało w nich urzędowo zaświadczone.	(1) Authentic instruments recorded in the prescribed form by public authorities instituted for this purpose or by other state authorities within the limits of their functions (competences) constitute proof of what they officially attest.
§ 2. Przepis § 1 stosuje się odpowiednio do dokumentów urzędowych sporządzonych przez organizacje zawodowe, samorządowe, spółdzielcze i inne organizacje społeczne w zakresie zleconych im przez ustawę spraw z dziedziny administracji publicznej. <sup>15</sup>	(2) The provision of paragraph 1 applies by analogy also to authentic instruments established by professional chambers, territorial organisations, cooperatives or other social organisations within the limits of the competences which have been entrusted to them by law within the public administration. <sup>16</sup>

### 1.1.4. Romania

In Romania, the definition of the authentic instrument is contained in Article 1171 of the 1864 Romanian Civil Code (in force since 1 December, 1865):

Article 1171 Code civil	Article 1171 Romanian Civil Code
Actul authentic este acela care s-a făcut cu solemnitățile cerute de lege, de un functionar public, care are drept de a functiona în locul unde actul s-a făcut. <sup>17</sup>	The authentic instrument is the act drawn up with the solemnities required by law, by a civil servant in right of office in the place where the act was made. <sup>18</sup>

## 1.2. Comparative analysis

### 1.2.1. Defining criteria

If we compare these definitions, their criteria are almost identical in the four civil law systems analyzed:

- The instrument has to be issued by a **public authority** or by an official.
- The authenticating authority or official has to be **empowered for authentication** of this act (either by an empowerment to authenticate in general, or a specific empowerment for certain types of document or subject matter).

<sup>15</sup> O. J. 1964 No 43, pos. 296, internet : <http://www.lex.com.pl/bap/notariusz/Dz.U.1964.43.296.html>.

<sup>16</sup> Own translation for this study.

<sup>17</sup> Internet: <http://www.dsclex.ro/coduri/cciv1.htm> or <http://legal.dntis.ro/codcivil/index-civ.html>

<sup>18</sup> Translation by the Romanian national reporter Prof. Popescu.

- The authenticating authority or official has to act within its **competence** for establishing authentic instruments.
- The authenticating authority or official must follow a specific **authentication procedure**.
- It must also follow the specific rules on the **form** of how to draw up and issue the authentic instrument.

Sometimes the **legal effects** of an authentic instrument are regulated in the same article as the definition. There are two main legal effects:

- conclusive **proof of the content** of the instrument (and not only of the signature); and
- (if the instruments authenticates a contract or another legal act by the parties) **enforceability** (which might require a specific submission to enforcement).

Statutory definition of an authentic instrument					
		France	Germany	Poland	Romania
statutory source		Art. 1317, 1319 CC	§§ 415, 417, 418 ZPO	art 244 kpc (Civil Procedure Code)	Art. 1171 CC
definition in substantive or procedural law		substantive law	procedural law	procedural law	substantive law
legal term		<i>acte authentique</i>	<i>öffentliche Urkunde</i>	<i>dokument urzędowy</i>	<i>act autentic</i>
R e q u i r e m e n t s	issuing authority	received by public officers	by a public authority or by a person empowered with public faith	by public authorities or by other state authorities	by a civil servant or a public authority
	empowered for authentication	empowered to draw up such instruments	empowered with public faith	instituted for this purpose	having the power to authenticate
	competence	at the place where the instrument was received (= within their competences)	within the limits of its competences (public authority) or within his functions (authenticating person)	within the limits of their competences	in right of office in the place where the act was made
	procedure	with the requisite formalities	in the form required	recorded in the prescribed form	drawn up with the solemnities required by law
	form				
L e g a l  E f f	probative value	Art. 1319: conclusive evidence of the agreement it contains between the contracting parties and their heirs or assigns	enjoy full proof of the act recorded	constitute proof of what they officially attest.	Article 1173 CC: provide full proof towards everybody about the provisions and conventions that they contain

f e c t s	enforceability	Art. 3 Law No 91-650	§ 794 (1) No 5 ZPO	Art. 774 No 4 Civil Procedure Code	Art. 66 Roma- nian Notarial Law
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### 1.2.2. Necessary reference to statutory provisions on authority, procedure and form

If we look at the definitions, one of their striking features is their **incomplete character**. None of the four definitions names either the officials empowered with public faith or the requisite procedure or the requisite form. All these defining elements have to be **filled out by other statutory norms**.

Also, the defining elements and the **legal consequences** of an authentic instrument are interwoven. Whether the statutory provisions on the competence, procedure and form of an act make the document an authentic instrument, can only be judged by asking whether the resulting instrument constitutes conclusive evidence of its content or not.

### 1.3. Types of authentic instrument

Authentic instruments might be categorized by various factors:

- either by the **authenticating authority** (notarial acts, authentic instruments by courts, authentic instruments by administrative agencies), which seems to be the usual categorization in the French legal doctrine;
- by the **area of law** to which they relate to (civil law, administrative law, procedural law), which are defined differently in Polish law; or
- by the **nature of their content** (contracts and other declarations, decisions and other official acts, statements of fact), which is the distinction of the German law (§§ 415 ss. ZPO).

It might be useful to explain the last distinction by reference to the **content** of the instrument. Here one can distinguish three basic types:

- authentic instruments on **contracts** or other juridical acts (FR *acte juridique*; DE *Rechtsgeschäft*; RO *act juridic*) or generally on declarations of intention (FR *déclaration de volonté*; DE *Willenserklärung*; RO *declarații de voință*) or on other **declarations** of persons (FR *déclaration*; DE *Erklärung*; RO *declarație*) - whether of legal significance or not (DE § 415 ZPO);
- decisions and other **official acts** or generally declarations of the public authority itself (DE § 417 ZPO); and finally
- authentic instruments about (other) **facts** (*Tatsachen*) (DE § 418 ZPO)<sup>19</sup>.

This distinction is particularly important, because in most civil law systems competence to authenticate differs according to the content of the instrument<sup>20</sup>:

<sup>19</sup> A similar distinction is made by the Romanian jurisprudence.

<sup>20</sup> See also Part One, par. 5.

- The power to authenticate contracts and other declarations by the parties, has generally been entrusted to the civil law notaries.
- While the power to authenticate **facts** (with the probative value attached to the instrument) generally is given to **specific authorities limited for specific facts** (e.g. to the civil status registers concerning the facts of birth or death).
- **Other public authorities** generally are only competent to authenticate their own **official acts**, as for example the decisions of an administrative authority or of a court: The public authority may authenticate these acts without having to refer to an authenticating official.

## 1.4. Distinction of authentic instruments from other forms of contracts or acts

### 1.4.1. Three basic types of forms

Now we are going to look not at the procedural aspects of authentic instruments, but at their role in substantive law. Here the authentic instrument has to be distinguished from other forms for contract, juridical act or other declaration. In their substantive law, civil law countries typically distinguish **three basic forms**:

- **authentic instruments**;
- writing with **certification of signature** (where the written text remains a private document); and
- **(private) writing** (including a signature).

Apart from these three basic forms, **text without signature** might be regulated as a fourth type (e.g. DE § 126b BGB; RO Article 1197 CC).

The table below shows that the same three basic forms (sometimes including text without signature as a fourth basic type) are found in all civil law countries. However, the form of an authentic instrument – being the cornerstone of the civil law approach of the system of preventive justice – is unknown in the Common Law legal systems (such as in England) or in the Nordic legal systems (such as in Sweden). In the table, the authentic instrument and thus the subject of this study is separated by a double line from the other forms.

<b>Basic types of form for contracts and other legal acts</b>						
	France	Germany	Poland	Romania	England	Sweden
authentic instrument	<i>acte authentique</i>	<i>Beurkundung</i> (BeurkG, § 415 ZPO)	<i>dokument urzędowy</i> (art 244 CC)	<i>Act authentic</i> (Art. 1171 CC)	not existing	not existing
certification of signature	<i>certification de signature</i> (very seldom used in French national law)	<i>Unterschriftsbeglaubigung</i> (§ 129 BGB, § 40 BeurkG)	<i>urzędowe poświadczenie podpisu</i>	<i>Legalizare de semnătură</i> (Art. 89 Notaries Law, No. 36/1995)	certification of signature	<i>bestyrkande av underskrift</i>
(private) writing (= written and signed)	<i>acte sous seing privé</i> (Art. 1322 ss CC)	<i>Schriftform</i> (§§ 126, 127 BGB)	<i>forma pisemna zwykła</i>	<i>Act sub semnătură privată</i> (Art. 1176-1186 CC)	deed instrument under hand	<i>skriftligen</i>
text without signature	not specially regulated	<i>Textform</i> (§ 126b BGB)	not specially regulated	<i>Început de dovadă scrisă</i> (Art. 1197 CC)	not specially regulated	not specially regulated



### 1.4.2. Authentic form

The **authentic form** is the form with the **most rigid requirements** and the **most far-reaching legal effects**, thus placing this form at the very top in the hierarchy of formal requirements.

In consequence, an authentic instrument can legally **replace any other form**.<sup>21</sup>

### 1.4.3. Certification of signature

In case of a document with **certification of signature** the authentication does not relate to the content of the private document but only to the signatures.

- Thus, the certifying authority does not assume any responsibility for the legal correctness of the content and the validity of the underlying agreement. Instead, he only certifies the genuineness of a signature.
- Likewise the certifying official does not consult the parties beforehand as to their legal rights and obligations and as to how the document is most adequately designed.

### 1.4.4. (Private) written documents

The third form, which generally is called writing or private **writing**, requires a text with a **signature** (FR *acte sous seing privé* Articles 1322 ss. CC; DE *Schriftform* § 126 BGB; PL *forma pisemna zwykła* Article 78 CC; RO *act sub semnătură privată* Article 1176-1186 CC).

### 1.4.5. Text without signature

Finally there is text without a signature, sometimes also called “writing” (FR *preuve littérale* or *preuve par écrit* Article 1316 CC); sometimes called “**textual form**” or “**text form**” (DE *Textform* § 126b BGB; PL Article 78 CC; RO *început de dovadă scrisă* Article 1197 CC).

Textual form is in particular relevant for provisions on **information duties**. Here a signature of the text is not required because authorship is not so relevant, but only the possibility to read the information slowly and, if necessary, also repeatedly, to store it and be able to refer to it later again.

Textual form is the only form, which has been regulated so far in various **EC Regulations** (all concerning information duties towards consumers)<sup>22</sup>. Some of these Regulations call the form “writing” or “written form” even if it does not require a signature. The Regulations do not require a signature, because they regulate only the information duties, not the conclusion of the contract.

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<sup>21</sup> DE § 126(4), § 129(2) BGB; PL Article 73 CC; RO no special provision, but accepted in the doctrine; FR not regulated.

<sup>22</sup> E.g. Article 6 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12–16; Article 4 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83–87; Articles 6(1), 11(1) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p. 66–92; Article 4 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, p. 59–64.

#### 1.4.6. Other Forms

All other forms are **subtypes** of the three main forms:

- The **holographic** or handwritten form is a subtype of a written instrument. In many civil law countries, the holographic testament is one of the possible forms of a testament.
- Also the specific **English** forms of a **deed** or an **instrument under hand** are two subtypes of written documents. All conveyances of an interest in registered real estate must be by deed, in writing and signed by the grantor. However, there is no requirement that deeds be prepared, witnessed or acknowledged by or before any particular kind of official. Thus, the deed is not equivalent to an authentic instrument.

## 2. Do similar instruments exist in the Common Law and Nordic legal systems?

### 2.1. England

#### 2.1.1. No authentic instrument

England has no equivalent of the civil law system of **preventive justice**.

Consequently, English law – like the whole of the Common Law legal family – has no concept of **authentic instruments** either<sup>23</sup>. The Common Law system does not provide for any contractual instrument issued by a neutral official, which gives full proof of its content and can be enforced without further judicial examination. There is no undisputed about this among the representatives of the Common Law themselves<sup>24</sup>. In spite of many interconnections between Common law and Civil law in general, both legal families have developed along separate paths in this respect<sup>25</sup>.

So we have to look whether there is any similar instrument equivalent to an authentic instrument.

#### 2.1.2. Public documents

English law does give some special evidentiary effect to **public documents**. According to Section 7(2) of the Civil Evidence Act, “public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated in them”<sup>26</sup>.

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<sup>23</sup> E.g. ZWEIGERT/KÖTZ, *Einführung in die Rechtsvergleichung*, volume II (1969), p. 44: “The Notary in his function as a public official entrusted with the establishment of authentic instruments is unknown in the legal concepts of the Anglo-American legal family. There is no such thing as the “notarielle Urkunde“ (§ 128 BGB), the “Notariatsakt“ (e.g. § 551 ABGB) or the “acte authentique“ (Art. 1312 Code civil) under Common Law“ (own translation from the German original). Cf. also LEUTNER, *Die vollstreckbare Urkunde im europäischen Rechtsverkehr* (1996), pp. 138 ss. (with further references); SCHLOSSER, *EU-Zivilprozessrecht*, 2nd edit. (2003), Art. 57 EuGVVO note 2. In detail LANGHEIN, *Kollisionsrecht der Registerurkunden*, p. 39 with further references: “Notarial authentication (...) and the authentic instrument are unknown to (the Common Law)“ (translated from German).

<sup>24</sup> Cf. e.g. CLANCY, *The Organisation and Function of the Profession of Notary in the United Kingdom*, Notarius International, Vol. 5, 2000, p. 102: “(...) the Anglo-American legal system does not recognise the role of the publicly certified instrument (...)” Ibid., p. 103: “(...) the notarial act and notarial evidence have never enjoyed the status of “authenticity” in common law jurisdictions.” In the same sense CLAUDET, *National Report England*, Notarius International 2002, 39, 40.

<sup>25</sup> As will be shown later in Part Two, the fact that the concept of the authentic instrument is unknown to England, results on the Community level among other things in the consequence that there is no need for transferring those provision of Community law into national law that deal with the cross-border recognition and enforcement of notarial authentic instruments as far as the establishment of such instruments is concerned. Consequently, the *Commission’s European Judicial Civil Atlas* clearly points out with regard to the establishment of a European enforcement order in England based on an authentic instrument according to Article 25 of the Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims: „While Authentic Instruments from other Member States will be enforced in England and Wales they are not produced in England and Wales. Therefore there is no need to designate an authority to certify them.”

<sup>26</sup> See also *Wilton & Company v. Phillips* (1903) 19 T.L. R. 390.

However, public documents under English law must not be mistaken for authentic instruments. A public document is rather different from the authentic instrument in that it only relates to the **official business** of public agencies or other public officials. Consequently, a private juridical act does not achieve any particular public or authentic status by virtue of the participation of a notary in the setting up of the documents.

In order for a document to enjoy the status of a public document, it must have a public origin and a public subject matter, and must be in the form of a public document with some indication of authenticity as what it purports to be.

- Specifically, a public document must on its face be issued by a **public agency or official** acting in the pursuit of his public duties. Public documents can be issued by any organ of national or local government including courts as well as executive, legislative and administrative bodies.
- The document must relate to the **official business** of the agency. Examples would be a **birth certificate** issued by the Registrar of Births, or a report of a Parliamentary committee, or a judgment of a court. Private business documents do not achieve public document status merely by being typed on a government letterhead.
- Finally, almost all public issuers have some **form** by which their issued documents are identified as genuine – usually a seal, an official's signature, or both.

### 2.1.3. Notarial documents

Documents set up by English general notaries<sup>27</sup> mainly serve as a **mere certification** in the above-mentioned sense, where the professional does not assume any responsibility for the legal correctness of the content and the validity of the underlying agreement.

- English law does not require a notarial instrument for any type of contract or other legal act. Also, the notarial procedure, the form of a notarial instrument and the duties of the English general notaries are not regulated by statute in the same way as those of their civil law counterparts. E.g. there are no provisions on **legal control** or on **independent legal counsel** to the parties. Unlike the civil law notary, the English general notary is not a neutral intermediary whose function is to counsel both parties and draft a balanced contract<sup>28</sup>.
- Thus, the English notary only certifies the **genuineness of a signature** or the identicalness of a copy with the original. The document thus produced is not an authentic instrument.
- Consequently, such “notarisations” do not share the main legal effects of authentic instruments, i.e. enforceability and full probative value. Notarial acts do not have any explicit statutorily-based evidentiary status as sufficient proof of their contents and are **not entitled to the particular evidentiary status** of a public document under English

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<sup>27</sup> For English notaries in general see: BROOKS/HELMHOLZ/STEIN, *Notaries Public in England since the Reformation*, published for the Society of Public Notaries of London, Norwich, Erskine Press, 1991; READY, *Brooke's Notary*, 12<sup>th</sup> edit. 2002; SHAW, ‘Notaries in England and Wales; Modernising a profession frozen in time’, *International Journal of the Legal Profession*, 2000, vol. 7, no. 2, pp. 141-155; SHAW, ‘Notaries in England and Wales: What future in a climate of globalisation?’ *Notarius International* 1-2/2006, p. 43.

<sup>28</sup> According to Section 6.2. of the Notaries Practice Rules 2001, a notary must not act for both parties to a transaction unless both have consented in writing; and he is satisfied that there is no conflict of interest between the parties, but where a conflict of interests exists or arises a notary may act or continue to act for both parties for the sole purpose of resolving or attempting to resolve that conflict of interest.

law<sup>29</sup>; although they may have enhanced credibility in individual cases by virtue of the circumstances under which they were prepared or the mercantile context in which they are used. A recent amendment to English procedural rules makes a notarial signature sufficient proof of authenticity (in the sense of genuineness) of private documents<sup>30</sup>. That, however, just grants it the same status as a document with a certification of signature in civil law jurisdictions, not as an authentic instrument.

- English law does not know the civil law concept of an “**executable title**” based on a notarial act as is common in civil law jurisdictions. Only a judgment of a court can be made the subject of a civil execution process in favour of a private party. English notaries have no power to create a document that can be executed against a debtor or his property without first going to court, initiating a suit, and obtaining a court judgment.

#### 2.1.4. Formal requirements

There are several formal requirements in the English law, above all the (private) **written form**. However, none of these requires an authentic instrument:

- Under English law **antenuptial agreements** and marriage settlements must follow independent advice to both parties, be in writing and be signed in the presence of independent witnesses<sup>31</sup>.
- The **Statute of Wills** sets forth the formal requirements for testamentary instruments and recognizes either a **holographic will** in the handwriting of the testator or a will signed by the testator in the presence of at least **two witnesses**<sup>32</sup>.
- The **Statute of Frauds** requires that transactions involving the title to **real estate** must be embodied in a written instrument signed by the party to be charged to gain enforcement in English courts<sup>33</sup>. Deeds transferring real estate must be filed with the Land Register along with an application for re-registration in order to secure re-registration of title in the name of the grantee.<sup>34</sup>
- **Charters of corporations** must be in writing (and must be filed with Companies House)<sup>35</sup>.

All the above-mentioned examples require only (private) written documents. The main **differences to authentic instruments** are:

- None of the statutory provisions mentioned requires the drawing of the instrument by an **authenticating authority** that is by an independent authority empowered by the state. Any one of these instruments can be drawn by the parties themselves as well as by solicitors (or, in the case of real estate deeds, by licensed land conveyancers)<sup>36</sup>.

<sup>29</sup> E.g. see READY, *Brooke's Notary* (12<sup>th</sup> Edition, 2002), Sec. 6-08.

<sup>30</sup> Rule 32 (20) of the Civil Procedure Rules.

<sup>31</sup> According to the case of *M. v. M.*, 1 FLR 323 (2001), both parties must disclose their financial positions and receive independent legal advice, provision must be made within it for review of the terms agreed after a period, the agreement must be signed 21 days or more before the marriage ceremony, and in addition to the parties, both independent legal advisers must sign the agreement which is independently witnessed.

<sup>32</sup> See Wills Act of 1837 (1 Vict. c.26).

<sup>33</sup> The Statute of Frauds was first enacted by Parliament in 1677. See 29 Car. II c. 3.

<sup>34</sup> See Land Registration Act 2002 and Land Registration Rules 2003 SI2003/1417 (as amended).

<sup>35</sup> See Companies Act 2006, Part 2.

<sup>36</sup> See MURRAY, *Real Estate Conveyancing in 5 European Union Member States: A Comparative Study*, Appendix E for a description of the real estate conveyancing process in England and Wales – internet: <http://www.cnue-nouvelles.be/en/000/actualites/murray-report-final.pdf>.

- **Legal counsel** is required by law only for antenuptial agreements or marriage settlements. Here, however, each party is required to obtain his or her own counsel. It is **not one impartial counsel for both**. Also the independent advice is only required before the conclusion of the agreement, the legal counsellor needs not to participate in the conclusion itself.
- **Antenuptial agreements and wills with two witnesses** both require third persons for the recording of the instrument. However the witnesses' role does not include drawing up the instrument or giving legal advice to the parties – as is the authenticating official's role in the civil law countries.

### 2.1.5. Results for England

Thus our result for England is: there are **neither authentic instruments** for contracts or other private acts nor anything equivalent to authentic instruments in English law, just as the civil law concept of preventive justice is not known in England either.

- English **formal requirements** are about writing, witnesses and filing, but not about authentication.
- English **notarial instruments** are not similar to authentic instruments. They come closest to mere certifications of signature.
- English **public documents** do not record declarations by the parties, but relate to the **official business** of public agencies or other public officials only.

## 2.2. Sweden

### 2.2.1. No authentic instrument

In Swedish law – just like in English law – there is no notion of “*acte authentique*” as in French civil law or of “*öffentliche Urkunde*” as in German civil law.

Not following the civil law approach of the system of preventive justice, either, there is, in fact, **not even an obvious term in the Swedish legal vocabulary** which could be used to translate into Swedish a foreign language text which refers to or is based on those concepts.

Thus, the Swedish versions of Regulations EC No 44/2001 and 2201/2003 use the term “*officiell handling (acte authentique)*” – with the French term added in brackets as explanation, while Regulation No 805/2004 uses the term “*officiell handling*” without referring to the French term. The Danish versions of all three Regulations, which are linguistically close to the Swedish ones, use consistently “*officielt bekræftet dokument*”, in English literally “officially confirmed document”.

### 2.2.2. Public documents

In Swedish law, the term “**public documents**” (*offentliga handlingar*) refers to “documents **accessible by the public**”, not to anything close to an authentic instrument.

For documents issued by a public authority in its own, official business, the most precise Swedish term (as it is used in the terminology chosen by the *Riksdag*, the Swedish Parliament) is “*allmänna handlingar*” which translates into “**official document**”. However,

this official document refers to official business only; there is no “*allmänna handlingar*” on private contracts or other private acts.

### 2.2.3. Maintenance agreements

Looking for similar instruments, one might think of certain **arrangements relating to maintenance** obligations concluded with administrative authorities. Any agreement concerning maintenance allowances under the Marriage Code and the Children and Parents Code can be enforced by the Swedish Enforcement Authority (*Kronofogdemyndighet*) like a final court decision, if in writing, signed by the debtor, and witnessed by two witnesses<sup>37</sup>.

Because of this Swedish particularity, **Regulation EC 805/2004** creating a European Enforcement Order for uncontested claims treats “an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them” as an equivalent to an authentic instrument (Article 4 No 3 b Regulation 805/2004) and gives summary proceedings of the Swedish Enforcement Authority the same status as a court summary proceeding (Article 4 No 7).

However, it also has to be taken into account that the Swedish Enforcement Authority is a **hybrid of a court of law and an enforcement agency**; this gives it a very special status.

Also, these arrangements play such a particular, **insular role** within the Swedish legal system that it does not seem justified to state that the Swedish legal systems builds upon a concept that is at least comparable to that of the authentic instrument under civil law.

### 2.2.4. Formal requirements

Under Swedish law, important agreements and similar legal acts etc. must usually be in **writing** and be signed by the acting person or persons. But no contract or other legal act or agreement requires the involvement of a neutral official to issue an authentic instrument about the act.

In a few cases there are legal requirements to **witness** certain very important acts (e.g. the maintenance agreements which have already been mentioned, the recognition of paternity, a will or a transfer of land). These requirements are all ancient, and the reasons for them are difficult to establish. Is the presence of witnesses prescribed in order to remind acting individuals of the seriousness of the act? Or must witnesses be present to observe the conclusion of the act in order to facilitate proof in future litigation that everything was conducted properly? And, can witnesses be relied upon at all to achieve these goals? There is no modern answer to these questions or analysis of requirements concerning the form of legal acts, and no coherent approach to questions of legal form and authentication in different fields of Swedish law – whether by using traditional means and methods or by relying on electronic tools.

In any case, the witnesses cannot be compared to the intervention of a civil law notary or other authenticating official, since they are acting only in their private capacity and are not involved in the drafting of or giving legal advice about, the act.

The low level of formal requirements in Sweden might also be due to the fact that much information is publicly available. If the recipient of a document is in doubt as to its veracity, he can just call the competent authority. The authority must answer him and give him the information within its competence. This informal approach works in a country like Sweden which is not too large and quite homogenous.

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<sup>37</sup> Chapter 3 Section 19 of the Code of Execution (SFS 1981:774).



### **2.2.5. Results for Sweden**

Thus, in Sweden also, there are **no authentic instruments** for private acts. The only instruments which come close are maintenance agreements which are enforceable by the Swedish Enforcement Authority. These are already regulated by Regulation EC 805/2004. In other areas of Swedish law, there is no equivalent instrument.

### 3. Use and objectives of the authentic instrument

#### 3.1. Which legal acts have to be drawn up in the form of authentic instruments?

##### 3.1.1. Comparative table

The legal acts for which the four civil systems require authentic instruments are **similar, but not identical** as the following table shows. The table also shows that England and Sweden might require (private) written documents or the involvement of witnesses for some legal acts, but not the intervention of an authenticating official and not an authentic instrument.

Authentication requirements in private law (and selected other formal requirements)							
		France	Germany	Poland	Romania	England	Sweden
F a m i l y	recogniton of paternity	Art. 316 CC	§ 1597 BGB	Art. 79 CF (Family Code)	Art. 57 Family Code (+ Art. 48 for recognition of maternity)	no formal requirement	written and signed with two witnesses (Children and Parents Code)
	consent to adoption	Art. 348-3 CC	§§ 1750, 1752 BGB	(only before the judge)	Art. 15 (2) Adoption Law, No 273/2004	no formal requirement	no formal requirement
	antenuptial or matrimonial agreements	Art. 1394 CC	concerning patrimonial effects: § 1410 BGB (§ 7 LPartG)	Art. 47 CF	not (yet) recognised	independent advice + writing/signed + attestation of witnesses	written, signed and registered with the district court
	maintenance agreement/title	no formal requirement	maintenance agreement, § 1585c BGB, + title § 794 (1) No 5 ZPO	no formal requirement	no formal requirement		enforceable, if in writing, signed and two witnesses (Ch. 3 Sec. 19 Code of Execution)
S u c c e s s i o n	testament (will)	notarial testament as a special form, Art. 969, 971, 976 CC	notarial testament as a special form, § 2232 BGB; authentication required for contract of inheritance, § 2276 BGB	notarial testament as a special form, Art. 950 CC	authentic testament as a special form, Art. 860 CC	written (and signed) + attestation by 2 witnesses	written (and signed) + 2 witnesses (Ch.10 Sec 1+2 Inheritance Code, SFS 1958:657)
	renunciation of a compulsory share in a future succession	Art. 929, 1527 CC	§ 2348 BGB (also § 2352 BGB <i>Zuwendungsverzicht</i> )	Art. 1048 CC	prohibited (Art. 702 CC)	no formal requirement	no formal requirement

L a w	disclaimer of an inheritance after the death of the decujus	Art. 804 CC	§ 1945 BGB (certification of signature)	declaration to the court suffices; otherwise certification of signature, Art. 1018 CC	Art. 696-698 CC + Art. 76(4) Notarial Law	no formal requirement	no formal requirement
	transfer of a succession	<i>acte de notoriété</i> Art 730-1 CC + <i>attestation de propriété immobilière</i> (Art. 29 Decree No 55-22 of 4 January 1955)	§§ 2033, 2371 BGB	Art. 1052 CC	Art. 1399-1401 CC	no formal requirement	no formal requirement
	donation	Art. 931 CC	§ 518 BGB (promise)	Art. 890 CC	Art. 813 CC	no formal requirement	transfer of text document suffices
L a n d  L a w	transfer of property of land and obligation	transfer, Art. 4 Land Register Decree n° 55-22  + certain types of obligations: <i>contrat de vente d'immeubles à construire/contrat de vente d'immeubles à rénover</i> (Art. 261-11, 262-1 Code of Construction and Housing)	obligation + transfer, §§ 311b, 925 BGB	obligation + transfer, Art. 158 § 3 CC	transfer only, art 2(1) of Title X (“Legal circulation of land”) Law No 247/2005 regarding the reform in the field of property and justice	written (and signed) deed	writing (and signed) (Ch. 4 Sec. 1 Land Code, SFS 1970:994)  + 2 witnesses for immediate registration (Ch. 20 Sec. 7 Land Code)
	creation/registration of limited rights in land	Art. 2129, 2146 CC ( <i>privilèges, hypothèques</i> );  in general: Art 4 Land Register Decree No 55-22	certification of signature, § 29 GBO	Art. 237, 245 CC	Art 2(2) Title X (“Legal circulation of land”) Law No 247/2005 regarding the reform in the field of property and justice		
C o m p a n y	creation of certain types of companies	no formal requirements  - except for the creation of an European Society (SE) (Art. 229-3 Commercial Code)	limited or joint-stock-company § 23 AktG, § 2 GmbHG	for all types of companies except the general partnership, Art. 92, 106, 131, 157, 301 Societies Code	general partnership, limited or public joint stock-company (the latter only if set up for public subscription) Art. 5 Company Law 31/1990	written/signed and filed	writing (and signed) (Ch. 2 + 3 Companies Act SFS 2005:551)

L a w	changes of the charter	no formal requirement	limited or joint-stock-company § 53 GmbHG § 130 AktG	limited or joint-stock-company Art. 255, 421 Societies Code	no formal requirement		signed minutes + registration (Ch. 3 Sec. 4 + Ch 7, Companies Act)
	transformation (merger/splitting) of companies	no formal requirement - except transnational merger: contrôle de la légalité de la fusion et de la constitution de la société nouvelle (Art. L 236-30 Commercial Code, Act No 2008-649 of 3 July 2008)	for all types of companies, §§ 6, 13 par 3, 193 par 3 UmwG	for all types of companies, Art. 506, 522, 541, 562 Societies Code	no formal requirement		signed minutes + registration (Ch. 23-24 Companies Act)
	transfer of shares	no formal requirement	§ 15 GmbHG	certification of signature, Art. 180 Societies Code	no formal requirement	no formal requirement	no formal requirement
E n f o r c e m e n t	enforceable titles	authentic instrument (Art. 3 Law No 91-650)	§ 794 par 1 No 5 ZPO	Art. 777 Code of Civil Procedure	Article 66 Notarial Law, No 36/1995	no enforceable title by declarations of the parties	no enforceable title by declarations of the parties (except maintenance agreements)

### 3.1.2. Comparative analysis

The comparative table shows that the legal acts for which the four civil systems require authentic instruments are **similar, but not identical**:

- In all four civil law systems studied, **legal acts changing the civil status** (such as recognition of paternity or consent to an adoption) usually require an authentic instrument (unless these acts fall within the exclusive competence of the courts anyway). These acts are of highest importance to the persons involved. Legal certainty as to family relations is also important to third parties.
- The same applies generally to **matrimonial or antenuptial agreements**, but does not in all civil law systems studied extend also to maintenance agreements. However, Germany recently introduced an authentication requirement for maintenance agreements, because it was generally considered to protect the weaker spouse from rash decisions, either during the marriage or in the course of divorce proceeding.
- In all four civil law systems studied, **testaments** can be made in notarial form, but other forms of testaments are also permitted. Only for a succession contract (DE *Erbvertrag*)

which binds the parties, the German law requires mandatory authentication. The notarial form ensures that the testament has not been falsified. Also, it ensures that the will of the testator is recorded clearly and that the testator has been advised about its legal effects (e.g. about reserved portions or the various testamentary provisions permitted by the succession law).

- Also the **transfer of a succession** typically requires an authentic instrument. The underlying reason is both to prevent an unconsidered transfer and to provide legal certainty to heirs. In Romania, in cases of transfer of a succession an authentic instrument is mandatory, when land or pieces of land are part of the succession.
- **Donations** (or more precisely the promise to donate) require an authentic instrument in all four civil law systems studied. The donor should not be bound by a rash word, but only by a formal act undertaken after sufficient consideration of his or her promise.
- In **land law**, generally both the transfer of immovable property and the creation of limited rights *in rem* in land require an authentic instrument (or the latter at least a certification of signature) for the registration. The underlying idea is to ensure the functioning of the land register and to guarantee the legal certainty provided by the land register in combination with the underlying authentic instrument. For land, legal security is even more important than for movables – if a piece of land is in dispute, then it cannot be used securely. Nor can land be replaced (whereas movables often are generic).
- For the **establishment of companies**, three out of the four civil law systems studied require an authentic instrument (and the fourth system (FR) for one specific type of company), in particular for limited companies and for joint stock companies, some also for some types of partnership<sup>38</sup>.
- A **transfer of shares** requires formalities in two of the four civil law countries studied (DE, PL). The formal requirement is meant to ensure proof of the chain of title. In Germany the authentic instrument and the list of the partners which is based on the act of transfer even serves as the basis for good faith acquisitions<sup>39</sup>.
- **Enforceable title** may be established in all four civil law systems studied by authentic instruments, whereas in England and Sweden in general enforceable title cannot be created by a declaration by the parties (with minor exceptions, in particular concerning maintenance agreements in Sweden, concluded before the Swedish maintenance office).

The legal situation in **England and Sweden** (as the examples studied of the Common Law or the Nordic systems respectively) is very different:

- Many of the above-mentioned contracts or legal acts do **not require any formalities** at all.
- If there is any formal requirement, it is limited to **writing** (including the signature of the party) and sometimes also the attestation by **two witnesses**. The witnesses are meant to prevent fraud and to enhance the probative value.

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<sup>38</sup> For the role of the civil law notaries in companies law, see in particular: DE: FITZ/ROTH, *Der Notar im Kapitalgesellschaftsrecht*, JBl. 2004, 205; PRIESTER, *Notar und Gesellschaftsrecht*, DNotZ 2001, Sonderheft (special edition) p. 52\*, 64\*; RO: POPESCU, *Contractul de societate*, Ed. Lumina Lex, București, 1996.

<sup>39</sup> DE §§ 16, 40 GmbHG (reform as of 1.11.2008, BGBl. = OJ 2008 I, p. 2026); see BT-Drucks. (parliamentary materials of Bundestag, the lower house of Parliament) 16/6140, p. 44; HARBARTH, *Gutgläubiger Erwerb von GmbH-Geschäftsanteilen nach dem MoMiG-RegE*, ZIP 2008, 57; KÖNIG/BORMANN, *Die Reform des Rechts der Gesellschaften mit beschränkter Haftung*, DNotZ 2008, p. 652, 668 s.

- However, none of the legal acts for which civil law countries “typically” require an authentic instrument requires the involvement of any **official** in England and Sweden. Thus, there is no requirement of an impartial legal counsel and no legal control, which are the key elements of authentication requirements in the civil law countries.

### 3.2. Legal objectives of authentication requirements for contracts and other declarations

In all four civil law systems studied, the same legal objectives apply for authentication, although in different combinations for the various legal acts. One might systematize the objectives or the functions of authentication requirements as follows<sup>40</sup>:

#### 3.2.1. Prevention of undue haste

The statutory necessity to contact an authenticating official and to undergo the formalities to create an authentic instrument:

- **prevents the parties from acting with undue haste** in concluding an important contract (FR *imposer le recours à des solennités particulières*; DE *Übereilungsschutz*; RO *impune precauție și moderație*); and
- warns them to **consider the matter carefully** (DE *Warnfunktion*; RO *funcție preventivă*).

#### 3.2.2. Guarantee of impartial and qualified counsel for the parties

The notarial involvement in the authentication **guarantees impartial and qualified counsel** to the parties (FR *donner aux parties un conseil impartial*<sup>41</sup>; DE *Belehrungsfunktion*; RO *garantează consilierea calificată și imparțială a părților*<sup>42</sup>).

- In particular, this **protects the weaker party** (DE *Schutzfunktion*; RO *funcție de protecție*); and
- thus serves as, in effect, **consumer protection** (though the requirement for authentication is not restricted to consumer protection).

#### 3.2.3. Guarantee of reliable proof

Another main function of the authentic instrument concerns its probative value:

- The authentication procedure ensures there is an **exact record** of the legal act (FR *sécuriser les opérations juridiques*; DE *Klarstellungsfunktion*; RO *asigură securizarea operațiunilor juridice*).

<sup>40</sup> See in particular: BAUMANN, *Das Amt des Notars – Seine öffentlichen und sozialen Funktionen*, MittRhNotK 1996, 1; BAUR, *Sinn und Funktion der notariellen Beurkundung*, BWNotZ 1977, Sonderheft (special edition) p. 43\*; HERTEL, ‘Preventive Consumer Protection in an Optional Instrument: A Practitioner’s View’, ERA-Forum 2/2003, 70 = Notarius International 2002, 217; HOFMEISTER, *Rechtssicherheit und Verbraucherschutz – Form im nationalen und europäischen Recht*, DNotZ 1993, Sonderheft (special edition), p. 32\*; RECHBERGER, *Formpflicht und Gestaltungsfreiheit*, 2002; STAUDINGER/HERTEL, *Vor (before) §§ 127a/128 BGB (BeurkG)*, 2005, notes 6, 43 ss; WAGNER, ‘Zum Schutzzweck des Beurkundungszanges gem. § 313 BGB’, AcP 172 (1972), p. 452; WELSER, ‘Zivilrechtliche Formgebote und Notariatsakt’, in: RECHBERGER, *Formpflicht und Gestaltungsfreiheit*, 2002.

<sup>41</sup> FR Cass. civ. (*Cour de cassation*, highest French court in civil matters), 1st civil Chamber, 15.5.2007, No 06-15.318.

<sup>42</sup> RO Articles 6(1) and 7 Notarial Law No 36/1995.

- Thereby it ensures **certain and reliable proof** of the act (FR *donner une autorité exceptionnelle aux actes*; DE *Beweisfunktion*; RO *funcție probatorie*).

### 3.2.4. Enforceability

Only the procedural guarantees of the authentication procedure allow parties to create an **enforceable title** (FR *titre exécutoire*; DE *Vollstreckungstitel*; RO *titlu executoriu*) without court intervention (DE *Vollstreckungsfunktion*; RO *funcție executorie*<sup>43</sup>).

If the state were to give effect to title created by the parties without intervention and control of a public official, it would risk incorrect enforcements which would erode the legitimacy and general acceptance of the enforcement procedures.

### 3.2.5. Legal certainty

Authentication provides **legal certainty and security** (FR *sécurité juridique*; DE *Rechtssicherheit*; RO *securitate juridică*)

- first to the **parties of the act** (who the notary has to advise as to the validity of the act – FR *efficacité*; DE *Wirksamkeit*; RO *eficacitate*)<sup>44</sup>;
- but also to third parties and to the **public in general**, which is particularly important for acts which are registered in **public registers**). The notarial instrument as the basis for registration might serve as the basis for the protection of good faith<sup>45</sup>.
- The authentic instrument also offers **financial security** to the parties, if the payment for the contract concluded by the authentic instrument are transferred by a notarial escrow account (e.g. in a sale of immovable property).

The **Swedish** example shows which problems might occur under much more informal approach to public registers. In Sweden, **identity theft** by using population register extracts is no rare occurrence.

- E.g. there has been a well-publicised criminal case<sup>46</sup>, in which a private limited company had lost assets, which – the owner of the company thought – were safely deposited in a bank account. The person who withdrew the money presented a **certificate issued by the Companies Register Office** showing he was a board member and authorised to represent the company. The certificate was genuine in the sense that it was issued by the right agency and correctly reported the contents of the companies register, but was obtained fraudulently. The alleged board member had obtained it after filing written and duly signed minutes of an alleged shareholders' meeting, at which an earlier board member had been replaced by him and which had authorised him to represent the company. The replacement and the granting of the right to sign were duly registered, and the requested certificate showing the legal situation of the company after the changes was correctly issued to the new board member. He then used it to prove his authority to withdraw the available funds from the bank account. Both he and the person who had devised the plot were apprehended and received quite heavy prison sentences.
- Consequently, the Companies Register Agency gives advice on its website on how to avoid fraud by applying some simple, but rather efficient verification routines. Also it is

<sup>43</sup> DE § 794(1) No 5 ZPO; RO Article 66 Notarial Law No 36/1995.

<sup>44</sup> In France, the notary always has to advise the parties; the notary cannot decline his responsibility by saying that he just authenticated what the parties were wishing (*Cour de cassation*, 1st civil Chamber, 3.4.2007, No 06-13.304).

<sup>45</sup> See for example, the new regulation on the good faith acquisition of shares in a German GmbH (Limited Liability Company), which is based on the notarial authentication and registration of the share transfer (§§ 16, 40 GmbHG - Law on Limited Liability Companies).

<sup>46</sup> District Court of Gothenburg (*Göteborgs tingsrätt*, målnhet 14:3) Judgment 10 July 2008, case B 1896-08.



presently conducting a project to structure electronic filing in a way which will further reduce the risk of fraud<sup>47</sup>.

- **Theft of property of land** – *mutatis mutandis* – can be carried out in very much the same way, e.g. by falsified purchase agreement, which happens a few times each year<sup>48</sup>.

The opposite problem of hiding the true identity also plays a prominent role in Sweden in the “**goalkeeper**” problem (*Målvaktsproblemet*) in company law:

- If the shareholders want to let their (private) limited company disappear without leaving any traces they appoint a **homeless person** as the only board member and managing director and have him duly registered with the company register. This homeless person would be authorised to receive service of process for the company and usually would be known to the police and social services, but this person herself would not know anything about the company and may not even remember the signing of any of the documents which later were filed with the Companies Register Office.
- Equally difficult to handle are cases in which a person with alleged residence in another EU Member State and with a very **common name** in that country, (but lacking a Swedish identity or co-ordination number) had been registered as “goalkeeper”.

It is often pointless to try and find these “goalkeepers” for service of documents in civil or commercial matters or a tax or insolvency decision<sup>49</sup>.

This situation results from a deliberate choice by the Swedish legislator, which considers the damage done by such fraudulent actions as smaller than the effort and expense necessary to install a working system of identity control. Obviously, civil law systems have decided otherwise.

### 3.2.6. Legal control

Also the authentication of a contract serves as a legal control by the state:

- that might be **preliminary legality control** (FR *contrôle légal préventif*; DE *vorbeugende Rechtmäßigkeitskontrolle*; RO *control juridic preventiv*);
- but includes also **notification** of controlling agencies (FR *devoir de notification*; DE *Mitteilungspflichten*; RO *notificarea autorităților competente*).

The legality control might cover various areas.

- In particular, the notarial intervention in authenticating a contract also obliges the notary to deny authentication and to notify the authorities in case of a suspicion of **money laundering** (FR *blanchiment d'argent*, DE *Geldwäsche*; RO *spălarea banilor*)<sup>50</sup>.

<sup>47</sup> Cf. two reports commissioned by the Companies Register Office: *Ett ombudsförfarande för elektronisk ingivning till Bolagsverket*, by PER FURBERG (Setterwalls Advokatbyrå), Delrapport I (30.02.2007) and II (12.07.2007), at [http://www.bolagsverket.se/om\\_bolagsverket/rapporter/index.html](http://www.bolagsverket.se/om_bolagsverket/rapporter/index.html)

<sup>48</sup> Cf. VOGEL, Gutgläubenserwerb, Fälschung, Staatshaftung und Identitätsfeststellung im schwedischen Grundstücksrecht, in: BASEDOW et al. (Editors), *Aufbruch nach Europa. 75 Jahre Max-Planck-Institut für Privatrecht*, Mohr Siebeck, Tübingen 2001, p. 1065–1074.

<sup>49</sup> Compare <http://kronofogden.se/nyheterpressrum/pressrummet/pressmeddelanden/2008/pressmeddelanden/meran1miljardkronorifordonsrelateradeskulder.5.f103d011bbc966256800011830.html> and Kronofogden: Handbok för konkurstillsyn. <http://kronofogden.se/download/18.2132aba31199fa6713e80006446/KFM+949+ut%C3%A5va+2.pdf>.

<sup>50</sup> FR Article L. 562-1 Code on Money and Finances; DE § 11 GwG (*Geldwäschegesetz* = Law against Money Laundering, version of 13 August 2008 (BGBl. 2008 I, 1690); PL Article 2 Law of 16 November 2000 concerning the fight against money laundering and against the financing of terrorism (Official Journal 2003

In particular, the authentication and the notification duties of the authenticating official might help the state in **collecting taxes** (FR *faciliter la perception d'impôts ou de taxes*).

- In some states, the notary is only obliged to **notify the tax authorities** concerning the acts authenticated by him (DE).
- In other states, the notary is also personally responsible for **collecting or retaining the tax**: e.g. in **France** and in **Romania**<sup>51</sup>, the notary acts as an unpaid auxiliary of the State in collecting taxes. If the legal act recorded in the authentic instrument is taxable, the notary is responsible for collecting the tax for the State. Therefore, the notary is obliged to verify the sincerity of the tax declarations by the parties and to withhold the registration rights due to the acts he has recorded. In principle, the notary is personally liable for the payment of the taxes arising from the authentic instruments authenticated by him.

### 3.3. Procedural requirements

In the civil law countries, authentic instruments might also be required for certain procedures:

- The registration in public registers mostly requires that all necessary documents are filed in the form of authentic instruments, in particular for the **land register**<sup>52</sup>.
- Authentic instruments may also be required for registration in the **companies register**<sup>53</sup>.
- The same applies for issuing the **enforceable copy** or the declaration of enforceability, if the enforceability depends upon a condition, or if the title has to be changed from the old to a new creditor, or from the old to a new debtor. Here too, the fulfilment of a condition, or the requisites for a transfer of the title, have to be proven by authentic instrument<sup>54</sup>.
- For these procedural requirements, in Germany (but not in France, Poland and Romania) a private document with a **certification of signature** suffices as a proof for declarations of parties, but generally not for other facts<sup>55</sup>.

The objective of the formal requirement in these registration proceedings is to have **certainty of proof** and thereby to achieve the **legal certainty** for the registration. This is necessary

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No 153, 1505; 2004 No 62, 577); RO Article 8(e) Law No 656/2002 on the prevention and punishment of money laundering.

<sup>51</sup> Article 77 ss. Law No 573/2003 - Romanian Fiscal Code.

<sup>52</sup> FR Article 4 Decree No 55-22 of 4 January 1955 containing reform of the land register; DE § 29 GBO; PL Article 31 KWH; RO an authentic instrument is mandatory when acquiring ownership or limited rights in rem over Romanian immovable property (Article 2 Title X Law No 247/2005 on the reform of property law and justice, and additional measures); but, in practice, the land registrar requires, in order to operate the land registration, that all necessary documents to be filed in the form of authentic instruments.

<sup>53</sup> DE § 12 HGB. RO authentic instruments are required for the registration of (1) a general partnership company or a limited partnership company, (2) a joint-stock company which is set up by public subscription, (3) any other company if the partnership contract or charter requires for the contribution of land property to the subscribed capital (Article 5 Law No 31/1990 - Law on trading companies); otherwise the creation and registration in the company register does not require an authentic instrument (Law No 26/1990 on the companies register). FR: Registration in the companies register does not require an authentic instrument.

<sup>54</sup> FR Article 28, 4 Decree No 55-22 on the land register; DE §§ 726, 727 ZPO; PL Article 788 Code of Civil Procedure. Also in Romania, in principle only authentic instruments (notarial acts or court decisions) create enforceable title (with some exceptions).

<sup>55</sup> DE § 29 GBO, § 12 HGB, §§ 726, 727 ZPO; – however not in France and not in Poland.

considering the effects of registration, in particular the protection of good faith in the land register<sup>56</sup> or for the opposability of the registration in the companies register<sup>57</sup>.

- Guaranteeing that the parties receive legal advice is not necessarily the primary objective of these procedural formal requirements. Otherwise, a mere certification of signature would not suffice for the declarations of the parties.
- However, one **effect** of the procedural requirement is that the vast majority of parties to such transaction receive **legal advice**. At least this is so under German<sup>58</sup> and Romanian<sup>59</sup> law, for a certification of signature the notary is also required to advise the parties (under German law only, if the notary has drafted the text of the document which is being signed).

Certainty of proof and legal certainty are also of utmost importance for **granting enforceability**. The state would undermine acceptance for its enforcement procedures if it could not ensure that almost all titles enforced are accurate.

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<sup>56</sup> FR Article 28, 4 Decree No 55-22 on the land register; DE § 892 BGB; PL Article 2, 3(i), 5 KWH; RO Article 1173 CC and Article 4 Notarial Law No 36/1995.

<sup>57</sup> FR Article L. 210-9 Commercial Code; DE § 15 HGB; PL Article 17 KRS; however not in Romania for the companies register.

<sup>58</sup> DE BGH DNotZ 1955, 396; BGH DNotZ 1956, 94; BGHZ 125, 218, 226 = DNotZ 1994, 764 = NJW 1994, 1344; BGH DNotZ 1997, 51 = NJW 1996, 1675

<sup>59</sup> RO Article 6(1) and 45(1) Notarial Law No 36/1995.

## 4. National authorities

As we have stated above, the various definitions of authentic instruments all are **definitions** referring to other national statutes – that is definitions which have no meaning without a regulation on who has been empowered by the state to authenticate and how the authentication is being done. So we have to look at the statutory provisions on competence to authenticate, on the procedure and form of authentication.

In describing the respective competences, we retain the distinction which we have found for the content of the authentic instruments:

- authentic instruments concerning **contracts**, legal acts and other **declarations** of the parties;
- authentic instruments concerning **official acts** of public authorities (including court decisions); and
- authentic instruments concerning other **facts**.

### 4.1. Overview (table)

	<b>contracts/declarations by third persons</b>	<b>decisions and official acts</b>	<b>statement of facts</b>
<b>civil law notaries</b> (or consular authorities abroad)	DE, FR, PL, RO		only if the fact has been perceived by the notary himself in his official capacity: DE, FR, PL, RO
<b>courts</b>	only court settlements: DE	court decisions: DE, FR, PL, RO	
<b>registrar of births, deaths and marriages</b>	only some acts related to personal status: DE, FR, PL, RO		only births, deaths and marriages etc.: DE, FR, PL, RO
<b>other administrative agencies</b>	generally no competence: DE, FR, PL, RO	only acts of the agency itself: DE, RO	only if the agency has a special competence for authenticating the respective fact: DE, FR, PL, RO

### 4.2. Civil law notaries

In all four civil law countries studied, civil law notaries are **generally competent** to authenticate contracts and other declarations<sup>60</sup>. The same is probably true for all countries with civil law notaries.

<sup>60</sup> FR Article 1 Ordinance No 45-2590 of 2 November 1945 on the Notariat; DE § 20(1) phrase 1 BNotO; PL Article 1 Notarial Law of 14 February 1991; RO Article 8 and 10 Notarial Law.

Typically, the civil law notary's competence is also **exclusive**. The notary is the only official with authority to authenticate contracts and other declarations of the parties. Other public authorities are only exceptionally competent to authenticate declarations of the parties<sup>61</sup>.

Civil law notaries may also authenticate **other facts** besides declarations of will<sup>62</sup>. Conclusive proof, however, is limited to facts which the notary has **perceived personally**<sup>63</sup>.

The central role of the civil law notary as the general authenticating official can also be seen in the **definition of the notary** in the four civil law states studied.

#### 4.2.1. France

First, for French law, we quote Article 1 of the Ordinance No 45-2590 of 2 November 1945 on the Notariat:

<b>Article 1 Ordonnance n°45-2590 du 2 novembre 1945 relative au statut du notariat</b>	<b>Article 1 Ordinance No 45-2590 of 2 November 1945 on the Notariat</b>
Les notaires sont les officiers publics, établis pour recevoir tous les actes et contrats auxquels les parties doivent ou veulent faire donner le caractère d'authenticité attaché aux actes de l'autorité publique, et pour en assurer la date, en conserver le dépôt, en délivrer des grosses et expéditions. <sup>64</sup>	Notaries are the public officials which are instituted to record all acts and contracts which the parties have to or want to give the character of authenticity which is attached to acts of public authority, to certify the date, to preserve the acts in deposit and to deliver official or certified copies. <sup>65</sup>

#### 4.2.2. Germany

In Germany, the definition of a notary is contained in Article 1 of the Notarial Law (BNotO – *Bundesnotarordnung*).

<b>§ 1 BNotO (Bundesnotarordnung)</b>	<b>§ 1 German Notarial Law</b>
Als unabhängige Träger eines öffentlichen Amtes werden für die Beurkundung von Rechtsgeschäften und andere Aufgaben auf dem Gebiet der vorsorgenden Rechtspflege in den Ländern Notare bestellt. <sup>66</sup>	Notaries are instituted in the states ( <i>Länder</i> ) as independent holders of a public office for the authentication of legal acts and for other functions in the area of preventive justice. <sup>67</sup>

#### 4.2.3. Poland

<sup>61</sup> FR no particular statutory provision; DE §§ 60, 61 BeurkG; PL Article 1 Notarial Law RO Article 10 Notarial Law No 36/1995.

<sup>62</sup> FR no explicit statutory provision; DE § 20(1) phrase 1 BNotO; PL Article 103 Notarial Law; RO Article 8(d) Notarial Law No 36/1995.

<sup>63</sup> FR no particular statutory provision; DE § 418 ZPO; PL Articles 1, 88 Notarial Law; RO Article 1173-1174 CC; see also IONAȘCU, *Probele în procesul civil (Evidence in Civil Process)*, Ed. Științifică, Bucharest, 1969, p. 109-111; see also Article 14 Law No 119/1996 regarding civil status documents.

<sup>64</sup> Internet: [www.legifrance.org](http://www.legifrance.org)

<sup>65</sup> Own translation.

<sup>66</sup> Internet: <http://www.bnotk.de/Berufsrecht/BNotO/Bundesnotarordnung.Inhaltsverzeichnis.html>

<sup>67</sup> Own translation.

In Poland, the definition of a notary is contained in Article 1 of the Polish **Notarial Law** of 14 February 1991:

<b>Art. 1</b> <b>Prawo o notariacie</b>	<b>Article 1</b> <b>Polish Notarial Law</b>
§ 1. Notariusz jest powołany do dokonywania czynności, którym strony są obowiązane lub pragną nadać formę notarialną (czynności notarialnych). <sup>68</sup>	(1) The notary is called to perform acts, which the parties are obliged to or wish to authenticate in notarial form (notarial instruments). <sup>69</sup>
§ 2. ...	(2) ...

#### 4.2.4. Romania

In Romania, the definition of notarial activity and of a notary (which is called “public notary” – RO *notarul public*) is contained in Articles 1 ss. of the **Notarial Law** (Law No 36 of 12 May 1995 - Law on Notaries and on Notarial Activities):

<b>Art. 1</b> <b>Legea nr. 36/12 mai 1995, privind legea notarilor publici si a activitatii notariale</b>	<b>Article 1</b> <b>Notarial Law (Law No 36/12) of May 1995 containing the Law on Notaries and on Notarial Activities</b>
Activitatea notarială asigură persoanelor fizice și juridice constatarea raporturilor juridice civile sau comerciale nelitigioase, precum și exercițiul drepturilor și ocrotirea intereselor, în conformitate cu legea.	The notarial activity enables individuals and legal entities to establish civil or commercial legal relations, to exercise their rights and to protect their interests, in accordance with the law.
<b>Art. 2</b>	<b>Article 2</b>
Activitatea notarială se realizează de notarii publici prin acte notariale și consultanță juridică notarială, în condițiile prezentei legi.	Notarial activity is carried out by the notary public by way of notarial instruments and by notarial legal advice, in the terms regulated by this law.
<b>Art. 3</b>	<b>Article 3</b>
Notarul public este investit să îndeplinească un serviciu de interes public și are statutul unei funcții autonome. <sup>70</sup>	The notary public is instituted to fulfil a function of public interest and has the status of an autonomous official. <sup>71</sup>

#### 4.3. Courts

As regards their procedural legal effects – heightened probative value and enforceability – **court decisions** are also regarded as a kind of authentic instruments in the civil law

<sup>68</sup> Internet: <http://www.prawo.lex.pl/bap/notariusz/Dz.U.2002.42.369.html>

<sup>69</sup> Own translation.

<sup>70</sup> Internet: <http://www.uniuneanotarilor.ro/?p=6&id=84&lang=en&p=6&legi=1>

<sup>71</sup> Own translation.

countries<sup>72</sup>. However, for the purpose of this study they will not be dealt with in greater detail since they are not the main object of the study.

However, since in the civil law system of preventive justice the task of authentication has deliberately been entrusted by the state to special authentication officials, namely civil law notaries, courts generally are **no longer competent to authenticate contracts**, legal acts or other declarations made by the parties (but focus instead on handing down judgments)<sup>73</sup>.

There are only limited **exceptions**:

- Courts sometimes may authenticate declarations made by the parties in a **court settlement**<sup>74</sup>. In some systems, the recording in a court settlement replaces a notarial authentication (e.g. in Germany and in Romania – however not in France)<sup>75</sup>.
- Also, the courts may authenticate declarations concerning procedures of preventive justice undertaken by them, in particular **civil status matters** in the area of family law, such as the recognition of paternity<sup>76</sup> or declarations concerning adoption<sup>77</sup>.

**Bailiffs** (FR *huissier*, DE *Gerichtsvollzieher*) may authenticate instruments in particular on the service of process (FR *notification/signification*; DE *Zustellung*).

#### 4.4. Consular authorities

Consular authorities are normally granted by their home state almost the **same material competences as civil law notaries**, the main difference being that their **territorial competence is outside the state** which they represent, whereas the notaries' competence is territorially limited to the state which has appointed them.<sup>78</sup>

- However, the consular authorities' authenticating powers may be exercised only insofar as **allowed by the state where it is exercised**. In particular, it might be restricted by consular conventions.
- A common restriction is to limit the exercise of consular powers to authenticate to cases in which both or at least one party is a **national of the consular's state**.

<sup>72</sup> FR Article 457 Code of Civil Procedure; DE § 417 ZPO; PL Article 244 Code of Civil Procedure; RO see DELEANU, *Tratat de procedură civilă*, vol. II, C. H. Beck, Bucharest, 2005, p. 6-8 ; LEȘ, *Tratat de drept procesual civil*, Beck, Bucharest, 2005, p. 523-524.

<sup>73</sup> E.g. in Germany, the previously possible (although rarely used) authentication by the courts was abolished on 1.1.1970 with the entry into force of the law on authentication (*Beurkundungsgesetz*, BGBl. 1969 I, p. 1513).

<sup>74</sup> DE § 794(1) No 1 ZPO; PL no explicit statutory regulation in Polish law; RO Article 261 pct 3 Romanian Code of Civil Procedure (more precisely, statements of the parties become authentic by recording - including them - in court decisions).

<sup>75</sup> DE § 127a BGB; PL no explicit statutory regulation in Polish law; RO Article 5 Title X ("Legal circulation of land"), Law No 247/2005 regarding the reform in the field of property and justice, published in the Official Gazette No 653 of 22 July 2005.

<sup>76</sup> DE § 62(1) No 1 BeurkG ; PL Articles 62-86 KRIOP.

<sup>77</sup> PL Article 117 KRIOP; RO Article 15(1), 17(1) and 18(1) Law No 273/2004 regarding the legal procedures for adoption.

<sup>78</sup> DE § 10 KonsularG; PL Consular Law of 13. February 1984; RO Article 13 Notarial Law No 36/1995. In France, the order of 6 December 2004 has cancelled the notarial powers of the consuls in the Member States of the European Union and the European Economic Area.

#### 4.5. Civil registers (e.g. registers of births, marriages and deaths, land register, companies register)

Typically, excerpts from civil registers are also regarded as authentic instruments. The excerpt is sufficient proof of the content of the register. In particular, this applies to:

- certificates of **birth, marriage and death** (FR *extraits d'actes de naissance*; DE *Personenstandsurkunden*; RO *Certificate de stare civilă, de naștere, de căsătorie și de deces*)<sup>79</sup>;
- certificates of registration in the **land register** (DE *Grundbuchauszug*; RO *extrase de carte funciară*)<sup>80</sup>; and
- certificates of registration in the **companies register** (FR *extraits Kbis*; DE *Handelsregisterauszug*; RO *certIFICATE constatatoare eliberate de Oficiul Registrului Comerțului*)<sup>81</sup>.

#### 4.6. Other public authorities, e.g. family care administration

##### 4.6.1. Official acts and own declarations of the agency

In some of the systems studied, other public authorities (including administrative authorities) may authenticate their **own official declarations**<sup>82</sup>, although they are not competent to authenticate contracts and declarations of third parties.

##### 4.6.2. Authentication of declarations of other persons

Administrative agencies are **rarely competent** to authenticate **contracts or declarations** of third persons. The examples stated in the national reports for the four civil law countries studied are very limited in scope and always closely linked to the material competences of the respective agency. Thus, generally, the notary is the only “authenticating authority”.

The example of **Germany** shows, that these exceptional competences are few in number and very limited in scope:

- The **registrar** of the **register of births, deaths and marriages** (DE *Standesbeamte*) is exclusively competent to authenticate wedding vows<sup>83</sup>. Otherwise, he has some limited competing authenticating competences: the **recognition of paternity** (DE *Vaterschaftsanerkennung*) may (in addition to authentication by a notary or the courts) also be authenticated by the registrar of the register of births, deaths and marriages<sup>84</sup> or the child care authorities<sup>85</sup>. The registrar may also authenticate declarations on the names of children<sup>86</sup>.

<sup>79</sup> FR Article 55 ss., 63 ss., 78, 1394 CC; DE §§ 60, 66 PersStG; PL Article 4 ASC; RO Articles 2 and 13 Law No 119/1996, Article 22(2) of Decree No 31/1954.

<sup>80</sup> RO Article 41(2) Law No 7/1996 - law on cadastre and real estate publicity.

<sup>81</sup> FR Article 511-9 Commercial Code; DE § 15 HGB, § 32 GBO, § 21 BNotO; RO Article 4 Law No 26/1990 on the trade register.

<sup>82</sup> DE § 417 ZPO, § 29(3) GBO – however not in France and not in Poland.

<sup>83</sup> DE § 9 PersStG.

<sup>84</sup> DE § 29a PersStG.

<sup>85</sup> DE §§ 59, 60 SGB VIII.

<sup>86</sup> DE § 31a PersStG.



- For historic reasons, the **town clerk** (*Ratsschreiber*) in Baden-Württemberg may authenticate certain land law contracts, restricted to the sale or exchange of land<sup>87</sup>. The town clerk is supposed to intervene only in simple cases<sup>88</sup>; and they are only entitled, not obliged to authenticate<sup>89</sup> (as opposed to notaries who are under a duty to authenticate<sup>90</sup>).
- Also in some German states the **cadastral authorities** (*Vermessungsbehörden*) may authenticate a land owner's demand for unification or parcelling of land<sup>91</sup>. However, the bulk of authentic instruments by the cadastral authorities concern facts (i.e. the boundaries of the land parcels).

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<sup>87</sup> DE § 61(4) BeurkG, § 32(3) LFGG = *Landesgesetz über die freiwillige Gerichtsbarkeit* – (Baden-Württemberg) State Law on Jurisdiction in Non-Contentious Matters – internet: [www.landesrecht-bw.de](http://www.landesrecht-bw.de)

<sup>88</sup> DE § 32(3) LFGG.

<sup>89</sup> RICHTER/HAMMEL, *Landesgesetz Freiwillige Gerichtsbarkeit* (LFGG), 4<sup>th</sup> edition 1995, § 32 LFGG note 3.

<sup>90</sup> DE § 15(1) BNotO.

<sup>91</sup> § 61(1) No 6 BeurkG and the respective state law.

## 5. Authentication procedure for authenticating contracts and other declarations

In this part, we mainly describe the procedure for authentication by (civil law) **notaries**, not by other public officials, because notarial authentication is by far the most important authentication procedure in all four countries studied.

The **statutory sources** regulating authentication procedure by the civil notaries are:

- in **France** the **Decree on Notarial Instruments** (*Décret n° 71-941 du 26 novembre 1971 relatif aux actes établis par les notaires*)<sup>92</sup>; partially also still the Law on the organisation of the Notariat of 1803 (*Loi contenant organisation du notariat - loi du 25 ventôse an XI*)<sup>93</sup>;
- in **Germany** the **Law on Authentication (BeurkG – Beurkundungsgesetz)** of 28 August 1969<sup>94</sup>;
- in **Poland** the **Notarial Law** (*Prawo o notariacie*) of 14 February 1991<sup>95</sup>; and
- in **Romania** the **Notarial Law** (Law No 36 of 12 May 1995 - Law on notaries public and on notarial activity - *Legea nr. 36 din 12 mai 1995, privind legea notarilor publici si a activitatii notariale*)<sup>96</sup>.

<sup>92</sup> Internet: [www.legifrance.org](http://www.legifrance.org)

<sup>93</sup> Internet: [www.legifrance.org](http://www.legifrance.org)

See in particular: AUBERT, *La responsabilité civile des notaires*, 4<sup>th</sup> edition, Defrénois, 2002; LAPEYRE, *De l'authenticité*, Syndicat national des notaires, Paris, 1983.

<sup>94</sup> BGBl. 1969 I, 1513; Internet: <http://bundesrecht.juris.de/beurkg/index.html>

See in particular: ARNDT/LERCH/SANDKÜHLER, *Bundesnotarordnung* (BNotO), 6<sup>th</sup> edition 2008; EYLMANN/VAASEN, *Bundesnotarordnung, Beurkundungsgesetz* (BNotO, BeurkG), 2<sup>nd</sup> edition 2004; KEIM, *Das notarielle Beurkundungsverfahren*, 1990; JANSEN, FGG (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*), 2<sup>nd</sup> edition 1971; LERCH, *Beurkundungsgesetz* (BeurkG), 3<sup>rd</sup> edition 2006; REITHMANN, *Allgemeines Urkundenrecht: Begriffe und Beweisregeln*, 1972; SCHIPPEL/BRACKER, *Bundesnotarordnung* (BNotO), 8<sup>th</sup> edition 2006; STAUDINGER/HERTEL, Vor (before) §§ 127a/128 BGB (BeurkG), 2005; WINKLER, *Beurkundungsgesetz* (BeurkG), 16<sup>th</sup> edition 2008.

<sup>95</sup> Internet: <http://www.prawo.lex.pl/bap/notariusz/Dz.U.2002.42.369.html>

See in particular: WALASIK, *Poddanie się egzekucji aktom notarialnym*, Warsaw 2008.

<sup>96</sup> published in the *Monitorul Oficial* (Official Journal) No 92/16 of May 1995,

internet: <http://www.uniuneanotarilor.ro/?p=6&id=84&lang=en&p=6&legi=1>

See in particular: LEȘ, *Manual de drept notarial*, Ediția a doua, C. H. Beck, București, 2008.

<b>Main steps of an authentication procedure (table)</b>				
	France	Germany	Poland	Romania
preparation	yes	§ 21 BeurkG (check the land register)	yes	Art. 8(a), 13(2)(a), 43(4) and Art. 44(1) Notarial Law No 36/1995
controlling and recording the identity of the parties	Article 5 Decree No 71-941 on Notarial Instruments	§§ 9, 10 BeurkG	Article 85 Notarial Law	Article 49(f) and 50 Notarial Law No 36/1995
recording the declarations of the parties	Article 5 et 6 Decree No 55-22 on the Land Register	§ 9, 17 BeurkG	Art. 92 (1) No 5 Notarial Law	Article 43(2) and 45(1) Notarial Law
reading aloud	reading by the parties suffices	§ 13 BeurkG	Article 92 (1) No 7 Notarial Law	not required (exception in Art. 61(3) Notarial Law for “the consent of a blind person”)
legal advice	yes	§ 17 BeurkG	Art. 80, 81, 92, 94 Notarial Law	Art. 6(1), 45 Notarial Law
signing by the parties and the notary	Article 10 Decree No 71-941 on Notarial Instruments	§ 13 BeurkG	Art. 92 (1) No 8 and 9 Notarial Law	Article 49(j), 64 Notarial Law No 36/1995
withholding of taxes or notification to tax authorities	Article 853 General Tax Code	only notification duties	Art. 7 Notarial Law	Art. 77-1 ss. Romanian Fiscal Code
registration with public registers	Article 26 Decree No 71-941 on Notarial Instruments	§ 53 BeurkG	Art. 92 (1) No 4 and 5 Notarial Law	Article 45(3) Notarial Law, Art. 54(1) Law No 7/1996 (Cadastral and land publicity law)
execution of the contract (e.g. obtaining necessary permits)	it depends	possible, but only if the parties wish so (§ 24 BNotO)	possible	only if all the parties involved wish so (Art. 45 (2) Notarial Law – obtaining the necessary permits)

## 5.1. Authenticating official

### 5.1.1. Competences

The authenticating official may act only within his or her competences. Civil law notaries have a general competence to authenticate any type of legal act, whereas other authenticating officials normally only have limited substantive competences.

An instrument issued outside the state which has appointed the notary, is invalid<sup>97</sup>.

### 5.1.2. Notary must authenticate in person

The notary must authenticate the instrument **in person**; otherwise the authentic instrument is invalid<sup>98</sup>. The notary must not delegate the authentication to his employees.

If the notary is sick or otherwise absent, the supervising authority (usually the court) can appoint a **representative** for the notary (FR *suppléant d'un notaire*; DE *Notarvertreter*)<sup>99</sup>.

For some special cases, the assistance of **second notary** might be required for the act: E.g. in France, some particularly important legal acts are invalid, if the act is not assisted by a second notary or by two witnesses<sup>100</sup>. This is the case for example for the anticipated renunciation of a forced share<sup>101</sup>.

## 5.2. General official duties concerning the authentication procedure

### 5.2.1. Impartiality and neutrality

Impartiality and neutrality is one of the main official duties of the civil law notary<sup>102</sup>. Only as an impartial official, can the notary be trusted to draft a **balanced contract** taking into account the interests of both parties at the same time. Impartiality is also an essential precondition for the specific probative value of notarial instruments.

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<sup>97</sup> DE § 2 BeurkG.

<sup>98</sup> FR Article 9 Ventôse Law as modified by law of 12 August 1902 and of 28 December 1966; DE § 13 BeurkG; PL Article 1 Notarial Law; RO Article 49(g) and (h) and Article 64 Notarial Law No. 36/1995, also Article 65(a)-(b) Notarial Law.

<sup>99</sup> FR Article 5 Decree 20 May 1955; DE *Notarvertreter*, § 39 BNotO; PL Article 21 Notarial Law; RO Art 37 Notarial Law provides: “The notary public must not be absent for more than 5 consecutive days without ensuring the functionality of his office under the terms of the law. In case of failure to comply with the provisions of paragraph (1), the Chamber of Notaries Public may delegate, as the case may be, another notary public to fulfil the attributions of the absent notary public, under the terms provided by the Statute of the Union.”

<sup>100</sup> FR see Article 9(2) Ventôse Law.

<sup>101</sup> FR Article 930 CC.

<sup>102</sup> FR Article 13(4) Decree 19 December 1945; DE § 14(1) BNotO; PL Article 80 Notarial Law; RO Articles 3, 7 and 45(1) Notarial Law; compare also Article 1.2.2. of the Code of Practice – *Code de déontologie*, which has been adopted by the assembly of CNUE on the 4 April 2003 (internet: <http://www.cnue-nouvelles.be/en/002/003.html> - French version only).

### 5.2.2. Duty to authenticate

The notary being a public official has the **duty to authenticate** legal acts when requested to do so by the parties<sup>103</sup>. The notary may and has to deny authentication in particular if an act is **illegal** or serves an illegitimate purpose.

If the notary refuses to act, the parties may **appeal to the courts**.

### 5.2.3. Duty to confidentiality

The civil law notary has an official duty of confidentiality (FR *devoir de confidentialité*; DE *Verschwiegenheitspflicht*; RO *obligatia de confidențialitate, de păstrare a secretului profesional*)<sup>104</sup>. The duty of confidentiality applies not only to the notarial instrument itself, but also to the correspondence sent to or by the notary and to all other information given to the notary, even as to the mere fact that a party has gone to see the notary.

Exemptions to the duty to confidentiality are in particular the various duties of notaries to supply information to other public authorities (in particular tax authorities or concerning the measures against money laundering).

## 5.3. Preparations before the authentication

### 5.3.1. Preliminary checks by the notary

National authentication laws differ as to which preliminary checks are required by the notary or other authenticating official<sup>105</sup>:

- In **Germany**, for contracts on immovables, by law the notary is only required to check the registration inscriptions in the land register<sup>106</sup>.
- In other countries, the preparatory tasks of the notary might be larger. Thus, in **France**, before authenticating a land sale, the notary has not only to verify the title of the seller of the immovable property, but - due to the merely declaratory character of the land register - also the title chain of the seller's predecessors<sup>107</sup>. Also the notary often checks the applicable land usage rules or the building permit.
- In Romania, before authenticating a contract on immovables, the notary is obliged to check the registration inscriptions in the land register<sup>108</sup>. The notary will determine and verify the documents necessary for authentication<sup>109</sup>.

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<sup>103</sup> FR Article 1ter (2) Ordinance No 45-2590 of 2 November 1945 on the Notariat; DE § 15(2) BNotO; PL Articles 81-83 Notarial Law; RO Article 6, 45(6) Notarial Law; compare also Article 1.2.2. of the Code of Practice of CNUE.

<sup>104</sup> FR Article 32 Regulation on Notaries, Article 226-13 Penal Code; DE § 18 BNotO, § 203 StGB; PL Article 18 Notarial Law; RO Article 36, 39(c) Notarial Law; compare also Article 1.2.3. of the Code of Practice of CNUE.

<sup>105</sup> For the legal control and the denial of illegal acts, see par. 5.6.1.

<sup>106</sup> DE § 21 BeurkG.

<sup>107</sup> FR Cass. civ., 1st civil Chamber, 13.11. 1991, Bull. civ. I, No 310.

<sup>108</sup> Article 45(2) Notarial Law, Article 70 Regulation No 710/C/1995, implementing the Notarial Law.

<sup>109</sup> Article 66 Regulation No 710/C/1995, implementing the Notarial Law.

### 5.3.2. Asking the parties the relevant facts

In general, the notary is not obliged to verify the relevant facts by himself. He may rely on the information given to him by the parties. However, the notary has to ask the parties for the relevant information, in particular for information which the parties might forget to mention because they typically consider it irrelevant<sup>110</sup>.

### 5.3.3. Drawing up a draft and sending it to the parties

The **notary is responsible** for the formulation of the instrument. Usually the notary (with the help of the notary's employees) also draws up the draft of the document. If the parties themselves (or with the help of others, e.g. with the help of their attorneys) have drawn up a draft, the notary nonetheless is required to check its content and formulation and is as responsible for this document as if it were his own draft<sup>111</sup>.

Often the notary sends the parties the draft before the date of the authentication. Under German law, for consumer contracts on real estate, the notary has to send the draft contract to the consumer two weeks before the date of the authentication<sup>112</sup>.

## 5.4. Conflict of interest

All four civil law systems studied prohibit the notary from acting in cases of conflict of interest<sup>113</sup>. Generally, the notary must not perform notarial acts if the notary himself, the notary's spouse or close relatives or the notary's associates are parties to the authenticated act or if their legal interests are otherwise involved.

### 5.4.1. Notary's spouse and relatives and spouse

The prohibitions apply:

- in all systems, if the **notary himself** or herself is involved;
- if the notary's **spouse** is involved (sometimes expressly comprising the registered partner in a registered homosexual partnership, e.g. DE);
- to **ascendants and descendants**, irrespective of the degree of relationship;
- in general to **collateral relatives** up to the third degree (**uncle or nephew**) (FR, DE, PL) (in Romania, however, the rules on conflict of interest do not apply to collaterals); and
- to relatives **in law** in direct (ascendant or descendant) line (FR, DE), and generally also to the **spouses** of the mentioned collaterals (FR; in Germany only to in law collaterals up to the second degree = sister or brother in law).

<sup>110</sup> DE § 17(1) BeurkG, compare BGH DNotZ 1961, 162, 163; BGH DNotZ 1981, 515 = NJW 1981, 451, 452; BGH NJW-RR 1989, 153; BGH NJW 1993, 729, 730; BGH DNotZ 1996, 572 = NJW 1996, 524, 525; BGH NJW 1999, 1214; GANTER, in: ZUGEHÖR/GANTER/HERTEL, *Handbuch der Notarhaftung*, 2004, notes 826 ss.; RO Article 6(1) Notarial Law.

<sup>111</sup> DE BGH DNotZ 1961, 162, 163, BGH DNotZ 2003, 845 = NJW-RR 2003, 1498; RO Article 43, 45(2) Notarial Law.

<sup>112</sup> DE § 17(2a) sentence 2 No 2 BeurkG.

<sup>113</sup> FR Article 2-3 Decree No 71-941 of 26 November 1971; DE §§ 3, 6-7 BeurkG, § 16 BNotO; PL Article 84 Notarial Law; RO Article 56 Notarial Law.

The prohibition continues to apply **even after the marriage** or relationship has been dissolved (DE, PL).

#### 5.4.2. Notary's associates

The prohibition also applies if other civil law notaries working in the same notarial office or other legal professionals **associated with the notary** (e.g. attorneys or tax consultants) or their spouses or relatives are involved in the act (FR, DE). However, for employees of the notary or their relatives, generally there is no prohibition.

The prohibitions also apply, if a **substitute** is acting for the civil law notary. Then the substitute must not act if one of the parties is a relative etc. either of the notary or of the substitute<sup>114</sup>.

#### 5.4.3. Membership in a society or organ

In Romania, the notary must not be a partner in a general partnership or a general partner in a limited partnership or director of a limited liability company etc.<sup>115</sup>. German law specifically regulates conflicts of interest in cases where the notary belongs to a society or other legal entity as a member of the society or of one of its organs, including to public entities<sup>116</sup>. In the other states, these cases have to be solved by applying the general rule on conflicts of interests.

#### 5.4.4. Previous involvement in non-notarial capacity

German law expressly prohibits notarial acts, if the notary (or one of the notary's associates) has been **involved with the subject matter in a non-notarial capacity** (e.g. as an attorney or a tax consultants) (DE *Vorbefassung*)<sup>117</sup>. In Germany, this case is of particular practical importance, considering the large number of attorney-notaries who are at the same time attorneys and civil law notaries and the even larger number of attorneys (or tax consultants) who are associated with attorney-notaries.

The other three civil law systems studied have not expressly regulated this case, probably because it is less important since there are no attorney-notaries in those states. However, here the general rule prohibits the notary from acting in a case in which he has previously been involved as an attorney, judge or in another non-notarial capacity.

#### 5.4.5. Legal consequences

If the notary acts despite a conflict of interest, the violation may be **sanctioned** by the supervising authority. E.g. in Germany, a notary will be **dismissed from office** for repeated serious violations of the conflicts of interest rules (§ 50(1)(9) BNotO).

Further, the authentic instrument might be **invalid**.

- In some systems, all authentic instruments issued in violation of the provisions on conflict of interests are invalid as an authentic instrument (although they might still be valid as a private document) (FR, PL, RO).

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<sup>114</sup> DE § 41(2) BNotO; PL Article 84(2) Notarial Law.

<sup>115</sup> RO Article 35 Notarial Law.

<sup>116</sup> DE § 3(1) No 5-6, 9, 3(2) and (3) BeurkG.

<sup>117</sup> DE § 3(1) No 7 BeurkG.

- In Germany, invalidity is restricted to the more serious and more visible violations (DE)<sup>118</sup>.

## 5.5. Identity and capacity of the parties and their representatives

### 5.5.1. Verification of the identity

#### 5.5.1.1. In general

All four civil law systems studied require the notary to **verify the identity** of the parties to the act<sup>119</sup>. Various **means** of checking identity are possible:

- either by (official) **identity documents**; or
- by **witnesses**, who are personally known to the notary public or who have been identified by him (including the notary's employees).
- No further verification of identity is required, if the notary **personally knows** the party.

#### 5.5.1.2. Provisions against money laundering

An even higher level of control and documentation applies within the area of application of the provisions against **money laundering**:

- Here a **valid passport or identity card** is required for checking the identity<sup>120</sup>.
- **Personal knowledge** of the party suffices only if the identity of the party had previously been verified according to the standards of the provisions against money laundering.
- Other means of verification (such as identification by witnesses or by an expired identity document are not sufficient.

#### 5.5.1.3. Recording in the instrument

The notary has to state the identity of the party as clearly as possible in the instrument in order to exclude any doubt, generally stating at least their full name, address and birth date<sup>121</sup>. Also, the notary has to state how he identified the parties<sup>122</sup>.

In the scope of the measures against money laundering, additional recording duties apply, e.g. for noting the number of the passport or identity card and the issuing authority<sup>123</sup>.

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<sup>118</sup> DE §§ 6-7 BeurkG.

<sup>119</sup> FR Article 5 Decree on Notarial Instruments No 71-941, compare also Articles 5-6 Decree No 55-22 on the land register; DE § 10 BeurkG; PL Article 85 Notarial Law; RO Article 49(f), 50 Notarial Law, see also: LUPULESCU/ LUPULESCU, *Identificarea persoanei fizice*, Ed. Lumina Lex, Bucharest, 2002.

<sup>120</sup> FR Decree No 2006-736 of 26 June 2006; DE § 4(4) GwG – *Geldwäschegesetz* – Law against money laundering; PL Law of 16 November 2000 against money laundering; RO Article 8 ss. Law No 656/2002 on preventing and sanctioning money laundering.

<sup>121</sup> FR Article 6 Decree on Notarial Instruments No 71-941; DE § 10 (1) BeurkG; PL Article 92 (1) No 3 Notarial Law; RO Article 49(f) Notarial Law and Article 58 Regulation No 710/C/1995, implementing the Notarial Law.

<sup>122</sup> FR Article 5 Decree on Notarial Instruments No 71-941; DE § 10(2) BeurkG; PL Article 85 (3) Notarial Law; RO Article 49(f), 50 Notarial Law.

<sup>123</sup> FR Decree No 2006-736 of 26 June 2006 concerning measures against money laundering; DE § 9 GwG; PL Law of 16 November 2000 against money laundering; RO Article 9 Law No. 656/2002 on the prevention and sanctioning of money laundering



### 5.5.2. Mental capacity

As a **general rule**, in some states the notary has to check whether the parties have the mental capacity required for the act (e.g. in Poland and Romania)<sup>124</sup>.

In other states, such a positive check is required only for **specific types** of legal acts: E.g. in Germany for the authentication of testaments or other **provisions mortis causa**, the notary is required to document his perceptions about the testator's mental capacity in the instrument<sup>125</sup>.

However, if the notary has any **doubts** about one of the parties' mental capacity, he is obliged to state this in the instrument or even to deny the authentication:

- In all systems, if the notary is convinced, that one party **lacks the required mental capacity**, he has to deny authentication<sup>126</sup>.
- If the notary is in **doubt** about one party's mental capacity, in some systems he is not allowed to authenticate (PL)<sup>127</sup>. In other systems, the notary can go ahead with the authentication, but **state his doubts** in the document (DE)<sup>128</sup>. Again in other systems, the notary may then proceed to the authentication only if a **specialised physician attests** in writing that the party may validly express his/her consent at the moment of concluding the act (RO)<sup>129</sup>.

### 5.5.3. Representatives

If a party is representing a third person, the notary also has to check the **power of attorney** which has been presented to him<sup>130</sup> or the **statutory power of representation** claimed by the representative<sup>131</sup>.

## 5.6. Legal advice to the parties

In all four civil law systems studied, the notary's duty to inform the parties of the legal situation and the legal effects of the contract is one of the **cornerstones** of the authentication procedure. One might distinguish four main duties in this respect<sup>132</sup>:

- First, the authentication by the notary reassures the parties that their contract is **valid**, because the notary has to check the validity and to refuse to authenticate invalid contracts or clauses.
- Second, the notary has to **clarify the intentions** of the parties and to formulate them clearly.

<sup>124</sup> PL Article 86 Notarial Law; RO Article 43 (4), 51(d) Notarial Law.

<sup>125</sup> DE § 28 BeurkG.

<sup>126</sup> DE § 11(1) BeurkG; PL Article 86 Notarial Law; RO Article 51(d) Notarial Law.

<sup>127</sup> PL Article 86 Notarial Law.

<sup>128</sup> DE § 11(1) sentence 1 BeurkG.

<sup>129</sup> RO Article 59 Notarial Act.

<sup>130</sup> DE § 12 BeurkG; PL 80 and 81 Notarial Law; RO see Romanian Methodological Norms on Unique Registers kept by National Union of Notaries Public of Romania: [www.uniuneanotarilor.ro/?p=4.8&lang=ro](http://www.uniuneanotarilor.ro/?p=4.8&lang=ro).

<sup>131</sup> DE: In Germany as a requirement for the validity of the legal act, compare § 17 (1) BeurkG.

<sup>132</sup> FR: BIGUENET-MAUREL, *Le devoir de conseil des notaires*, Defrénois, 2006, 333 p., coll. Doctorat et notariat; DE: For Germany, compare – besides the commentaries to § 17 BeurkG – also: GANTER, in: ZUGEHÖR/GANTER/HERTEL, notes 482 ss.; STAUDINGER/HERTEL, Before §§ 127a/128 BGB notes 446 ss.; ARMBRÜSTER/KRAUS, NotBZ 2004, 325; KESSELER, ZNotP 2005, 251.

- Third, the notary has to advise the parties on the **legal requirements and consequences** of the authenticated act so that the parties understand what they are signing.
- Finally, the parties are assured that the transaction to which they consent is balanced since the notary, being impartial, has to propose them a **secure and balanced contract**.

## 5.6.1. Denial of illegal acts

### 5.6.1.1. Illegal transaction or illegitimate purpose

The notary has to deny the authentication if the legal act is recognisably **invalid** or serves an illegal or illegitimate purpose<sup>133</sup>.

In **Romania**, the notary must check that the act, as it has been proposed by the parties does not comprise clauses contrary to the law or to good morals. If the requested act is contrary to the law and morals, the notary shall refuse to authenticate it. If the presented act has a doubtful content and the notary may not refuse the drawing up of the act, the notary shall draw the attention of the parties upon the legal consequences to which they expose themselves and he shall make a special mention in the act. If the parties object to the insertion of the mention, the notary shall refuse to authenticate the act. The rejection shall also comprise the motivation of the rejection, the remedy at law before the law court and the time limit for exercising such remedy<sup>134</sup>.

### 5.6.1.2. Invalid contract clauses

The same applies also to an invalid clause, which the parties want to include in their contract. The notary must not authenticate a clause, which is clearly invalid, but has to advise the parties about the invalidity.

### 5.6.1.3. Doubts concerning validity

If the notary **doubts** whether the legal act conforms to the law or the true intentions of the parties, the notary has to advise the parties and to include a remark about his doubts in the instrument<sup>135</sup>. The same applies to questionable clauses.

## 5.6.2. Clarifying and clear formulation of the parties' intentions

The notary has to clarify the **true intention** of the parties, to ask them for the relevant facts and to record their declarations in a **clear and unambiguous** way<sup>136</sup>.

- The notary has to make sure that he has understood clearly the **intention** of the parties<sup>137</sup>.
- Also the notary has to **formulate precisely** the declarations made by the parties and to clarify any ambiguities<sup>138</sup>. The notary is not a scribe who just notes the parties'

<sup>133</sup> FR: In France, the duty to refuse illegal acts is not expressly regulated; however, an indirect acknowledgement by the legislator can be found in the guarantee of the independence of the salaried notary (which is possible in France, unlike in most other civil law notarial systems) (Article 1ter(2) of the Ordinance No 45-2590 of 2 November 1945 on the Notariat); DE § 4 BeurkG, § 14(2) BNotO (compare BGHZ 14, 25, 30; OLG Frankfurt DNotZ 1978, 748); PL Article 81 Notarial Law; RO Article 6(1)-(2) Notarial Law.

<sup>134</sup> RO Article 6 and 51 Notarial Law.

<sup>135</sup> DE § 17(2) BeurkG; PL Article 94(1) Notarial Law; RO Article 6(3)-(4) Notarial Law.

<sup>136</sup> DE § 17(1) BeurkG; PL Article 94(1) Notarial Law; RO Article 45(1) Notarial Law.

<sup>137</sup> FR *contrôler l'exactitude des déclarations des parties*; DE § 17(1) BeurkG; PL Article 80(1), 94(1) Notarial Law; RO Article 45(1) Notarial Law.

declarations. The notary's duty is to draft the text of the contract or the act so that it reflects the true intention of the parties.

### 5.6.3. Advising on the legal effects

#### 5.6.3.1. In general

The notary has to advise the parties as to the legal effects of the act<sup>139</sup>.

- In particular, the advice has to cover the **requirements for the substantive validity** of the act, mostly also the statutory requirements for the performance of the contract.
- On the legal consequences, the notary has to advise in particular about **liability risks** arising from the act by operation of law<sup>140</sup>.

#### 5.6.3.2. State permits and statutory rights of pre-emption

In particular, the notary typically has to advise the parties on permits required for the validity or the performance of the contract and on statutory rights of pre-emption:

- Thus, in **France**, in a land sale, the notary must inform the buyer in the case of a built-on property on the applicable land usage rules, i.e. zoning, public utility easements, works involved in town and country planning. For a plot of building land, information must be more complete to enable the buyer to ensure that the planned operation is possible with regard to the applicable planning rules. Also the notary must ensure that construction work has been performed after a building permit has been legally obtained, and that the construction conforms to the initial project. Also, the notary has to inform about the urban right of pre-emption.
- The **German law** on authentication expressly states that the notary has to advise about possible requirements of a state permit (*Genehmigung*) or statutory rights of preemption (*Vorkaufsrecht*)<sup>141</sup>.
- Similarly, in **Poland** and **Romania**, the notary has to inform the parties about necessary permits<sup>142</sup>.

#### 5.6.3.3. Advice about tax duties

Often, the notary expressly has to **inform the parties about specific tax duties**<sup>143</sup> or on the consequences of evading taxes<sup>144</sup>.

#### 5.6.3.4. Duty to warn

Typically, the notary is not obliged to advise on general economic and tax consequences. However, the notary has to **warn** a party, if the party runs a particular risk.

- This applies, if one party tries to cheat or exploit the other party<sup>145</sup>.

<sup>138</sup> DE § 17(1) BeurkG; PL Article 80 Notarial Law; RO Article 43(2) and 45(1) Notarial Law.

<sup>139</sup> DE § 17(1) BeurkG; PL Article 80(3), 92(3) Notarial Law; RO Article 6(1), 45(1) Notarial Law.

<sup>140</sup> DE BGH DNotZ 1982, 504; BGH DNotZ 1993, 752 = NJW 1993, 2741; BGH DNotZ 1996, 658 = NJW 1996, 5220; GANTER, in: ZUGEHÖR/GANTER/HERTEL, notes 1048 ss.

<sup>141</sup> DE §§ 18 and 20 BeurkG.

<sup>142</sup> RO Article 45(2) Notarial Law.

<sup>143</sup> DE § 19 BeurkG (land acquisition tax); PL Article 7 Notarial law (and other provisions in tax law); RO Article 77 ss. Romanian Fiscal Code and Article 49(i) Notarial Law No 36/1995.

<sup>144</sup> FR Article 43(3) Law No 71-1061 of 29 December 1971.

- Also the German courts have developed a duty to warn, if due to specific circumstances of the case – be it because of the legal construction or because of the type of performance – the notary has reason to fear that one party might suffer a damage without realizing the risk, because he does not know the legal situation or some facts, which influence the relevance of the legal act for his economic interests<sup>146</sup>.

### 5.6.3.5. Procedural ramifications

Finally, the notary has to **organise the authentication procedure** in such a way that the advice may be efficient (DE *belehrungsgerechte Gestaltung des Beurkundungsverfahrens*, § 17(2a) BeurkG). In particular in contracts between a consumer on one side and an enterprise on the other side, the notary has to try to achieve, that the consumer personally makes his declarations (or by a representative in whom the consumer places special trust – DE *Vertrauensperson*) and that the consumer before the authentication has sufficient opportunity to consider the contract (which for the sale or acquisition of land usually means that the consumer received a first draft two weeks before the date of authentication)<sup>147</sup>.

### 5.6.4. Drafting an impartial and secure transaction

Combining all the above-mentioned advisory duties, the German courts see a duty on the notary to **draft a balanced contract according to the state of notarial art** (DE *Amtspflicht zur Vertragsgestaltung*)<sup>148</sup>. That may require the notary to propose a solution, which differs from a (non-mandatory) statutory rule, if the statutory rule is not appropriate for the interests of the parties in that specific case<sup>149</sup>.

German courts have also developed two more specific duties concerning contract drafting:

<sup>145</sup> DE § 4 BeurkG, § 14(2) BNotO; PL Article 80(2) Notarial Law; RO Article 6(1): “Notaries public and the other institutions provided in Article 5 which carry out notarial activity must check that the acts which they authenticate do not comprise clauses contrary to the law or to good morals, request and explain to the parties the content of such acts in order to ensure that the parties understand the meaning thereof and accepted their effects in order to avoid disputes.” See also Article 45(3)-(4) Notarial Law.

<sup>146</sup> DE BGH DNotZ 1967, 323, 324 = NJW 1967, 931, 932; BGHZ 58, 343, 348 = NJW 1972, 1422; BGH DNotZ 1976, 54, 55 = NJW 1975, 2016, 2017; BGH DNotZ 1987, 157 = NJW-RR 1987, 84, 86; BGH DNotZ 1989, 45 = NJW-RR 1988, 972; BGH DNotZ 1989, 452 = NJW 1989, 586; BGH DNotZ 1991, 759 = NJW 1991, 1346; BGH DNotZ 1992, 813 = NJW-RR 1992, 1178, 1180; BGH DNotZ 1994, 485 = NJW 1993, 2744; BGH DNotZ 1996, 118 = NJW 1995, 2713 with case note by REITHMANN, NJW 1995, 3370 = WM 1995, 1883; GANTER, in: ZUGEHÖR/GANTER/HERTEL, notes 1198 ss.; compare also PL Article 80(2) Notarial Law.

<sup>147</sup> Compare Bundesnotarkammer (Federal Chamber of German civil law notaries), *Rundschreiben* (circular) No 20/2003 of 28.4.2003 (*Anwendungsempfehlungen zu praktischen Umsetzungen von § 17 Abs. 2a Satz 2 BeurkG* – Recommendations on the practical application of § 17 (2)a phrase 2 BeurkG) – internet: www.bnotk.de – Unser Service/Merkblätter; BNotK-Intern 4/2002, S 5; BOHRER, DNotZ 2002, 579; BRAMBRING, ZfIR 2002, 597; GRZIWOTZ, ZfIR 2002, 667; GRZIWOTZ, ZIP 2002, 2109; HERTEL, ZNotP 2002, 286; JOST, ZGS 2002, 346; LITZENBURGER, NotBZ 2002, 280; MAAB, ZNotP 2002, 455; PHILIPSEN, NotBZ 2003, 137; RIEGER, MittBayNot 2002, 325; SCHMUCKER, DNotZ 2002, 510; SOLVEEN, RNotZ 2002, 318; SORGE, DNotZ 2002, 593; STRUNZ, ZNotP 2002, 389.

<sup>148</sup> BGHZ 96, 157, 168 = DNotZ 1986, 406 = NJW 1986, 576; BGH NJW-RR 1989, 1492; BGHZ 123, 178 = DNotZ 1995, 494 = NJW 1993, 2617; BGH DNotZ 1995, 403 = NJW 1994, 2283; DNotZ 1995, 407 = NJW 1995, 330; DNotZ 1996, 568 = NJW 1996, 522; BRAMBRING/SCHIPPEL, NJW 1979, 1802, 1806; GANTER, in: ZUGEHÖR/GANTER/HERTEL, notes 923 ss.; JERSCHKE, DNotZ 1998, Sonderheft (special edition), p. 21\*, 28\*; KEIM, *Das notarielle Beurkundungsverfahren*, note 81; REITHMANN, ZNotP 2003, 242; REITHMANN, in: *Festschrift Schippel* (1996), p. 769; REITHMANN, in: REITHMAN/ALBRECHT, *Handbuch der notariellen Vertragsgestaltung*, note 17 s.; STAUDINGER/HERTEL, Vor §§ 127a/128 BGB, note 458; WINKLER, § 17 BeurkG, notes 247 ss.

<sup>149</sup> BGH DNotZ 1995, 403 = NJW 1994, 2283.

- The notary has to propose a contractual solution whereby none of the parties bears the **risk of unsecured advance performance** (DE *ungesicherte Vorleistung*)<sup>150</sup>.
- If more than one solution fits the intentions of the parties, then the notary has to propose the **safest (and least risky) solution** (DE *sicherster Weg*)<sup>151</sup>.

Also in the other civil law systems studied, a balanced contract is the consequence of the notary's impartiality and duty of advice.

### 5.6.5. Statutory provisions on advisory duties

#### 5.6.5.1. France

In France, the official duties to refuse to authenticate illegal acts and to give the parties impartial legal advice are **not codified**, but universally acknowledged in jurisprudence and practice.

#### 5.6.5.2. Germany

<b>Beurkundungsgesetz</b> <b>§ 4 Ablehnung der Beurkundung</b>	<b>German Law on Authentication</b> <b>§ 4 Refusal to perform notarial act</b> <sup>152</sup>
Der Notar soll die Beurkundung ablehnen, wenn sie mit seinen Amtspflichten nicht vereinbar wäre, insbesondere wenn seine Mitwirkung bei Handlungen verlangt wird, mit denen erkennbar unzulässige oder unredliche Zwecke verfolgt werden.	A notary shall refuse to authenticate if it is not consistent with his official duties, in particular if his assistance is asked for in connection with an act, which evidently serves illegal or immoral objectives.
<b>3. Prüfungs- und Belehrungspflichten</b>	<b>3. Control and advisory duties</b>
<b>§ 17 Grundsatz</b>	<b>§ 17 Principle</b>
(1) Der Notar soll den Willen der Beteiligten erforschen, den Sachverhalt klären, die Beteiligten über die rechtliche Tragweite des Geschäfts belehren und ihre Erklärungen klar und unzweideutig in der Niederschrift wiedergeben. Dabei soll er darauf achten, daß Irrtümer und Zweifel vermieden sowie unerfahrene und ungewandte Beteiligte nicht benachteiligt werden.	(1) A notary shall ascertain the intentions of the parties, ask for the relevant facts, advise the parties on the legal relevance of the act and record the declarations of the parties clearly and unambiguously in the instrument. Also the notary shall ensure that errors and doubts are avoided and that inexperienced or incompetent parties are not disadvantaged.
(2) Bestehen Zweifel, ob das Geschäft dem Gesetz oder dem wahren Willen der Beteiligten entspricht, so sollen die Bedenken mit den Beteiligten erörtert werden. Zweifelt der Notar an der Wirksamkeit des Geschäfts und bestehen die Beteiligten auf der Beurkundung, so soll er die Belehrung und die dazu abgegebenen Erklärungen	(2) If a notary has doubts whether a transaction conforms with the law and the true intentions of the parties, the notary shall discuss those doubts with the parties. If a notary doubts the validity of the transaction, and parties insist on the authentication, the notary shall indicate his or her advice and the declarations of the parties on this

<sup>150</sup> BGH DNotZ 1989, 449 = NJW 1989, 102, 103; DNotZ 1990, 58 = NJW-RR 1989, 1492, 1494; DNotZ 1995, 407 = NJW 1995, 330, 331; DNotZ 1996, 568 = NJW 1996, 522; DNotZ 1997, 64 = NJW 1996, 3009, 3010; DNotZ 1998, 637 with case note by REITHMANN; DNotZ 2001, 473 with case note by BRIESKE = NJW 1999, 2188, 2189; DNotI-Report 2008, 45 = DNotZ 2008, 280 = NJW 2008, 1321 = ZNotP 2008, 168; DNotI-Report 2008, 85 = NJW 2008, 1319 = ZfIR 2008, 370 = ZNotP 2008, 212.

<sup>151</sup> BGHZ 56, 26, 28 = NJW 1971, 1363, 1364; BGH DNotZ 1983, 450 = NJW 1983, 1801; BGH NJW 1992, 3237, 3239.

<sup>152</sup> § 14(2) BNotO provides a general norm with the same content, but applying not only to authentications, but to all not all notarial acts.

der Beteiligten in der Niederschrift vermerken.	issue in the instrument.
<p>(2a) Der Notar soll das Beurkundungsverfahren so gestalten, daß die Einhaltung der Pflichten nach den Absätzen 1 und 2 gewährleistet ist. Bei Verbraucherverträgen soll der Notar darauf hinwirken, dass</p> <ol style="list-style-type: none"> <li>1. die rechtsgeschäftlichen Erklärungen des Verbrauchers von diesem persönlich oder durch eine Vertrauensperson vor dem Notar abgegeben werden und</li> <li>2. der Verbraucher ausreichend Gelegenheit erhält, sich vorab mit dem Gegenstand der Beurkundung auseinander zu setzen; bei Verbraucherverträgen, die der Beurkundungspflicht nach § 311 b Abs. 1 Satz 1 und Abs. 3 des Bürgerlichen Gesetzbuchs unterliegen, geschieht dies im Regelfall dadurch, dass dem Verbraucher der beabsichtigte Text des Rechtsgeschäfts zwei Wochen vor der Beurkundung zur Verfügung gestellt wird.</li> </ol> <p>Weitere Amtspflichten des Notars bleiben unberührt.</p>	<p>(2a) The notary shall organise the procedure of authentication in a way that ensures compliance with the duties regulated in paragraphs (1) and (2) is ensured. In acts involving consumers, the notary shall work toward that:</p> <ol style="list-style-type: none"> <li>1. the legal declarations of the consumer are made personally by the consumer in person or by a representative he trusts; and</li> <li>2. that the consumer has sufficient opportunity to consider the transaction beforehand; in consumer contracts require authentication according to § 311 b paragraph 1 sentence 1 and paragraph 3 of the Civil Code<sup>153</sup> this is generally achieved by providing the consumer with the draft text of the transaction two weeks before the date of the authentication.</li> </ol> <p>These rules do not affect additional official duties of the notary.</p>
<p>(3) Kommt ausländisches Recht zur Anwendung oder bestehen darüber Zweifel, so soll der Notar die Beteiligten darauf hinweisen und dies in der Niederschrift vermerken. Zur Belehrung über den Inhalt ausländischer Rechtsordnungen ist er nicht verpflichtet.</p>	<p>(3) If the law of a foreign state must be applied or if there are doubts concerning its application, a notary shall inform the parties thereof and indicate such fact in the notarial instrument. A notary need not explain the content of the law of a foreign state.</p>

### 5.6.5.3. Poland

<b>Prawo o notariacie</b> <b>Art. 80</b>	<b>Polish Notarial Law</b> <b>Article 80</b>
§ 1. Akty i dokumenty powinny być sporządzone przez notariusza w sposób zrozumiały i przejrzysty.	§ 1. Acts and documents should be drawn up by the notary public in a clear and transparent way.
§ 2. Przy dokonywaniu czynności notarialnych notariusz jest obowiązany czuwać nad należytych zabezpieczeniem praw i słusznym interesów stron oraz innych osób, dla których czynność ta może powodować skutki prawne.	§ 2. When making a notarial act the notary is obliged to ensure due protection for the rights and legitimate interests of the parties and other persons on whom the act may have legal effects.
§ 3. Notariusz jest obowiązany udzielać stronom niezbędnych wyjaśnień dotyczących dokonywanej czynności notarialnej.	§ 3. The notary is obliged to provide the necessary clarifications to the parties assisting in the notarial acts.
§ 4. ...	§ 4. ...
<b>Art. 81</b>	<b>Article 81</b>

<sup>153</sup> § 311b(1) BGB requires the authentication of contracts for the sale of land (or other obligations to transfer or acquire property in land).

Notariusz odmówi dokonania czynności notarialnej sprzecznej z prawem.	The notary must refuse to carry out any authentication contrary to the law.
<b>Art. 94</b>	<b>Article 94</b>
§ 1. Akt notarialny przed podpisaniem powinien być odczytany przez notariusza lub przez inną osobę w jego obecności. Przy odczytaniu aktu notariusz powinien się przekonać, że osoby biorące udział w czynności dokładnie rozumieją treść oraz znaczenie aktu, a akt jest zgodny z ich wolą. Na żądanie powinny być odczytane również załączniki do aktu.	§ 1. The notarial instrument has to be read by the notary or by another person in the notary's presence prior to the signing. While reading the notarial instrument, the notary act should ascertain whether the parties involved in the transactions understand the content and legal consequences of the act, and whether the instrument is consistent with their wishes. At the request of the parties, also the annexes to the instrument have to be read to them.
§ 2. ...	§ 2 ...

#### 5.6.5.4. Romania

<b>Legea nr. 36 din 12 mai 1995</b> <b>Art. 5</b>	<b>Romanian Notarial Law (Law No 36 of 1995)</b> <b>Article 5</b>
(1) Notarii publici si celelalte instituții prevăzute la Art. 5, care desfășoară activitate notarială, au obligația să verifice ca actele pe care le instrumentează să nu cuprindă clauze contrare legii si bunelor moravuri, să ceară si sa dea lămuriri părților asupra conținutului acestor acte spre a se convinge că le-au înțeles sensul și le-au acceptat efectele, în scopul prevenirii litigiilor.	(1) Public notaries and other institutions provided for in Article 5, which carry out notarial activity, have the obligation to verify that the instruments which they authenticate do not contain provisions contrary to law and morality, to ask questions and give the parties advice on the content of these acts in order to satisfy themselves that the parties understand its meaning and that they accept the effects, in order to prevent disputes.
(2) În cazul în care actul solicitat este contrar legii și bunelor moravuri, notarul public va refuza întocmirea lui.	(2) If the requested act is against law or morality, the notary public shall reject the authentication.
(3) Dacă înscrisul prezentat are un conținut îndoielnic, iar notarul public nu poate refuza instrumentarea actului, va atrage atenția părților asupra consecințelor juridice la care se expun și va face mențiune expresă în act.	(3) If the requested act is of doubtful content, and notary public cannot refuse authentication of the act, the notary shall draw the parties' attention to the legal consequences and expressly mention these in the instrument.
(4) Dacă partea se opune la inserarea mențiunii, notarul public va refuza întocmirea actului.	(4) If the parties oppose the indicated insertion, the notary public shall refuse to authenticate the act.
<b>Art. 45</b>	<b>Article 45</b>
(1) Notarul public are obligatia sa deslusească raporturile reale dintre parti cu privire la actul pe care vor sa-l încheie, să verifice dacă scopul pe care-l urmaresc este în conformitate cu legea si să le dea îndrumările necesare asupra efectelor lui juridice.	(1) The notary must determine the real relations between the parties with regard to the act which they conclude, check whether their objectives comply with the law and give the necessary advice about its legal effects.
(2) De asemenea, el trebuie sa ceară partilor, ori	(2) Similarly, the notary must ask the parties,

de câte ori este cazul, documentele justificative și autorizațiile necesare pentru încheierea actului sau, la cererea acestora, va putea obtine el însuși documentația necesară.	whenever appropriate, for documents and licenses required for the completion of the act or, at their request, he may obtain the necessary documentation by himself.
(3) Actele din care rezultă drepturi ce urmează a fi supuse publicității mobiliare sau imobiliare se vor comunica de îndată, la locul unde se ține această evidentă, de notarul public, care va face și demersurile necesare în numele titularilor pentru aducerea la îndeplinire a tuturor lucrurilor de publicitate. Se exceptează cazul în care părțile interesate vor cere în scris să îndeplinească ele însele formalitățile de mai sus.	(3) Instruments that change rights which are subject to registration in the register of movable or immovable property shall be communicated immediately to the competent registration authority, and the notary public shall take the necessary steps to apply for registration on behalf of the holders of the right. This does not apply, if the parties concerned ask in writing to fulfil the above mentioned formalities by themselves.
(4) În vederea îndeplinirii obligațiilor ce-i revin, potrivit alin. 2 și 3, notarul public va avea acces liber la birourile de publicitate mobilă și imobiliară.	(4) In order to comply with the duties regulated in paragraphs 2 and 3, the public notary has free access to the registers of movable or immovable property.
(5) Notarul public nu poate refuza îndeplinirea actului notarial solicitat decât în condițiile arătate la Art. 6.	(5) The public notary cannot refuse to perform a notarial act required except under the conditions regulated in Article 6.

## 5.7. Procedure: Reading, ratification, signing

### 5.7.1. Reading

The authentic instrument has to be read to the parties by the notary or in his presence.

Concerning reading, the various systems have slightly **different rules**:

- Germany and Poland require **the notarial instrument to be read aloud** to the parties<sup>154</sup>. The reading can also be done by another person in the presence and under the supervision of the notary. If the instrument has not been read, it is invalid.
- In France, reading is also a requirement for validity. However, the reading can be done by the **parties themselves**<sup>155</sup>.
- In Romania, reading the notarial instrument aloud to the parties is only required as an exception for the consent of a blind person<sup>156</sup>.

It may also be permitted to record parts of the act not in the instrument itself, but in an **annex** (FR *annexe*; DE *Anhang*; RO *anexă*). Then the annex also has to be read to the parties<sup>157</sup>. Under Romanian law, the number of the annexes comprised in the authentic instrument must be stated in the instrument (under sanction of nullity)<sup>158</sup>.

However, if the parties want to apply clauses to their act which have already been authenticated in another notarial instrument, a mere **reference to the other instrument**

<sup>154</sup> DE § 13(1) BeurkG; PL Article 92(1) No 7 Notarial Law.

<sup>155</sup> FR Article 6(3) Decree on Notarial Instruments No 71-941.

<sup>156</sup> RO Article 61(3) Notarial Act No. 36/1995.

<sup>157</sup> DE § 9(1) sentence 2 BeurkG.

<sup>158</sup> RO Article 65(c) Notarial Law.



suffices; it is not required to read the clauses of the other instrument (again), if the parties waive the repeated reading<sup>159</sup>.

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<sup>159</sup> DE § 13a BeurkG.

### 5.7.2. Ratification and signing by the parties

All four civil law systems studied require **ratification and signature** by the parties<sup>160</sup>. So after reading the instrument, the notary usually will ask the parties whether they have understood its content and whether the content of the instrument expresses their will. If so, the parties will proceed to sign the instrument.

Without the parties' ratification and signature, the document is **not valid** as an authentic instrument. Generally, the statement of ratification is also required in the instrument. However, a party's signature might imply or raise a presumption that the person also ratified the instrument<sup>161</sup>.

**French** law also requires not only a signature at the end of the instrument, but also the parties' (and the notary's) **initials** (FR *paraphe*, DE *Paraphe*) **on each page** of the instrument – by sanction of nullity of any pages, which are not initialled<sup>162</sup>. Polish law also requires the initials on every page<sup>163</sup>. German and Romanian law do not require the parties' initials.

If **witnesses** participate in the act, generally the signature of the witnesses is also required<sup>164</sup>.

### 5.7.3. Signing and seal of the notary

All four civil law systems studied require the notary to sign the instrument<sup>165</sup>. Without the notary's signature, the document is **not valid** as an authentic instrument.

The **seal** is also required in France and Germany, but generally not as a requirement for the validity of the act (in Romania, however, it is a validity requirement)<sup>166</sup>.

## 5.8. Content and Form of the instrument

### 5.8.1. Minimum content

Typically, the laws on authentication require a certain minimum content of authentic instruments, which comprise in particular<sup>167</sup>:

- the date and place of the authentication;
- the notary authenticating the instruments; and
- the parties to the authentication.

Normally, these statements are to be found in the **beginning** of the notarial instrument.

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<sup>160</sup> FR Article 10 Decree on Notarial Instruments No 71-941; DE § 13(1) BeurkG; PL Article 92(1) No 8 Notarial Law; RO Article 64, 65(a)-(b) Notarial Law.

<sup>161</sup> DE § 13(1) sentence 3 BeurkG.

<sup>162</sup> FR Article 14(4) Decree on Notarial Instruments No 71-941. There is no such requirement in German or Romanian law.

<sup>163</sup> PL Article 93 Notarial Law.

<sup>164</sup> RO Article 64 Notarial law.

<sup>165</sup> FR Article 10 Decree on Notarial Instruments No 71-941; DE § 13(3) BeurkG; PL Article 92(1) No 9 Notarial Law; RO Article 49(j), 52 Notarial Law.

<sup>166</sup> FR Article 7, 15 Decree on Notarial Instruments No 71-941; DE § 44 BeurkG, § 31 DONot; RO Article 49(k), 52 Notarial Law; PL the seal is required only for official copies, not for the original of the instrument.

<sup>167</sup> FR Article 6 Decree on Notarial Instruments No 71-941; DE § 9 BeurkG; PL Article 92 Notarial Law; RO Article 49 Notarial Law.

The minimum content typically also comprises a statement about the reading of the instrument, on its ratification and signature by the parties (naturally at the **end** of the instrument). In Romania, the conclusion has to be expressed in the words: “This instrument is declared authentic”; otherwise the instrument is invalid<sup>168</sup>.

Otherwise, the required **substantive content** of the declarations of the parties does not depend on the law of authentication, but on the law governing the relevant transaction.

### 5.8.2. Formal requirements about the text

As to the text, typical requirements are<sup>169</sup>:

- document proof paper and ink;
- “legible, careful writing manner, without abbreviations”;
- figures shall be also recorded in words;
- blank spaces shall be filled in by drawing lines; and
- sometimes also numbering of the pages (the latter three are not required in Germany).

These are typically not requirements for validity (which might be explained by the fact that these rules may be contained not in the law itself, but in an ordinance of lower degree, such as in Germany).

### 5.9. Distinction between official duties and requirements for the validity of the contract

All the above-mentioned steps are official duties (FR *obligations légales*; DE *Amtspflichten*; RO *obligații legale*) of the notary (or other authenticating official). However, not all are requisites for the formal validity of the instrument. Otherwise, authentication would decrease not increase legal certainty, if a mere claim that e.g. a breach of the advisory duty had happened would suffice to raise doubts about the validity of the contract.

Requirements for the validity typically include<sup>170</sup>:

- date and place of the act (however in Germany not a validity requirement);
- name of the **notary**;
- name (and address) of the **parties** participating in the act;
- the **declarations** made by the parties;
- **reading aloud** to the parties;
- **ratification** and **signature** by the parties; and
- **signature** of the **notary** (in Romania also the seal and the formula “This instrument is declared authentic”).

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<sup>168</sup> RO Article 65(d) Notarial Law.

<sup>169</sup> FR Article 8-9, 11-13 Decree on Notarial Instruments No 71-941; DE § 29 DONot; PL Article 80 Notarial Law, Article 94(2) Notarial Law; RO Article 43(3)-(4) Notarial Act.

<sup>170</sup> FR Article 6 ss. Decree on Notarial Instruments No 71-941; DE §§ 9, 13 BeurkG; PL Article 92 Notarial Law; RO Articles 49, 65 Notarial Law.

## 5.10. Language and translation

### 5.10.1. Language of the instrument

Generally, an authentic instrument is recorded in the **official language** of the state, which has appointed the authenticating official.

- Most systems, however, allow authentic instruments to be recorded in a **foreign language**, if the authenticating official has sufficient knowledge of this language (DE, PL, RO)<sup>171</sup>. In France, however, authentic instruments must be issued in the French language<sup>172</sup>. In Romania a translation into Romanian is required<sup>173</sup>.
- For **registration** in a public register an instrument in the official language might be required; but even a translation may be insufficient (because the registered instrument has to be open to consultation by third parties who should not suffer because of an imprecise or inaccurate translation).

### 5.10.2. Translation requirement

If a party to the act does not understand the language of the instrument, a **translator** has to attend the authentication<sup>174</sup>.

- Generally, the **notary** may translate himself, if he understands and speaks the foreign language sufficiently.
- Normally, an **oral translation** suffices if the affected party consents<sup>175</sup>. However that party may demand a written translation, if she so wishes<sup>176</sup>.

### 5.10.3. Certification of translation by the notary

Often, the notaries can certify translations of their own instruments or at least the translation from a foreign language in their own official language (provided that they have sufficient command of the language of the translation). Then the translation provides full proof<sup>177</sup>.

## 5.11. Disabled persons

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<sup>171</sup> DE § 5 BeurkG; PL Article 2(3) Notarial Law; RO Article 47(4)-(5) Notarial Law:“(4) On the justified request of the parties, the notary public may authentic instruments in another language than the Romanian language, only if the authenticating notary knows the language in which the instruments are drawn up or after he has learned about their content through an interpreter, in which case a copy translated into Romanian and signed by the person who performed the translation shall be enclosed to the file.

(5) Documents destined to be translated into a foreign language shall be drawn up either in two columns comprising in the first column the text in Romanian and in the second column the text in the foreign language, or successively, first the text in the Romanian language, continuing with the text in the foreign language.”.

<sup>172</sup> FR Article 111 Ordinance of *Villers Cotterêts* of 1539, Article 2 Decree of 2 Thermidor Year II.

<sup>173</sup> RO Article 47 par. 4 Notarial Law.

<sup>174</sup> DE § 16 BeurkG; PL Article 87(1) No 1 Notarial Law; RO Article 47(2) Notarial Law.

<sup>175</sup> DE § 16 BeurkG; PL Article 94 Notarial Law; RO Article 47(2) Notarial Law.

<sup>176</sup> DE § 16 BeurkG.

<sup>177</sup> DE § 50 BeurkG.

In all four systems, there are special statutory provisions for authentications with the participation of disabled persons (who are **deaf, dumb or blind** or who **cannot sign** – or who even have a combination of multiple disabilities). Such authentication procedures might require the assistance of a second notary or of witnesses and additional measures to ensure that the disabled person nonetheless understands the content of the instrument and can express his or her will clearly and unmistakably<sup>178</sup>.

## 5.12. Changes, procedure after the authentication

### 5.12.1. No changes after the notary's signature

During the authentication, changes can be made by annotations in the margins or at the end of the instrument, generally requiring the notary's signature (in order to prevent fraudulent changes after the authentication)<sup>179</sup>.

After the authentication has been completed by the signature of the notary, nothing may be changed in the instrument – not even with the consent of all parties. Generally the notary may correct clerical errors in the text by an additional remark annexed to the instrument, but not by changing the instrument itself<sup>180</sup>. Other changes can only be achieved, if the parties authenticate the changes in a new instrument.

### 5.12.2. Custody of the original

The notary keeps the original (or one original) of the authentic instrument in her or his **custody** (FR *dépôt au rang des minutes*; DE *Verwahrung*; RO *arhivă*)<sup>181</sup>. If the instrument consists of several pages, they must be bound and sealed together<sup>182</sup>.

### 5.12.3. Copies

The notary may issue **certified copies** upon request of the parties.

- Some systems distinguish an **official copy** (DE *Ausfertigung*), which **replaces the original** from (ordinary) certified copies, which merely prove the content of the original<sup>183</sup>. Only the parties themselves may demand or grant an official copy<sup>184</sup>. Thus only the possession of an official copy proves that an authenticated power of attorney is still valid (otherwise the principal would have demanded the return of the official copy), whereas there may be innumerable certified copies.
- In other systems (Romania), the parties sign not just one, but several original instruments<sup>185</sup>.

<sup>178</sup> FR Article 9 Ventôse Law on the Organisation of the Notariat of 1803; DE §§ 22-26 BeurkG; PL Article 87 Notarial Law; RO Article 61, 62 Notarial law.

<sup>179</sup> FR Article 14 Decree on Notarial Instruments No 71-941; DE § 44a (1) BeurkG; PL Article 94 Notarial Law; RO no specific statutory provision in Romania.

<sup>180</sup> DE § 44a(1) BeurkG; RO Article 53 Notarial Law.

<sup>181</sup> DE § 45(1) BeurkG; RO Article 64, 102 and 103 Notarial Law.

<sup>182</sup> DE § 44 BeurkG; RO Article 63 Regulation implementing the Notarial Law, adopted by Order of the Minister of Justice No 710/C/1995.

<sup>183</sup> DE § 47 BeurkG.

<sup>184</sup> DE § 51 BeurkG.

<sup>185</sup> RO there is not just one original instrument. There are several original authenticated instruments. According to Article 64 Notarial Law, "All original copies of the authenticated instrument requested by the parties, as well as the one that is kept in the archive of the notary office, together with the annexes that are integral part

- Most systems distinguish the **enforceable** (official) **copy**, which in France and Germany may be issued by the notary himself<sup>186</sup>.

## 5.13. State control

### 5.13.1. Denial of illegal acts

If an act is illegal, the notary must not authenticate it<sup>187</sup>. This shows clearly that authentication comprises a **preventive legal control**.

### 5.13.2. Measures against money laundering

In the scope of the measures against money laundering, even stricter requirements for **identity control** and enlarged documentation duties apply<sup>188</sup>.

Also, notaries are obliged to **notify** the authorities if they have suspicions that acts requested from them have the object of money laundering<sup>189</sup>.

### 5.13.3. Taxation

The scope of the notary's or other authenticating official's involvement in taxation procedures varies greatly in the various states:

- In some states, the notary is personally responsible for **withholding the tax** on acts authenticated by him (e.g. in France or in Romania<sup>190</sup> for transactions on immovable property). French notaries collect around **22 billion Euro** taxes for the State per year (land sale, inheritance, value added tax for immovable property, donation tax etc.). This amounts to 1,2% of the gross national product.
- In other systems, the notary is only required to **notify the tax authorities** (e.g. Germany)<sup>191</sup>.

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of such instrument shall be signed before the notary public by the parties or their representatives and by the ones called to approve the acts, as the case may be, which the parties draw up, by assistant witnesses, when their presence is necessary and by the one who drew up the instrument, if the case may be, under the terms of this law. Each party may request at least one original counterpart of the authentic instrument.”

See also Article 55 Notarial Law: “(1) On request of the party to be given a duplicate of the original instrument, the notary office that authenticated the instrument may consent to the issuance of the duplicate. The notary public shall summon the parties for such purpose or their successors, as the case may be. (2) The content of the document and of the conclusion whereby the drawing up of the original act was assessed shall be reproduced word by word on the text of the duplicate. Instead of the original signatures, the last and first name of each signatory shall be mentioned. (3) The duplicate shall have the same proving force as the original.”

<sup>186</sup> FR Article 31 Decree on Notarial Instruments No 71-941; DE § 797 ZPO; however not in Poland and not in Romania, see RO Article 55 Notarial Law.

<sup>187</sup> See par. 5.6.1. - DE § 14(2) BNotO, § 4 BeurkG; PL Article 81 Notarial Law; RO Article 51 Notarial Law.

<sup>188</sup> See par. 5.5.1.

<sup>189</sup> FR Decree No 2006-736 of 26 June 2006; DE § 11 GwG – Law against money laundering; PL Law of 16 November 2000 against money laundering; RO Article 8 ss. Law No 656/2002 on preventing and sanctioning money laundering.

<sup>190</sup> RO Article 77(1)-(6) Law No 573/2003, Romanian Fiscal Code.

<sup>191</sup> DE § 34 ErbStG for donations or a partition of inheritance, §§ 18, 20 GrEStG for the sale of land, § 54 EStDV for the founding or the transformation of a capital corporation or the transfer of shares.

Thus, notarial involvement also ensures that transactions concluded by an authentic instrument cannot be used for tax evasion.

#### 5.13.4. Other notification duties

There may also be duties to notify other authorities. E.g. in Germany, authentic instruments concerning the recognition of paternity etc. have to be notified to the competent court or authority<sup>192</sup>.

### 5.14. Registration and obtaining required permits

#### 5.14.1. Registration

In all four civil law systems studied, the notary has to **register** all instruments, which require registration in a public register (land register, companies register etc)<sup>193</sup>.

#### 5.14.2. Obtaining state permits

Otherwise, the notary's part in helping the parties in the execution of contracts varies in the various states:

- In France, the notary is considered a legal agent of the parties. Thus, upon their demand he will obtain whatever documents are necessary, including state permits. If the parties want to do it themselves, the notary still remains responsible for any mistakes, as he has a general duty of verification and control so that the act may produce all its effects.
- In **Germany** and **Romania**, by statute, the notary is only obliged to advise the parties about the permits, which are necessary for the validity of the contract, but he is not obliged to help them obtain these permits (and other permits necessary for the registration of the contract)<sup>194</sup>. However, the notary is allowed to undertake these tasks<sup>195</sup> and regularly undertakes it. According to case law, he is even obliged to tell the parties before the authentication, if he is not willing to help them with the permits<sup>196</sup>.

### 5.15. Comparative Results

For authentication by **civil law notaries**, we can find the **same main steps** in the authentication procedure in all four jurisdictions covered by this study – as well as in most other jurisdictions with Latin notaries.

- In the authentication procedure itself, one main difference may be seen that some systems (France, Poland, Romania) emphasize more the material and **textual securities** against falsifications (no insertions, no empty spaces, page numbering), while other systems (Germany) emphasize the importance of the **reading** (which in some of the other systems may be replaced by self-reading by the parties).

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<sup>192</sup> DE §§ 1597(2), 1626d BGB, §§ 29, 29b, 30 PersStG.

<sup>193</sup> FR Article 26 Decree on Notarial Instruments No 71-941; DE § 53 BeurkG; PL Article 92(4)-(5) Notarial Law; RO Article 45(3) Notarial Law; Article 54(1) Law No 7/1996 concerning Land Register and Real Estate Publicity.

<sup>194</sup> DE § 18 BeurkG; RO Article 45(2) Notarial Law and Article 54(1) Law No 7/1996 concerning Land Register and Real Estate Publicity.

<sup>195</sup> DE § 24 BNotO; RO Article 45(2) Notarial Law.

<sup>196</sup> DE BGH DNotZ 1956, 319, 322; BGH DNotZ 1969, 173, 176.



- The notarial functions in the four countries differ widely in the **preparation** before the authentication and in the stage after the authentic instrument has been issued. The differences in preparation are at least partially due to different legal environments.
- The **differing notarial duties after the authentication** are mainly due to different ways of state control, in particular concerning the involvement of the notary in the collection of **taxes** on the recorded transactions.

## 6. Authentication procedure for authentic instruments on facts and official acts

There is a broad variety of authentic instruments on facts and official acts which might play a role in civil law. Here, as examples, we will cover two of these instruments which are of particular high importance:

- birth, marriage and death certificates; and
- certificates of registration in public registers (e.g. land register or company register).

### 6.1. Certificates of birth, marriage or death

Birth, marriage or death certificates (FR actes d'état civil; DE Personenstandsurkunden; PL akt stanu cywilnego; RO certificatele de stare civilă: de naștere, de căsătorie sau de deces) or the excerpts from the registry of births, marriages or deaths (personal status registry; FR extraits d'actes de naissance; DE Auszüge aus dem Personenbuch; PL odpis aktu stanu cywilnego; RO extrase din registrele de stare civilă) are full and conclusive proof of the facts certified<sup>197</sup>.

The **authentication procedure** for these certificates resembles in some respects a notarial authentication. That procedure applies even to registrations of birth and death, but even more so to the authentication of marriage vows. As an example, we will look at the German law:

- A **duty to register** applies for births and deaths to certain people present at the act. Marriages normally can be concluded only by declaration to the registrar. If a state allows other officials (e.g. religious officials) to solemnize a marriage, then the state has also placed a duty to register on that church official.
- The registrar has to **check** the parties' statements in cases of doubt (legal control)<sup>198</sup>.
- If the registrar denies registration, the parties may **appeal to a court**<sup>199</sup>.

In particular the rights of appeal to a court resemble features found in regulated notarial authentication procedures.

Thus, the solemnization of a **marriage** resembles the authentication of a contract:

- The registrar has to **check**, whether there are any obstacles to the marriage<sup>200</sup>.
- At the solemnization, the registrar **asks** both spouses individually whether they want to contract the marriage<sup>201</sup>. However, there is no duty to counsel both spouses about the legal effects of the marriage.
- The registration of a marriage has to be **signed** by the contracting parties, any witnesses and the registrar<sup>202</sup>.

<sup>197</sup> FR Article 55 ss. (birth certificate); Article 63 ss. CC (marriage certificate), Article 78 ss. CC (death certificate); DE §§ 60, 66 PersStG; PL Article 4 ASC; RO Article 13 and 14 Law No 119/1996 (regarding civil status documents) and Article 22(2) Decree No 31/1954 (regarding natural and. legal persons).

<sup>198</sup> DE §§ 20, 36 PersStG; RO Article 6(1) Law No 119/1996 on civil status documents.

<sup>199</sup> DE § 45 (1) PersStG; RO Article 10 Law No 119/1996 on civil status documents.

<sup>200</sup> DE § 5 (2) PersStG; RO Article 28(2) Law No 119/1996 on civil status documents.

<sup>201</sup> DE § 1312(1) BGB; RO Article 31(1) Law No 119/1996 on civil status documents.

<sup>202</sup> DE § 11(2) PersStG; RO Article 31(2) Law No 119/1996 on civil status documents.

## 6.2. Certificates of registration in public registers

Certificates of registration in public registers are also authentic instruments. Usually, these certificates provide full proof not only for the registration, but also of the facts or the legal situation which has been registered – or at least a presumption of correctness arises from registration, e.g. for:

- the land register<sup>203</sup>; and
- the companies register<sup>204</sup>.

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<sup>203</sup> DE § 891 BGB: presumption of correctness of the content of the land register; PL Article 3 KWH; RO Article 41 Law No 7/1996 on the cadastre and on real estate publicity.

<sup>204</sup> DE § 15 HGB, § 32 GBO; PL Article 17 KRS; RO Article 4 Law No 26/1990.

## 7. Legal value

### 7.1. Overview (table)

Procedurally, the two main effects of an authentic instrument are:

- An authentic instrument establishes conclusive **proof** of its content (which can only be rebutted by a special procedure or – in most countries – by proving the contrary).
- An authentic instrument regarding a contract or other declaration by the parties is either enforceable by operation of law or if the debtor in the instrument expressly submitted himself to enforcement.

The classic version of these two legal effects is contained in the Ventôse Law on the Organisation of the Notariat of 1803:

<b>Article 19 Loi contenant organisation du notariat - loi 25 ventôse an XI</b>	<b>Article 19 Ventôse Law on the Organisation of the Notariat of 1803</b>
(1) Tous actes notariés feront foi en justice, et seront exécutoires dans toute l'étendue de la République.	(1) All notarial instruments provide evidence in justice and are enforceable everywhere in the Republic. <sup>205</sup>
(2) ...	(2) ...

A table may give an overview over the relevant provisions in national law:

<b>Probative value and executive force of authentic instruments on declarations (table)</b>						
	France	Germany	Poland	Romania	England	Sweden
probative value	conclusive proof (Art. 1319 CC)	conclusive proof (§§ 415, 417, 418 ZPO)	conclusive proof (Art. 244 CC)	conclusive proof (Art. 1171 CC)	generally not applicable., since authentic instruments do not exist; “notarial acts” have certain probative value as to genuineness, but not otherwise/no comprehensive proof	not applicable, since parties cannot create an act with higher probative value
executive force	executive force per se (Art. 3 Law No 91-650)	if subjection to enforcement has been declared (§ 794 (1) No 5 ZPO)	if subjection to enforcement has been declared (Art. 777 Code of Civil Procedure)	executive force per se (Art. 66 Notarial Law)	Not applicable; no enforceable title can be created by declarations of the parties	Not applicable; no enforceable title can be created by declarations of the parties (except maintenance agreements)

<sup>205</sup> Own translation.

## 7.2. Probative value

### 7.2.1. France

Article 1319 Code civil	Article 1319 French Civil Code
(1) L'acte authentique fait pleine foi de la convention qu'il renferme entre les parties contractantes et leurs héritiers ou ayants cause.	(1) An authentic instrument is conclusive evidence of the agreement it contains between the contracting parties and their heirs or assigns.
(2) Néanmoins, en cas de plaintes en faux principal, l'exécution de l'acte argué de faux sera suspendue par la mise en accusation ; et, en cas d'inscription de faux faite incidemment, les tribunaux pourront, suivant les circonstances, suspendre provisoirement l'exécution de l'acte.	(2) Nevertheless in case of a criminal complaint for forgery, the execution of the instrument allegedly forged is suspended by the indictment; and in case of allegation of forgery made incidentally, the courts may, according to the circumstances, suspend temporarily the execution of the instrument. <sup>206</sup>

### 7.2.2. Germany

§ 415 ZPO Beweiskraft öffentlicher Urkunden über Erklärungen	§ 415 ZPO (German Code on Civil Procedure) Probative value of authentic instruments on declarations
(1) Urkunden, die von einer öffentlichen Behörde innerhalb der Grenzen ihrer Amtsbefugnisse oder von einer mit öffentlichem Glauben versehenen Person innerhalb des ihr zugewiesenen Geschäftskreises in der vorgeschriebenen Form aufgenommen sind (öffentliche Urkunden), begründen, wenn sie über eine vor der Behörde oder der Urkundsperson abgegebene Erklärung errichtet sind, vollen Beweis des durch die Behörde oder die Urkundsperson beurkundeten Vorganges.	(1) Instruments which have been issued by a public authority within the limits of its competences or have been authenticated by a person empowered with public faith within his functions in the form required (authenticate instruments), enjoy, insofar as they concern a declaration stated to the authority or the authenticating person full proof of the act recorded by the authority or the authenticating person. <sup>207</sup>
(2) ...	(2) ...

### 7.2.3. Poland

Art. 244 Kodeks postępowania cywilnego (kpc)	Article 244 Polish Civil Procedure Code (kpc)
§ 1. Dokumenty urzędowe, sporządzone w przepisanej formie przez powołane do tego organy władzy publicznej i inne organy państwowe w zakresie ich działania, stanowią dowód tego, co	(1) Authentic instruments recorded in the prescribed form by public authorities instituted for this purpose or by other state authorities within the limits of their functions constitute proof of

<sup>206</sup> Translation quoted from Legifrance - internet: <http://195.83.177.9/code/liste.phtml?lang=uk&c=22>  
See also: GROUD, La loi applicable à la force probante des actes authentiques, *Gaz. Pal.* 25 février 2006, n° 56, p. 2.

<sup>207</sup> Own translation.

<sup>208</sup> Translation by the Polish national reporter Tomasz Kot.

zostało w nich urzędowo zaświadczone. <sup>208</sup>	what they officially attest. <sup>209</sup>
§ 2. ...	(2) ...

#### 7.2.4. Romania

Art. 1173 Code civil	Article 1173 Romanian Civil Code
(1) Actul autentic are deplină credință în privirea oricărei persoane despre dispozițiile și convențiile ce constată.	(1) Authentic instruments provide full proof towards everybody about the provisions and conventions that they contain. <sup>210</sup>
(2) ...	(2) ...

#### 7.2.5. Comparative result

##### 7.2.5.1. Conclusive evidence

Thus, all four civil law systems have basically the same rule that authentic instruments provide **full and conclusive proof** of the legal act and the facts recorded in the instrument. This is a **strict rule of evidence**; the judge must not weigh the evidence provided by the authentic instrument nor consider it insufficient, but is bound by the rule of evidence.

What is covered by the conclusive proof?

- First, the rule applies to the **facts personally perceived** and stated by the authenticating official, e.g. the date and place of the act or the fact, that one party has provided the original of a power of attorney.
- The authentic instrument also proves, that the **declarations** of the parties recorded in the instrument have been made by these parties. However, declarations by the parties about facts do not prove that the facts are true, but merely that the parties made the declarations<sup>211</sup>.

##### 7.2.5.2. Additional rules

This general rule might be strengthened by additional rules:

- Additional special rules might also provide that authentic instruments are also proof of specific other **facts** even if they have **not been personally perceived** by the authenticating official, e.g. the birth or death certificate for births or deaths (even though the registrar normally was not present at the birth or death).
- Also, in some systems an additional presumption of **completeness and correctness** (FR *système de la preuve écrite préconstituée*; DE *Vermutung der Vollständigkeit und Richtigkeit*; RO *prezumția caracterului complet și veridic*) applies for all documentary evidence regarding declarations of the parties, in particular also for authentic

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See also: ERECIŃSKI, *Kodeks postępowania cywilnego*, Komentarz, Wasrsaw 2007; GUDOWSKI, *Kodeks postępowania cywilnego*, Komentarz, Warsaw 2007.

<sup>209</sup> Own translation.

<sup>210</sup> Own translation.

See also: IONAȘCU, *Probele în procesul civil*, Ed. Științifică, Bucharest, 1969; FODOR, *Probele în procesul civil*, Ed. Universul Juridic, Bucharest, 2006.

<sup>211</sup> DE OLG Hamburg MDR 2999, 375 = OLG-Report 1998, 439.

instruments<sup>212</sup>. It is presumed, that the instrument contains the complete legal act. If someone wants to prove a side-agreement besides the one documented in the instrument, then the burden of proof is on him<sup>213</sup>.

### 7.2.5.3. Presumption of genuineness

The rule of conclusive evidence applies only to genuine authentic instruments. However, domestic authentic instruments generally have a **presumption of genuineness**<sup>214</sup>. That means that whoever doubts the genuineness of an authentic instrument, has the burden of proving that it is not genuine (or that it has been falsified).

For **private documents** it is just the other way round. If the genuineness of a private document is contested, the burden of proof lays with the party who relies on the document<sup>215</sup>. It is within the discretion of the judge to decide whether the private document is genuine or not.

### 7.2.5.4. No external faults

The rule of conclusive evidence might apply only, if the authentic instrument is free of external faults<sup>216</sup>.

- As examples of external faults German law mentions **cancellations, erasures, insertions** or other external faults. In particular – but not necessarily – these are faults, which give rise to the suspicion that the document has been manipulated after issue. It needs not be proved that the document has been changed after issue; the mere possibility of a later change suffices.
- Alterations that are **allowed by the law of authentication** are not external faults<sup>217</sup>.
- If the instrument is tainted by external faults, it no longer provides conclusive evidence, but the general rule of **free evaluation of the evidence** by the court applies instead<sup>218</sup>.

## 7.3. Enforceability

<sup>212</sup> FR Article 1341 CC; DE BGH MDR 1999, 759 = NJW 1999, 1702 = WM 1999, 965 = ZfIR 1999, 516; BGH DNotI-Report 2002, 149 = NJW 2002, 3164 = ZIP 2002, 1809 = ZNotP 2002, 409; PL Article 244 Code of Civil Procedure; RO Article 1174 CC (“*are tot efectul între părți*”).

<sup>213</sup> DE BGHZ 20, 109, 111 = BB 1956, 286 = NJW 1956, 665; BGH NJW 1999, 1702 = WM 1999, 965 = ZfIR 1999, 516

<sup>214</sup> FR Article 1319, 1320 CC; DE § 437 ZPO; PL Article 244 Code of Civil Procedure; RO *Prezumția de autenticitate*, Article 1173 CC (“*are deplină credință în privința oricărei persoane*”).

<sup>215</sup> FR Article 1319 CC, Article 305 Civil Procedure Code; DE § 440 (1) ZPO; PL Article 6 CC; RO Article 1178 CC: If the genuineness of a private document is contested, then the court will order the verification of the document (“*procedura verificării de scripte*” – procedure to verify the document).

<sup>216</sup> FR Article 41 Decree on Notarial Instruments No 71-941; DE § 419 ZPO; PL Article 244 Code of Civil Procedure; RO no explicit statutory rule in Romania.

<sup>217</sup> DE BGH BB 1956, 542 = DNotZ 1956, 643, 644 = Rpfleger 1957, 110; BGH DNotZ 1995, 28 = NJW 1994, 2768.; OLG Koblenz DNotZ 1977, 48; BAUMBACH/LAUTERBACH/ALBERS/HARTMANN, § 419 ZPO note 4; MUSIELAK/SCHREIBER, § 419 ZPO note 3; STAUDINGER/HERTEL, Before §§ 127a/128 BGB note 706; ZÖLLER/GEIMER, § 419 ZPO note 1 ; RO Article 53 Notarial Law (“*erori materiale*”).

<sup>218</sup> FR Article 26 Decree on Notarial Instruments No 71-941; DE BGH DB 1965, 1665; BGH MDR 1966, 835; BGH MDR 1987, 915 = NJW 1988, 60, 62; BGH NJW 1992, 512 = WM 1991, 2008; BGH NJW 1994, 2768; BAGE 110, 252 = BB 2004, 1967 = DB 2004, 2220 = NZA 2004, 673; RGZ 29, 430; RGZ 95, 72; RGZ 108, 397; BAUMBACH/LAUTERBACH/ALBERS/HARTMANN, § 419 ZPO note 4; MUSIELAK/SCHREIBER, § 419 ZPO note 1; ZÖLLER/GEIMER, § 419 ZPO note 1.

This section deals with two questions:

- Are authentic instruments (or at least some types of authentic instruments) enforceable as such – or are the authentic instruments enforceable only if the debtor expressly submits to its enforceability?
- In what respects, if any, is the enforceability of authentic instruments different from that of judgments?

### 7.3.1. France

In France, the execution of authentic instruments is regulated by Article 3 of the Law No 91-650 of 9 July 1991 reforming the procedure for civil execution (for notarial instruments also in Article 19 (1) of the Ventôse Law on the Organization of the Notariat of 1803). Execution of authentic instruments is dealt with in the same article, and in the same way, as the execution of court decisions. There is no restriction as to which obligations may be the subject of a notarial instrument.

<b>Art. 3 Loi n° 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution</b>	<b>Article 3 Law No 91-650 of 9 July 1991 containing reform of the procedure of civil execution</b>
<p>Seuls constituent des titres exécutoires :</p> <p>1° les décisions des juridictions de l'ordre judiciaire ou de l'ordre administratif lorsqu'elles ont force exécutoire ;</p> <p>2° les actes et les jugements étrangers ainsi que les sentences arbitrales déclarés exécutoires par une décision non susceptible d'un recours suspensif d'exécution ;</p> <p>3° les extraits de procès-verbaux de conciliation signés par le juge et les parties ;</p> <p>4° les actes notariés revêtus de la formule exécutoire ;</p> <p>5° le titre délivré par l'huissier de justice en cas de non-paiement d'un chèque ;</p> <p>6° les titres délivrés par les personnes morales de droit public qualifiés comme tels par la loi, ou les décisions auxquelles la loi attache les effets d'un jugement.</p>	<p>Execution titles are only:</p> <p>1. judicial decisions of the ordinary or of the administrative tribunals if they are enforceable;</p> <p>2. foreign instruments and judgments as well as decisions in arbitrations declared enforceable by a decision against which there is no legal remedy suspending enforcement;</p> <p>3. ...</p> <p>4. notarial instruments given the clause of enforceability;<sup>219</sup></p> <p>5. ...</p> <p>6. ...</p>

### 7.3.2. Germany

In Germany, the execution of authentic instruments is regulated by § 794 (1) No 5 ZPO. A submission to enforcement is required.

For a few types of obligations, parties cannot submit to immediate enforcement, either:

- if the **party cannot dispose** of her rights in a settlement; or

<sup>219</sup> Own translation.



- where there is an obligation to **vacate an apartment used for living** where the lease has not expired at the time of declaring the submission.

The latter exception aims to protect a tenant who might not fully consider the consequences of making the submission for a future obligation on such a basic necessity as an apartment for living.

§ 794 ZPO Weitere Vollstreckungstitel	§ 794 ZPO Other enforceable titles
(1) Die Zwangsvollstreckung findet ferner statt: 1. aus Vergleichen, ... 5. aus Urkunden, die von einem deutschen Gericht oder von einem deutschen Notar innerhalb der Grenzen seiner Amtsbefugnisse in der vorgeschriebenen Form aufgenommen sind, sofern die Urkunde über einen Anspruch errichtet ist, der einer vergleichswisen Regelung zugänglich, nicht auf Abgabe einer Willenserklärung gerichtet ist und nicht den Bestand eines Mietverhältnisses über Wohnraum betrifft, und der Schuldner sich in der Urkunde wegen des zu bezeichnenden Anspruchs der sofortigen Zwangsvollstreckung unterworfen hat.	(1) Also enforceable are: 1. court settlements, ... 5. instruments, authenticated by a German court or a German notary within their official competences in the prescribed form, provided that the instrument contains a claim which may be the object of a regulation by way of settlement, and that it has not a declaration of intention for its objective and does not concern the existence of a lease for living purposes, and provided that the debtor has submitted himself to immediate enforcement for the specified claim in the instrument. <sup>220</sup>
(2) ...	(2) ...

### 7.3.3. Poland

In Poland, enforceability of authentic instruments is regulated by Article 777 of the Code of Civil Procedure. Enforceability of instruments containing declarations of the parties requires a **submission to enforceability** (as in Germany). The effects of an enforceable instrument are the same as those of an enforceable judgment.

Only certain claims are enforceable by authentic instrument:

- **Money claims** are by far the most important subject and enforceable authentic instruments.
- But also obligations to **transfer possession** of an object are commonly enforceable by authentic instruments (e.g. in leasing contracts).
- Finally, it is also to make a **mortgage** enforceable using an authentic instrument.

Article 777 Kodeks postępowania cywilnego (kpc)	Article 777 Code of civil procedure
§ 1. Tytułami egzekucyjnymi są: 1) orzeczenie sądu prawomocne lub podlegające natychmiastowemu wykonaniu, jak również ugoda zawarta przed sądem;	§ 1 Enforceable titles are: 1) court judgments which are not appealable or which are capable of immediate enforcement, as well as settlement concluded before a court;

<sup>220</sup> Own translation.

<p>...</p> <p>4) akt notarialny, w którym dłużnik poddał się egzekucji i który obejmuje obowiązek zapłaty sumy pieniężnej lub uiszczenia rzeczy oznaczonych co do gatunku, ilościowo w akcie oznaczonych, albo też obowiązek wydania rzeczy indywidualnie oznaczonej, lokalu, nieruchomości lub statku wpisanego do rejestru gdy termin zapłaty, uiszczenia lub wydania jest w akcie wskazany;</p> <p>5) akt notarialny, w którym dłużnik poddał się egzekucji i który obejmuje obowiązek zapłaty sumy pieniężnej do wysokości w akcie wprost określonej albo oznaczonej za pomocą klauzuli waloryzacyjnej, gdy akt określa warunki, które upoważniają wierzyciela do prowadzenia przeciwko dłużnikowi egzekucji na podstawie tego aktu o całość lub część roszczenia, jak również termin, do którego wierzyciel może wystąpić o nadanie temu aktowi klauzuli wykonalności;</p> <p>6) akt notarialny, w którym właściciel nieruchomości albo wierzyciel wierzytelności obciążonych hipoteką, niebędący dłużnikiem osobistym, poddał się egzekucji z obciążonej nieruchomości albo wierzytelności, w celu zaspokojenia wierzyciela hipotecznego, jeżeli wysokość wierzytelności podlegającej zaspokojeniu jest w akcie określona wprost albo oznaczona za pomocą klauzuli waloryzacyjnej, i gdy akt określa warunki, które upoważniają wierzyciela do prowadzenia egzekucji o część lub całość roszczenia, jak również wskazany jest termin, do którego wierzyciel może wystąpić o nadanie temu aktowi klauzuli wykonalności.<sup>221</sup></p>	<p>...</p> <p>4) notarial acts in which the debtor has submitted himself to enforcement and which concern the payment of a sum of money or the delivery of objects defined in the act by type or by quantity or the obligation to hand over individually specified objects, rooms, land or a registered ship, provided that the time of payment, of delivery or of handing over has been indicated in the act;</p> <p>5) notarial acts in which the debtor has submitted himself to enforcement and which concern the payment of a sum of money the maximum amount of which is indicated plainly and simply or which can be calculated by using an evaluation formula, provided that the act determines the conditions which authorises the creditor to execute against the debtor, based on the act, the total or a part of the claim, as well as the time in which the creditor can demand the issue of the writ of enforceability;</p> <p>6) notarial acts in which the owner of an immovable property or the creditor of a claim which has been burdened with a mortgage who is not the personal debtor submits to enforcement in the burdened immovable or claim for the satisfaction of the mortgage creditor, provided that the amount of the claim is indicated plainly and simply or can be calculated using an evaluation formula and that the act states the conditions under which the creditor is entitled to enforce the total or a part of the claim against the debtor, as well as the time in which the creditor can demand the issue of the writ of enforceability.<sup>222</sup></p>
§ 2 ...	§ 2 ...

#### 7.3.4. Romania

In Romania, Article 66 of the Notaries Public and Notarial Activity Act, No 36/1995, deals with the enforceability of notarial acts as follows:

- Authentic instruments are **enforceable as such**.
- All types of obligations may be enforced by an authentic instrument.
- There is no difference, for these purposes, between authentic instruments drawn up by a notary and a judgment.

<b>Art. 66 Legea nr. 36/1995</b>	<b>Article 66</b>
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<sup>221</sup> O. J. 1964 No 43, pos. 296, internet : <http://www.lex.com.pl/bap/notariusz/Dz.U.1964.43.296.html>.

<sup>222</sup> Own translation.

<b>a notarilor publici si a activitatii notariale</b>	<b>Romanian Notarial Law</b>
Actul autentificat de notarul public care constată o creanță certă și lichidă are putere de titlu executoriu la data exigibilității acesteia. În lipsa actului original, titlul executoriu îl poate constitui duplicatul sau copia legalizată de pe exemplarul din arhiva notarului public. <sup>223</sup>	An act authenticated by a notary public that gives rise to a specified and payable debt constitutes an enforceable title on the date of its enforceability. In the absence of the original instrument, a writ of execution may be attached to a duplicate or to a certified copy of a copy from the archives of the notary public. <sup>224</sup>

### 7.3.5. Comparative analysis

In two of the four civil law countries, covered by this study, authentic instruments are enforceable only if the debtor has **submitted to enforceability** (DE; PL); in the other two civil law countries the authentic instrument is enforceable without the necessity of submission (FR; RO).

The **substantive scope** of enforceable instruments may be somewhat smaller than that of enforceable court decisions (e.g. in Poland only money claims and transfer of possession are enforceable in this way); but in other countries there are no (FR, RO) or almost no limitations (DE) on such enforceability. In all countries, money claims may be enforced by authentic instruments; other claims play in practice only a limited role.

Often, the notary himself is competent to issue the enforceable copy (**writ of execution**) of his or her own notarial instruments; court intervention is not required<sup>225</sup>.

Authentic instruments that create enforceable title are subject to the **same rules as those applicable to an enforceable court decision**. The provisions on enforceable instruments are either in the same article as those on enforceable court decisions (FR; PL), or refer to those provisions (DE; RO). Thus the authentic instrument does not create a “second class” enforceable title, but one that is equal in value to a court decision (though created from a different source).

<sup>223</sup> Internet: <http://www.uniuneanotarilor.ro/?p=6&id=84&lang=en&p=6&legi=1>

<sup>224</sup> Own translation.

<sup>225</sup> FR Article 32 Decree on Notarial Instruments No 71-941; DE § 797 ZPO; RO Article 66 Notarial Law; however not in Poland.

## 8. Contesting an authentic instrument

In all countries, it is possible to challenge an authentic instrument:

- In two of the four civil law systems, covered by this study,, no special procedure is required. Instead an authentic instrument can be contested in the **same proceeding** in which the authentic instrument is being used as a proof (**Germany and Poland**).
- In **France and Romania**, however, if one of the parties wants to contest an authentic instrument, which is being used in the procedure, the party has to use a **specific procedure** for contesting the instrument (generally before the same court, though by a separate procedure).

### 8.1. No special procedure required (DE, PL)

In **Germany and Poland**, there are two ways of contesting an authentic instrument:

- either one may contest the proof provided by the authentic instrument in the **same procedure** in which the authentic instrument has been introduced as a proof; or
- one may initiate an action for a **declaratory judgment** in order to have a specific instrument declared invalid or falsified.

#### 8.1.1. Contesting within the same proceeding

As a general rule, the conclusive evidence on an issue provided by an authentic instrument may be contested by **proving the contrary** (FR *preuve contraire*; DE *Gegenbeweis*; RO *proba contrară*)<sup>226</sup>:

- It is possible to introduce evidence that proves the contrary of the authentic instrument both as regards the content of any **declarations** it contains<sup>227</sup> and as regards other **facts** it states (subject, in Germany, in the latter case, to State law not making evidence to the contrary inadmissible<sup>228</sup>).
- Proof to the contrary is **not admitted for** authentic instruments containing **official acts** (or a declaration by the issuing authority) itself<sup>229</sup>. Here, only a proof of falsification is possible – or a judicial appeal against the act contained in the instrument.

Proof to the contrary requires sufficient evidence to discharge the **full burden of proof**; it is not enough just to put the evidentiary value of the authentic instrument in doubt.

#### 8.1.2. Action for declaratory judgement

In both states, it is also possible to initiate an action for a declaratory judgment (DE *Feststellungsklage*; PL *powództwo o uznanie*)<sup>230</sup>. In this specific type of action the court may rule on the instrument in question has been falsified.

- The court's jurisdiction and **procedure** follow its **general rules**.

<sup>226</sup> DE §§ 415(2), 418(2) ZPO.

<sup>227</sup> DE § 415(2) ZPO.

<sup>228</sup> DE § 418(2) ZPO.

<sup>229</sup> DE § 417 ZPO.

<sup>230</sup> DE § 256 ZPO; PL Article 189 Code of Civil Procedure.

- The plaintiff must have a **legal interest** in the outcome of the requested judicial declaration on the genuineness of the instrument<sup>231</sup>.
- The judgment is *res judicata* **only between the parties**<sup>232</sup>.

## 8.2. Specific procedure required (FR, RO)

In **France** and **Romania**, the proof provided by an authentic instrument cannot be challenged by introducing evidence to the contrary (*preuve contraire*) within the same procedure. Instead the challenger must have recourse to a separate judicial procedure called inscription of falsification (FR *inscription de faux*; RO *înscriere în fals*)<sup>233</sup>. This reinforces the status of the authentic instrument.

Article 1319 Code de procédure civile	Article 1319 French Code of Civil Procedure
(1) ...	(1) ...
(2) Néanmoins, en cas de plaintes en faux principal, l'exécution de l'acte argué de faux sera suspendue par la mise en accusation ; et, en cas d'inscription de faux faite incidemment, les tribunaux pourront, suivant les circonstances, suspendre provisoirement l'exécution de l'acte.	(2) Nevertheless in case of a criminal complaint for forgery, the execution of the instrument allegedly forged is suspended by the indictment; and in case of allegation of forgery made incidentally, the courts may, according to the circumstances, suspend temporarily the execution of the instrument. <sup>234</sup>

In France, the inscription of falsification procedure (FR *inscription de faux*) is regulated by **Articles 303 to 316** of the French Code of civil procedure. It is a lengthy, costly and risky procedure for the plaintiff:

- The procedure starts with a communication to the **public prosecutor** (*ministère public*).
- The procedure is dealt by the **same court** before which the main matter is pending (or, if there is not yet any pending proceeding concerning the matter, by a higher court, *tribunal de grande instance*)<sup>235</sup>.
- If the plaintiff cannot prove falsification, he must pay not only **damages** plus interest, or the other party's costs in these proceedings, but must also pay a **penalty**.
- If, however, falsification is proved, then it will be severely punished by a penalty of **up to 10 years of prison** or a fine up to 150.000 €<sup>236</sup>. If the falsification has been committed by a public official empowered with public trust (e.g. by a civil law notary), then it is a felony (*crime*), punishable by **up to 15 years of prison** or a fine up to 225.000 €<sup>237</sup>.

The Romanian procedure (RO *înscriere în fals*) is largely similar<sup>238</sup>.

<sup>231</sup> DE § 256(1) ZPO; PL Article 189 Code of Civil Procedure.

<sup>232</sup> For Germany: RGZ 148, 29; ZÖLLER/GREGER, § 256 ZPO note 6.

<sup>233</sup> Article 1319(2) French Code of civil procedure.

<sup>234</sup> Translation quoted from Legifrance - internet: <http://195.83.177.9/code/liste.phtml?lang=uk&c=22>

<sup>235</sup> Articles 314-316 French Code of civil procedure.

<sup>236</sup> FR Article 441-4 (1) French Penal Code; see also RO Article 289 Penal Code.

<sup>237</sup> Article 441-4(3) French Penal Code.

<sup>238</sup> RO Article 180-184 Civil Procedure Code.

### **8.3. No special provisions for authentic instruments (EN, SE)**

As England and Sweden do not recognise authentic instruments, they have no specific rules about the heightened probative value of such instruments.

## 9. Publicity of authentic instruments

The term “public” (FR *publique*, DE *öffentlich*; RO *public*) as in the German term “*öffentliche Urkunde*”, in the Italian “*atto pubblico*” or in the Romanian “*act public*” (“public instrument”, or authentic instrument) does not mean that authentic instruments generally are in the public domain. These instruments are “public” in the sense that they have been **established by a public authority** – and also that they provide **proof against everybody**.

Often these instruments are also meant to be registered in some **public register** (which might to be a requirement to make them opposable to third parties). Registered authentic instruments are therefore accessible to those with a legal interest in the matters they cover – sometimes even the general public.

### 9.1. Company Law

In all Member States, documents filed with the companies register (FR *registre du commerce et des sociétés*, DE *Handelsregister*, RO *Registrul comerțului*) are accessible to the general public<sup>239</sup>. Thus, **all documents** registered with the companies register are **publicly accessible**, whether or not they are authentic instruments.

- So publicity is not a function of authentic instruments, but a result of their filing with the companies register.
- However, the **probative value** of registered acts (and thereby the functioning of the companies register) is greatly enhanced, if the documents filed are authentic instruments.

### 9.2. Land law

Access to the land register is regulated quite differently.

- In some states, entries in the land register are publicly accessible (England, France, Poland, Romania<sup>240</sup>, Sweden).
- The German land register (*Grundbuch*) is accessible only if one has a **legitimate interest** (DE *berechtigtes Interesse*)<sup>241</sup> in the plot of land concerned – and if one demonstrates this legitimate interest to the land register. Therefore, access to the land register is quite **limited**.

Under **German** law, a legitimate interest exists e.g. in the following cases:

- if someone has a *ius in rem* in the real property<sup>242</sup>;
- if someone is already negotiating with the owner about the purchase of the property, but not, if someone just wants to find out who owns the property in order to make him an offer to purchase or rent<sup>243</sup>;

<sup>239</sup> FR Article R. 123-150 Commercial Code; DE § 9(1) HGB; PL Article KRS; RO Article 4 Law No 26/1990 on the trade register (republished in Official Journal of Romania No 49 of 4 February 1998), as subsequently amended and supplemented.

<sup>240</sup> RO Article 41 Law No 7/1996 concerning Land Register and Real Estate Publicity.

<sup>241</sup> DE § 12 GBO.

<sup>242</sup> Demharter, § 12 GBO note 8.

- if someone has an enforceable title against a debtor and is inquiring about the existence of real property to be seized in an execution procedure<sup>244</sup>; or
- if a bank wants to check whether an applicant for a loan owns real property<sup>245</sup>.
- The German Constitutional Court (BVerfG - *Bundesverfassungsgericht*) has even decided that in some specific cases a legitimate public interest expressed by the press might constitute a legitimate interest for the purposes of § 12 GBO<sup>246</sup>.

### 9.3. Family law

Matrimonial contracts are **not publicly accessible**, nor are other contracts concerning family law matters. There might be a limited publication not of the matrimonial contract in itself, but of the change of the marital property regime or of other results affected by the contract. This shall be illustrated by the example of the German law:

- Contractual changes to the statutory matrimonial property regime and some similar contracts (e.g. the contractual exclusion of a spouses right to incur contractual obligations for the daily necessities also obliging the other spouse<sup>247</sup>) may be registered in the **register on the marital property regimes** (*Güterrechtsregister*<sup>248</sup>).
- This register is publicly accessible<sup>249</sup>. However, this does not grant the public **access** to the underlying matrimonial contract, just to the **registration**. The registration details available only include a general description of the differences between the parties' arrangement and the arrangements prescribed under the statutory regime, but no more detail than that<sup>250</sup>.
- In any event, the register on the marital property regimes is **not very relevant in practice**. Most matrimonial contracts are not registered, because registration is not required for the validity, but only in order to make the contract binding on third parties – which is not necessary for most matrimonial contracts to be effective in accordance with their terms.

### 9.4. Succession

Authentic instruments containing dispositions *mortis causa* are not accessible to anybody before the testator's death.

These dispositions are **not publicly accessible after the testator's death either**, but are disclosed only to the heirs and legatees and to those who would have been statutory heirs in the absence of the disposition *mortis causa* (FR *Fichier central des dispositions de dernières volontés* - FCDDV; RO National Records Register of Authentic Wills - NRRAW).

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<sup>243</sup> BayObLG Rpfleger 1984, 351; OLG Hamm Rpfleger 1986, 128.

<sup>244</sup> OL G Zweibrücken NJW 1989, 531.

<sup>245</sup> KGJ 20, 173; BayObLG Rpfleger 1975, 361.

<sup>246</sup> BVerfG Rpfleger 2001, 15 = FGPrax 2001, 53 with note by DEMHARTER; compare also OLG Hamm Rpfleger 1988, 473; OLG Düsseldorf Rpfleger 1992, 18.

<sup>247</sup> DE § 1357 BGB.

<sup>248</sup> DE §§ 1558-1563 BGB.

<sup>249</sup> DE § 1563 BGB.

<sup>250</sup> DE § 1562(2) BGB.



At the European level, ENRW (European Network of Registers of Wills or RERT – *du Réseau Européen des Registres Testamentaires*) allows a search in all the testamentary registers which have joined so far. ENRWA (European Network of Registers of Wills Association) is a non-profit international association established under Belgian law aiming at extending the frame of ENRW (European Network of Registers of Wills) to all States having, or wishing to have a register of wills. Presently, ENRWA numbers 10 members the French, Belgian and Slovenian bodies of notaries (founding members) as well as the Italian, Dutch, Portuguese, Latvian, Bulgarian, Romanian bodies of notaries and the body of notaries of the region of Saint Petersburg.

## 10. Electronic authentic instruments (documents)

In this section, we analyse;

- whether **electronic authentic instruments** (documents) or **electronic filings** in public registers (e.g. the companies and land registers) are recognised and regulated by national law; and
- whether such documents and filings have the same **legal effects** as a ‘paper’ authentic instruments.

### 10.1. Relevant statutory provisions

#### 10.1.1. France

In France, a provision on electronic authentic instruments (Article 1371 (2) CC) has been inserted in the Civil Code by Act No 2000-230 of 13 March 2000. It gives electronic authentic instruments the **same status** as ‘paper’ authentic instruments<sup>251</sup>.

The rules on how to issue electronic authentic instruments are contained in **Articles 16 – 20** of the **Decree on Notarial Instruments** No. 71-941 of 26 November 1971, as modified by Decree No 2005-973 of 10 August 2005.

- The electronic act has to be signed by the **notary** with a **qualified electronic signature**<sup>252</sup>.
- The **parties** (and witnesses) have to **sign by hand** in such a way that their signature under the notarial act can be seen on screen. Thus the authentication procedure requires the parties to be present; otherwise the notary could not verify their identity and could not counsel them appropriately.

Article 1371 Code civil	Article 1371 French Code civil
(1) L'acte authentique est celui qui a été reçu par officiers publics ayant le droit d'instrumenter dans le lieu où l'acte a été rédigé, et avec les solennités requises.	(1) An authentic instrument is one which has been received by public officers empowered to draw up such instruments at the place where the instrument was written and with the requisite formalities.
(2) Il peut être dressé sur support électronique s'il est établi et conservé dans des conditions fixées par décret en Conseil d'Etat.	(2) It may be drawn up on an electronic medium if it is established and stored under the conditions fixed by a decree of the State Council. <sup>253</sup>

#### 10.1.2. Germany

<sup>251</sup> See DE LAMBERTERIE, *Les actes authentiques électroniques, Réflexion juridique prospective*, La documentation française, 2002, 279 p., Coll. Perspectives sur la justice - Mission de recherche “Droit et Justice”; GRIMALDI/REYNIS, L’acte authentique électronique, *Deffrénois*, No 17, 15 sept. 2003, art. 37798, p. 1023-1042; REYNIS, Signature électronique et acte authentique : le devoir d’inventer, *JCP éd. Not et Imm.* 2001, p. 1494.

<sup>252</sup> Conforming to Decree No 2001-272 of 30 March 2001 and Article 1316-4 of the Civil Code.

<sup>253</sup> Translation quoted from Legifrance: <http://195.83.177.9/code/liste.phtml?lang=uk&c=22>

German procedural law grants electronic authentic documents (*öffentliche elektronische Dokumente*) which have been issued by a public authority within the limits of its competence in the prescribed form the **same probative value** as “paper” authentic instruments<sup>254</sup>. The genuineness of the electronic authentic document is presumed, if a qualified electronic signature has been affixed to the document<sup>255</sup>.

However, until now, there has been **no German law procedural rule** on how to authenticate electronic authentic instruments authenticating **declarations** by the parties.

- Therefore, electronic authentic instruments containing **declarations** by third parties (§ 415 ZPO) are not possible.
- But electronic authentic instruments containing declarations of an **issuing authority** (§ 417 ZPO) are permitted.
- As are authentic instruments concerning other **facts** – provided that the procedural law on the specific authentication provides so, (§ 418 ZPO). E.g. the notaries may certify a signature or a copy by way of simple electronic certificates (*einfache elektronische Zeugnisse*)<sup>256</sup>.

<b>§ 371a ZPO Beweiskraft elektronischer Dokumente</b>	<b>Section 371a ZPO Probative value of electronic documents</b>
(1) ...	(1) ...
(2) Auf elektronische Dokumente, die von einer öffentlichen Behörde innerhalb der Grenzen ihrer Amtsbefugnisse oder von einer mit öffentlichem Glauben versehenen Person innerhalb des ihr zugewiesenen Geschäftskreises in der vorgeschriebenen Form erstellt worden sind (öffentliche elektronische Dokumente), finden die Vorschriften über die Beweiskraft öffentlicher Urkunden entsprechende Anwendung. Ist das Dokument mit einer qualifizierten elektronischen Signatur versehen, gilt § 437 entsprechend.	(2) For electronic documents which have been issued by a public authority within the limits of its competence or by an official empowered with public trust within his designated competence in the prescribed form (electronic authentic documents), provisions on the probative force of authentic instruments apply. If a qualified electronic signature has been affixed to the document, Section 437 applies analogously. <sup>257</sup>

### 10.1.3. Poland

Polish law has **no rules** on electronic authentic instruments.

### 10.1.4. Romania

In Romania, electronic notarial acts have been introduced by Law No 589 of 15 December 2004 on the legal status of the electronic notarial activity.

<b>Legea Nr. 589/2004 privind regimul juridic al activității electronice notariale Articolul 2</b>	<b>Law No 589/2004 on the legal status of the electronic notarial activity Article 2</b>
(1) Actele notariale în formă electronică	(1) Electronic notarial acts drawn up by the notary

<sup>254</sup> DE § 371a (2) sentence 1 ZPO.

<sup>255</sup> DE § 371a (2) sentence 2 ZPO.

<sup>256</sup> DE § 39a BeurkG.

<sup>257</sup> Own translation.

<p>instrumentate de notarul public trebuie sa indeplinească, sub sancțiunea nulității absolute, urmatoarele conditii:</p> <p>a) să fie efectuate in formă electronică;</p> <p>b) să fie semnate cu semnatura electronică extinsă a notarului public, bazata pe un certificat calificat, eliberat de un furnizor de servicii de certificare acreditat. Certificatele emise pentru notarii publici vor contine informatii privind biroul notarial, stabilite prin reglementări de catre autoritatea de reglementare si supraveghere specializată in domeniu;</p> <p>c) să îndeplineasca condițiile de fond prevăzute de lege privind operațiunea juridică pe care o consemnează;</p>	<p>must satisfy, under the sanction of absolute nullity, the following conditions:</p> <p>a) be electronically processed;</p> <p>b) bear the qualified electronic signature of the notary, based on a qualified certificate, issued by a provider of accredited certification services. The certificates issued for the notaries shall contain information concerning the notary office, established through regulations by the regulatory and supervisory authority in the field;</p> <p>c) meet the substantive conditions provided by the law for the legal operation recorded.</p>
<p>(2) Notarul public si celelalte instituții prevăzute la art. 1 au obligația să verifice îndeplinirea tuturor condițiilor prevăzute la alin. (1).</p>	<p>(2) The notary and the other institutions provided for in Article 1 shall be bound to check that all conditions provided in paragraph (1) are satisfied.<sup>258</sup></p>

Electronic notarial acts have the **same legal status** as notarial acts carried out pursuant to the Notarial Law (Law No 36/1995)<sup>259</sup>.

However, an authentication of declarations by the parties by electronic instrument is not possible. The law allows **only certain certifications of facts** by electronic notarial act<sup>260</sup>:

- legalisation of electronic copies of the original documents;
- giving a fixed date by time-marking of the documents that meet the conditions provided in Article 2 (1) and attesting the place where their conclusion was effected;
- receipt and safe-keeping in the electronic archives of documents that meet the conditions provided in Article 2 (1);
- authentication of electronic translations and
- issuing of certified copies (duplicates).

## 10.2. Electronic authentic instrument

Thus, electronic authentic instruments have been introduced in three of the four civil law systems covered by this study. However, only the **French** law provides for the authentication of a contract or other legal act in an electronic authentic instrument.

In **Germany** and **Romania**, only certifications of fact may be issued in electronic form, in particular a certified signatures and copies. Though, German law also provides for electronic official acts and electronic declarations by public authorities.

<sup>258</sup> Own translation.

<sup>259</sup> RO Article 3 Law No 589/2004 on the legal status of the electronic notarial activity.

<sup>260</sup> RO Article 5 Law No 589/2004 on the legal status of the electronic notarial activity.

### 10.3. Electronic registration

However, in **Germany** electronic certification of (electronic) copies is indispensable for the (mandatory) electronic filing to the **companies register** (DE *Handelsregister*)<sup>261</sup>. All applications to the companies register must be made in electronic form; this requires an electronically certified copy of the application.

An expansion of electronic filing to the **land register** is currently being considered in Germany. It might be introduced from 2010 onwards (state by state).

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<sup>261</sup> DE § 12 HGB.

See in particular: APFELBAUM/BETTENDORF, Die elektronische beglaubigte Abschrift im Handelsregisterverkehr, RNotZ 2007, 89-97.

## **Part Two**

### **CIRCULATION (MUTUAL RECOGNITION AND ENFORCEMENT) OF AUTHENTIC INSTRUMENTS**

In Part Two of this study, we shall look at the **existing rules** on the cross-border circulation of authentic instruments within the European Union.

- First we will give an overview of the relevant legal provisions.
- Secondly we will describe the conditions and procedure for the cross-border use of foreign authentic instruments.
- Thirdly we will look at enforcement of foreign authentic instruments.
- Finally, we will look at the effects of the cross-border use of foreign authentic instruments.

#### **1. Relevant legal provisions**

In this first section, we will give an overview of the relevant legal provisions, namely:

- **national rules implementing** the relevant **EC Regulations** (the EC Regulations themselves will be analysed in Part Three);
- **multilateral** conventions;
- **bilateral** agreements between Member States; and
- **national provisions** regarding other authentic instruments (which are not yet covered by EC legislation or by multilateral or bilateral agreements).

#### **1.1. Implementation or application of EC legislation by national law**

##### **1.1.1. Relevant EC Regulations**

The circulation of authentic instruments issued in other Member States is regulated by three EC Regulations:

- Article 57 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter called “**Brussels I Regulation**”) (replacing Article 50 of the previous Brussels Convention);
- Article 46 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter called “**Brussels II bis Regulation**”); and
- Articles 25 and 4(3)(a) of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (hereinafter called “**EEO Regulation**”).

### 1.1.2. Competences under national law

The three above-mentioned Regulations are directly applicable. Therefore, there is **no need for their implementation** by national legislators, except for provisions on the **competence** of national authorities.

The relevant provisions are to be found:

- in **England** in the Civil Procedure Rules (CPR);
- in **France** in the Code on Civil Procedure (CPC - *Code de procédure civile*);
- in **Germany** partly in the Code on Civil Procedure (ZPO - *Zivilprozessordnung*), partly in the “Law on the application of recognition and execution” (AVAG - *Anerkennungs- und Vollstreckungsausführungsgesetz*)<sup>262</sup>;
- in **Poland** partly in the Code on Civil Procedure (CPP), partly in the Law of 27.6.2001 (Law on the Order of the General Law Courts);
- in **Romania** in the Law No 191/2007, approving Emergency Government Ordinance No 119/2006 on measures necessary to implement certain Community regulations from the date of the accession of Romania to the European Union; and
- in **Sweden** in the Act (SFS 2006:74) laying down supplementary provisions on the jurisdiction of courts and recognition and international enforcement of certain decisions and Ordinance containing provisions concerning recognition and international enforcement of certain decisions (SFS 2005:712) (both supplementary to Brussels I and EEO Regulations) and in the Act containing supplementary provisions to Brussels II bis Regulation (SFS 2008:450) and the Ordinance (SFS 2005:97) with the same title.

Competent national authorities <sup>263</sup> under Brussels I and Brussels II bis and EEO Regulation								
			France	Germany	Poland	Romania	Sweden	England (United Kingdom)
Brussels I Regulation	certificate	judgments (Art. 54, Annex V)	court which issued the judgment (Art. 509-1 CPC)	court which issued the judgment (§ 56 AVAG)	court which issued the judgment	the first instance (Art. I <sup>2</sup> Law No 191/2007)	court which issued the judgment (SFS 2006: 74)	court which issued the judgment
		authentic instruments	president of chamber of notaries (Art. 509-3 CPC)	notary (§ 56 AVAG)	<i>sąd rejonowy</i> district court art 781 CPC (disputed)	local court ( <i>Judecătoria</i> ) (Art. I <sup>2</sup> Law No 191/2007)	not applicable	not applicable
	declara- tion of en- forcement	judgments (art 39, Annex II)	<i>tribunal de grande instance</i> (High court) (Art. 509-2 CPC)	<i>Landgericht</i> (county court) (§ 3 AVAG)	court (Art. 1153 CPC)	county court ( <i>Tribunalul</i> ) (Art. I <sup>2</sup> Law	<i>Svea hovrätt</i> (court of appeal)	High Court of Justice (for maintenance

<sup>262</sup> BGBl. 2001 I, p. 288, 436 - internet: [http://bundesrecht.juris.de/avag\\_2001/index.html](http://bundesrecht.juris.de/avag_2001/index.html)

<sup>263</sup> Some of the authorities have been listed by the Member States in annexes to the relevant instrument. Others are listed in the Commission’s European Judicial Atlas in Civil Matters: [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_information_en.htm)

		authentic instruments	president of chamber of notaries (Art. 509-3 CPC)	court or notary (§§ 3, 55(3) AVAG)		No 191/2007)		judgments: Magistrates' Court)
Brussels II bis Regulation	certificate (Art. 39)	judgments	court which issued the judgment (Art. 509-1 CPC)	court which issued the judgment (§ 48 (1) IntFam-RVG)	court which issued the judgment (Law of 27.6.2001)	the first instance (Art. I <sup>3</sup> Law No 191/2007)	court	court
		authentic instruments	not applicable		not applicable	not applicable	not applicable	
	declaration of enforcement (Art. 29)	judgments	<i>tribunal de grande instance</i> (High court) (Art. 509-2 CPC)	<i>Familiengericht</i> (family court) located at the seat of the <i>Oberlandesgericht</i> (§ 12 (1) Int-FamRVG)	<i>Sąd okręgowy</i> (district court) (Art. 1153 CPC)	county court ( <i>Tribunalul</i> ) (Art. I <sup>3</sup> Law No 191/2007)	<i>Svea hovrätt</i> (court of appeal)	High Court of Justice – Principal Registry of the Family Division
Regulation on the European Enforcement Order	certificate	judgments (art 9, Annex I)	court which issued the decision (Art. 509-1 CPC)	court which issued the act (§ 1079 ZPO)	court which issued the judgment (Art. 795 CPC)	the first instance (Art. I <sup>1</sup> Law No 191/2007)	court	court
		authentic instruments (art 25/ Annex III)	president of chamber of notaries (Art. 509-3 CPC) – in the future the individual notary <sup>264</sup>	notary or youth welfare office ( <i>Jugendamt</i> ) which issued the act § 1079 ZPO	district court (Art. 795 CPC)	local court ( <i>judecătoria</i> ) (Art. I <sup>1</sup> Law No 191/2007)	social welfare office ( <i>Socialn-ämnd</i> ) for its own acts	explicitly declared “not applicable” <sup>265</sup>
	refuse, stay or limit enforcement	judgments (Art. 21, 23)	court of first instance (Art. 509-1 CPC)	court § 1084 ZPO	court	court which issued the certificate	district court	court
		authentic instruments	president of chamber of notaries (Art. 509-3 CPC)					

<sup>264</sup> This Article has been modified by decree No 2008-484 of 22 May 2008, but the modification has not yet come into force. The modification will give the notary who issued the notarial instrument also the competence to certify it as a European Enforcement Order.

<sup>265</sup> European Judicial Atlas in Civil Matters – information communicated by the British government: “While Authentic Instruments from other Member States will be enforced in England and Wales they are not produced in England and Wales. Therefore there is no need to designate an authority to certify them.” (internet: [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_otherinfoeeo\\_uk\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_otherinfoeeo_uk_en.htm)).



## 1.2. Multilateral conventions

### 1.2.1. Lugano Convention

The Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter called “**Lugano Convention**”) follows almost verbatim the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter called “**Brussels Convention**”).

The Lugano Convention extends the geographic scope of application of regulations parallel to the Brussels Convention to (most) States of the European Economic Area, that is at present to **Iceland, Norway and Switzerland** (but not yet to Liechtenstein). Authentic instruments are regulated by Article 50.

The Lugano Convention is soon to be replaced by a “Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters” (hereinafter: “**new Lugano Convention**”) which will be concluded between the European Union (no longer the Member States), the EFTA countries and every other State which wants to accede under the conditions and criteria imposed by Article 72 of the Convention.

- The new Lugano Convention was signed in Lugano on 30 October 2007<sup>266</sup>.
- The Council has recently adopted a decision approving the conclusion of the Convention<sup>267</sup>.

The new Lugano Convention basically duplicates the rules of **Brussels I Regulation**. Thus the rule on enforcement of authentic instruments is contained in Article 57 of the new Lugano Convention. Besides the provisions taken from Articles 57 of Brussels I Regulation (and also Article 4(3)(b) EEO Regulation), Article 57(3) of the new Lugano Convention provides: “The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.”

### 1.2.2. Hague Apostille Convention

#### 1.2.2.1. Territorial scope

The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (hereinafter called: “Hague Apostille Convention”) applies to **all Member States**. No Member State has raised an objection to its application in another Member State.

However, the Convention does **not apply to all other European States**, mainly due to objections raised by various Member States under Article 12 paragraph 2 of the Convention:

- **Albania** has acceded to the Convention (entry into force: 9.5.2004), but **Belgium, Germany, Greece, Italy** and **Spain** raised an objection to the accession of Albania.
- **Azerbaijan** has acceded to the Convention (entry into force: 2.3.2005), but **Germany, Hungary** and the **Netherlands** raised an objection to the accession of Azerbaijan (which Hungary later revoked).

<sup>266</sup> The text of the Convention is published in OJL 339, 21.12.2007, pp. 3-41.

<sup>267</sup> COM(2008) 116 of 29.02.2008; 2873rd Council meeting Justice and Home Affairs, Luxembourg, 5-6 June 2008.

- **Georgia** has acceded to the Convention (entry into force: 14.5.2007), but **Germany** and **Greece** raised an objection to the accession of Georgia.
- The Republic of **Moldova** acceded to the Convention (entry into force: 16.3.2007), but **Germany** raised an objection to the accession of Moldova.
- The **Ukraine** has acceded to the Convention (entry into force: 22.12.2003), but **Belgium** and **Germany** raised an objection to the accession of the Ukraine (which Belgium later has withdrawn).

This record of objections shows that Belgium, Greece and Germany in particular are not convinced that standards for authentic instruments are fully satisfied **in some European States outside of the European Union**.

### 1.2.2.2. Material scope of application

The Hague Apostille Convention applies to the following documents (which it calls “public documents”, although most of them are authentic instruments):

<b>Convention de la Haye du 5 octobre 1961 supprimant l'exigence de la légalisation des actes publics étrangers</b> <b>Article 1</b>	<b>Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents</b> <b>Article 1</b>
La présente Convention s'applique aux actes publics qui ont été établis sur le territoire d'un Etat contractant et qui doivent être produits sur le territoire d'un autre Etat contractant.	The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.
Sont considérés comme actes publics, au sens de la présente Convention: <i>a)</i> les documents qui émanent d'une autorité ou d'un fonctionnaire relevant d'une juridiction de l'Etat, y compris ceux qui émanent du ministère public, d'un greffier ou d'un huissier de justice; <i>b)</i> les documents administratifs; <i>c)</i> les actes notariés; <i>d)</i> les déclarations officielles telles que mentions d'enregistrement, visas pour date certaine et certifications de signature, apposées sur un acte sous seing privé.	For the purposes of the present Convention, the following are deemed to be public documents: <i>a)</i> documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server (“huissier de justice”); <i>b)</i> administrative documents; <i>c)</i> notarial acts; <i>d)</i> official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.
Toutefois la présente Convention ne s'applique pas: <i>a)</i> aux documents établis par des agents diplomatiques ou consulaires; <i>b)</i> aux documents administratifs ayant trait directement à une opération commerciale ou douanière.	However, the present Convention shall not apply: <i>a)</i> to documents executed by diplomatic or consular agents; <i>b)</i> to administrative documents dealing directly with commercial or customs operations.

Thus, the scope of application extends to other “public documents” which are not authentic instruments. The Hague Apostille Convention does not have to distinguish between public documents which merely emanate from a public authority, and authentic instruments which have conclusive probative value, because it only exempts documents from the legalisation requirement, but does not grant them any positive effects in the State of destination, in particular neither a particular probative value nor enforceability.

### 1.2.3. European Convention abolishing legalisation

Both legalisation, and the requirement for attaching an apostille are abolished by the Convention Abolishing the Legalisation of Documents in the Member States of the European Communities, done at Brussels on the 25th May, 1987 (hereinafter called “**European Legalisation Convention**”).

The European Legalisation Convention did not enter into force, because it has not been ratified by all Member States (as it required by Article 6(2)).

However, those Member States, which have ratified the Convention can declare that the Convention nonetheless should apply for them in relation to other Member States which have also made such a declaration (Article 6 (3)). Thus, the Convention has been ratified and is applied provisionally by **five Member States**, namely Belgium (applicable since 16.3.1997), Denmark (26.10.1989, excluding Greenland and the Faroes Islands), France (12.3.1992), Italy (11.1.1991) and Ireland (8.3.1999)<sup>268</sup>. Cyprus (29.4.2005) and Latvia (21.6.2004) have acceded to the Convention, however without declaring it provisionally applicable.

As to its substantive scope of application, Article 1(2) of the European Legalisation Convention applies basically to the same **types of documents** as the Hague Apostille Convention, but without the exceptions contained in Article 1(3) Hague Apostille Convention. Documents executed by diplomatic or consular agents are explicitly included (Article 1(3) European Legalisation Convention).

Article 4 of the European Legalisation Convention provides for a procedure in cases in which the authority of the State of destination has **serious doubts**, with good reason, in relation to any document which is produced as to the authenticity of its signature(s), the capacity in which the person signing the document has acted, or the identity or seal of the stamp which it bears. In this situation, the authority of the State of destination may direct that such information as it thinks relevant to be requested in accordance with Article 4 of the Convention from the Central Authority of the State from which the act or document emanated. Such requests for information must only be made in exceptional cases and should always set out the grounds upon which they are based.

### 1.2.4. Diplomatic and consular acts

Authentic instruments issued by diplomatic and consular authorities are exempted from legalisation and apostille between the ratifying States of the **European Convention on Diplomatic and Consular Instruments** of 7 June 1968.

- The Convention is in force in **14 EU Member States**: Austria (1973), Cyprus (1971), the Czech Republic (1998), France (1971), Germany (1971), Greece (1979), Ireland (1999),

<sup>268</sup> Royaume de Belgique, Service public fédéral Affaires étrangères, Commerce extérieur et Coopération au Développement, Circ 1315, Direction des Traités, internet: <http://www.diplomatie.be/fr/word/treaties/viii1.doc>

Italy (1971), Luxembourg (1979), the Netherlands (1971), Poland (1995), Spain (1982), Sweden (1973) and the United Kingdom of Great Britain and Northern Ireland (including its non-EU parts Isle of Man, Guernsey and Jersey) (1971).

- However, **13 EU Member States** have **not (yet) signed** the Convention, namely Belgium, Bulgaria, Estonia, Denmark, Finland, Hungary, Latvia, Lithuania, Malta, Portugal, Romania, Slovakia, Slovenia.
- The Convention also applies to several European **non EU Member States**, namely: Liechtenstein (1973), the Republic of Moldavia (2002), Norway (1981), Switzerland (1971) and Turkey (1987).

### 1.2.5. Extracts from civil status records

Several conventions drafted by the *Commission Internationale de l'État Civil* (CIEC – International Commission on Civil Status) also exempt **extracts from civil status records** from the requirement of legalisation or apostille<sup>269</sup>:

- Article 5 of the “Convention on the issue of certain extracts from civil status records for use abroad” (*Convention relative à la délivrance de certains extraits d'actes d'état civil destinés à l'étranger*), signed in Paris on the 27 September 1956 (hereinafter called “**Paris CIEC-Convention of 1956**”);
- Article 4 of the “Convention on the issue free of charge and the exemption from legalisation of copies of civil status records” (*Convention relative à la délivrance et à la dispense de légalisation des expéditions d'actes de l'état civil*) signed in Luxembourg on the 26 September 1957 (hereinafter called “**Luxembourg CIEC-Convention of 1957**”);
- Article 8 of the “Convention on the issue of multilingual extracts from civil status records” (*Convention relative à la délivrance d'extraits plurilingues d'actes de l'état civil*), signed in Vienna on the 8 September 1976 (hereinafter called “**Vienna CIEC-Convention of 1976**”); and
- Article 2 of the “Convention on the exemption from legalisation of certain records and documents” (*Convention portant dispense de légalisation pour certains actes et documents*), signed in Athens on the 15 September 1977 (hereinafter called **Athens CIEC-Convention of 1977**”).

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<sup>269</sup> An unofficial English translation of the conventions is published on the CIEC website (<http://www.ciec1.org/index.htm>): <http://web.lerelaisinternet.com/CIECSITE/ListeConventions.htm>

However, all of these conventions apply only to some, **not to all Member States of the European Union**, namely:

<b>Exemption from legalisation by CIEC Conventions</b> (by date of entry into force)				
Convention	Paris 1956	Luxembourg 1957	Vienna 1976	Athens 1977
Austria	1965	1965	1983	1982
Belgium	1975	1966	1997	
Bulgaria				
Cyprus				
Czech Republic				
Denmark				
Estonia				
Finland				
France	1958	1960	1987	1982
Germany	1961	1961	1997	
Greece				
Hungary				
Ireland				
Italy	1968	1968	1983	1982
Latvia				
Lithuania				
Luxembourg	1960	1960	1983	1981
Malta				
Netherlands	1958	1960	1987	1981
Poland			2003	2003
Portugal	1982	1982	1983	1985
Romania				
Slovakia				
Slovenia	1992		1992	
Spain			1983	1981
Sweden				
United Kingdom				
total signatory EU Member States (out of 27)	9	8	11	8

Thus each convention has been signed and ratified by **less than half of the current EU Member States**.

- Even the convention with most contracting States (the Vienna CIEC-Convention of 1976) has been ratified by only 11 out of the 27 EU Member States.
- The other three conventions have been ratified by only 8 or 9 Member States.

If we look at the Member State signatories, **only 11 out of the 27 EU Member States** have signed and ratified at least one of the four conventions:

- All of these **11 Member States** have ratified the **Vienna CIEC-Convention of 1976**. So for the question, whether a legislation (or more precisely an apostille) is required for civil status extracts, we just have to look at the ratification of the Vienna Convention of 1976

and can disregard ratification of the other three relevant CIEC conventions (which have basically identical provisions concerning the exemption from legalisation).

- 6 Member States have ratified **all four conventions** (Austria, France, Italy, Luxembourg, the Netherlands and Portugal).
- 2 Member States have ratified **three** of the four conventions (but not the 1977 Athens Convention) (Belgium and Germany).
- 3 Member States have ratified (various) **two** of the four conventions (Poland, Slovenia and Spain).
- This leaves **16 out of the 27 EU Member States to which none of the CIEC Conventions abolishing the legalisation requirement** for extracts from civil status records apply (namely Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Romania, Slovakia, Sweden and the United Kingdom).

**1.2.6. Table: Multilateral conventions waiving legalisation for foreign authentic instruments – application in the Member States of the European Union**

<b>Multilateral conventions</b> (and year of entry into force for the respective country)				
	Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961	European Convention on diplomatic and consular Instruments of 7 June 1968	Vienna Convention on the issue of multilingual extracts from civil status records of 8 September 1976 <sup>270</sup>	European Convention Abolishing Legalisation of Documents of 25 May 1987
Austria	1968	1973	1998	
Belgium	1976		1998	1997
Bulgaria	2001			
Cyprus	1973	1971		(signed 2005)
Czech Republik	1999	1998		
Denmark	2006			1989
Estonia	2002			
Finland	1985			
France	1966	1971	1998	1992
Germany	1966	1971	1997	
Greece	1985	1979		
Hungary	1973			
Ireland	1999	1999		1999
Italy	1978	1971	1998	1991
Latvia	1996			(signed 2004)
Lithuania	1997			
Luxembourg	1979	1979	1998	
Malta	1968			
Netherlands	1966	1971	1998	
Poland	2006	1995	2003	
Portugal	1969		1998	
Romania	2001			
Slovakia	2002			
Slovenia	1993		1998	
Spain	1978	1982	1998	
Sweden	1999	1973		
United Kingdom of Great Britain and Northern Ireland	1966	1971		

<sup>270</sup> For the table, we have chosen the Vienna CIEC-Convention of 1976, because all the EU Member States which have ratified any other relevant CIEC Conventions, have also ratified the Vienna CIEC-Convention of 1976.

### 1.3. Bilateral agreements between Member States

#### 1.3.1. Overview (table)

There are several bilateral treaties, abolishing legalisation and apostille requirements. However, even between the civil law countries, for most States **bilateral agreements are the exception rather than the rule**.

- There is **no consistent pattern** as to the geographic or substantive scope of the agreements.
- There are **very few bilateral agreements with non-civil law countries** (e.g. Sweden or the United Kingdom).
- The **new EU Member States** tend to conclude **more bilateral agreements** waiving the apostille than the older Member States. Of the six countries covered by this study, **Poland** has concluded the largest number of bilateral agreements abolishing legalisation and apostille (with 18 of the other 26 EU Member States).
- Most of the bilateral agreements have been concluded from the **1950's to the 1980's**. Since the 1990's, only a few bilateral have been added to the list, in our sample all but one involving Poland.
- Also, **types of authentic instrument** covered vary between different agreements. While court instruments generally are included, some agreements do not abolish the legalisation or apostille requirement for instruments by lower administrative authorities or by notaries (e.g. the agreements between Germany and Greece respectively Switzerland).



<b>Bilateral Treaties with other EU Member States</b> (date of conclusion of the agreement)						
State (number of agreements)	France (12)	Germany (6)	Poland (18)	Romania (9)	Sweden -	United Kingdom (2)
Austria	15.6.1966	21.6.1923	11.12.1963	17.11.1965		
Belgium	9.11.1981	13.5.1975	17.12.1986	3.10.1975		
Bulgaria	18.1.1989		4.12.1961	3.12.1958		
Cyprus			14.11.1996			
Czech Republic	19.6.1995		21.12.1987	31.5.1995		
Denmark		17.6.1936				
Estonia			27.11.1998			
Finland			27.5.1980			
France	–	13.9.1971	5.4.1967	5.11.1974		3.6.1937
Germany	13.9.1971	–				
Greece		11.5.1938	24.10.1979			
Hungary	31.7.1980		6.3.1959	7.10.1958		
Ireland						
Italy		7.6.1969	28.4.1989			
Latvia			23.2.1994			
Lithuania			26.1.1993			
Luxembourg	27.3.1923					
Malta			26.8.1931 (see UK)			
Netherlands						
Poland			–	25.1.1962/ 15.5.1999		26.8.1931/ 23.2.1967
Portugal	20.7.1983					
Romania	5.11.1974		4.6.1962/ 15.5.1999	–		
Slovakia	7.8.1996		21.12.1987	25.10.1958		
Slovenia	25.5.1994		6.2.1960			
Spain				17.11.1997		
Sweden					–	
United Kingdom	3.6.1937		26.8.1931/ 23.2.1967			–

### 1.3.2. France

France has concluded bilateral agreements with **12** other EU Member States waiving the requirement of legalisation or apostille for authentic instruments<sup>271</sup>:

- **Austria:** French-Austrian Convention of 15 July 1966 (Art. 1 and 18), OJ of 11.8.1967, p. 8068 – in force since 13.8.1967;
- **Belgium:** French-Belgian Convention of 9 November 1981 (Art. 1 to 3), OJ of 31.1.1982, p. 430 – in force since 1.1.1982;

<sup>271</sup> For a comprehensive list of the bilateral conventions abolishing the legalisation requirement, see: <http://74.125.39.104/search?q=cache:YtNimi9HfwUJ:www.diplomatie.gouv.fr/fr/IMG/pdf/CONVBILATERALE3.pdf+convention+franco-autrichienne+sur+l%C3%A9galisation&hl=fr&ct=clnk&cd=1&gl=fr&client=firefox-a>

- **Bulgaria:** French-Bulgarian Convention of 18 January 1989 (Art. 23), OJ of 6.10.1989, p. 12547 - in force since 1.10.1989;
- **Czech Republic:** French-Czech exchange of letters of 16 May and 19 June 1995, setting into force the French-Czechoslovak Convention of 10 May 1984 (Art. 18), OJ of 21.7.1985, p. 8287 - in force since 19.6.1995 (OJ of 23.9.1998, p. 14518);
- **Germany:** Agreement between the Federal Republic of Germany and the French Republic on the Abolishment of Legalisation for Authentic Instruments of 13 September 1971 (Art. 1 to 4), OJ of 16.4.1975, p. 3956 - in force since 1.4.1975;
- **Hungary:** French-Hungarian Convention of 31 July 1980 (Art. 17), OJ of 12.2.1982, p. 550 - in force since 1.2.1982;
- **Luxembourg:** French-Luxembourg Declaration of 27 March 1923 (Art. 1), OJ of 1.6.1923, p. 5216 - in force since 1.7.1923;
- **Portugal:** French-Portuguese Convention of 20 July 1983 (Art. 25), OJ of 14.10.1984, p. 3222 - in force since 1.10.1984;
- **Romania:** French-Romanian Convention of 5 November 1974 (Art. 10), OJ of 17.11.1975, p.11791 - in force since 1.9.1975;
- **United Kingdom:** French-British Agreement of 3 April 1937 (Art. 1), OJ of 30.5.1937, p. 5899 - in force since 3.6.1937;
- **Slovakia:** French-Slovak exchange of letters of 7 August 1996, setting into force the French-Czechoslovak Convention of 10 May 1984 (Art. 18), OJ of 21.7.1985, p. 8287 - in force since 7.8.1996 (OJ of 23.9.1998, p. 14515);
- **Slovenia:** French-Slovenian exchange of letters of 28 March and 25 May 1994, setting into force the French-Yugoslav Convention of 29 October 1969 (Art. 5), OJ of 3.11.1970, p. 10145) - in force since 25.5.1994 (OJ 22.3.1996, p. 4442).

### 1.3.3. Germany

Germany has also concluded 6 bilateral agreements with other EU-Member States, most of them with neighbouring states:

- **Austria:** *Deutsch-österreichischer Beglaubigungsvertrag* (German-Austrian Authentication Treaty) of 21 June 1923 (RGBl 1924 II, 61, notification of reapplication after WW II: BGBl. 1952 II, 436);
- **Belgium:** *Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Belgien über die Befreiung öffentlicher Urkunden von der Legalisation* (Treaty between the Federal Republik of Germany and the Kingdom of Belgium on the Abolishment of Legalisation for Authentic Instruments) of 13 May 1975 (BGBl. 1980 II, 815), in force since 1.5.1981 (BGBl. 1981 II, 142)<sup>272</sup>;
- **Denmark:** *Deutsch-dänisches Beglaubigungsabkommen* (German-Danish Agreement on Legalisation) of 17 June 1936 (RGBl 1936 II 213; notification of reapplication after WW II: BGBl. 1953 II, 186);
- **France:** *Abkommen zwischen der Bundesrepublik Deutschland und der Französischen Republik über die Befreiung öffentlicher Urkunden von der Legalisation* (Agreement between the Federal Republic of Germany and the French Republic on the Abolishment

<sup>272</sup> Belgium considers the agreement invalid, due to a fault in the ratification procedure. Germany, however, is applies the agreement.

of Legalisation for Authentic Instruments) of 13 September 1971 (BGBl. 1974 II, 1074, 1100), in force since 1.4.1975)<sup>273</sup>;

- **Greece:** *Deutsch-griechisches Abkommen über die gegenseitige Rechtshilfe in Angelegenheiten des bürgerlichen und Handels-Rechts* (German-Greek Agreement on the Mutual Legal Assistance in Civil and Commercial Matters) of 11 May 1938 (RGBl 1939 II 848), in force since 17.7.1939 (RGBl 1939 II, 848, notification of reapplication after WW II: BGBl. 1952 II, 634); and
- **Italy:** *Vertrag zwischen der Bundesrepublik Deutschland und der Italienischen Republik über den Verzicht auf die Legalisation von Urkunden* (Treaty between the Federal Republic of Germany and the Italian Republic on the Waiver of Legalisation of Documents) of 7 June 1969 (BGBl. 1974 II, 1069), in force since 5.5.1975<sup>274</sup>.
- An agreement with **Poland**, concluded in the 1920s, has ceased to be applied with World War II<sup>275</sup>.

Bilateral agreements with other European states:

- **Switzerland:** *Deutsch-schweizerischer Vertrag über die Beglaubigung öffentlicher Urkunden* (German-Swiss Treaty on Legalisation of authentic instruments) of 14 February 1907 (RGBl 1907, 411, 415).

Germany has not concluded any bilateral agreements concerning authentic instruments with non-European states.

#### 1.3.4. Poland

Of the six countries studied, Poland has the most bilateral agreements abolishing legalisation and apostille, concluded with **18** of the 26 other EU Member States.

- **Austria:** Art. 56 Convention on civil relations and documents of 11 December 1963 (OJ 1974 No 6 item 34);
- **Belgium** (only concerning divorce): Convention on the recognition of decisions in divorce matters of 17 December 1986 (OJ 1997 No 39 item 234);
- **Bulgaria:** Art. 88-90 Convention on judicial assistance in civil, family and penal matters of 4 December 1961 (OJ 1963 no 17 item 88 and 89);
- **Cyprus:** Convention concerning judicial cooperation in civil and penal matters of 14 November 1996 (OJ 1999 No 39 item 383 and 384);
- **Czech Republic:** Art. 15 Convention on judicial assistance and judicial relations in civil, family, labour and penal matters of 21 December 1987 (in succession of Czechoslovakia) (OJ 1989 No 39 item 210 and 211);
- **Estonia:** Art. 15 Convention on judicial assistance and judicial relations in civil, labour and penal matters of 27 November 1998 (OJ 2000 No 5 item 49 and 50);
- **Finland:** Art. 11 Convention on the legal protection and judicial assistance in civil, family and penal matters of 27 May 1980 (OJ 1981 No 27 item 140 and 141);
- **France:** Convention on the applicable law, jurisdiction and exequatur in the law of persons and in family law of 5 April 1967 (OJ 1969 No 4 item 22 and 23);

<sup>273</sup> see ARNOLD, *Die Beglaubigungsverträge mit Frankreich und Italien*, DNotZ 1975, 581.

<sup>274</sup> see ARNOLD, *Die Beglaubigungsverträge mit Frankreich und Italien*, DNotZ 1975, 581.

<sup>275</sup> RGBl. 1925 II, p. 139.

- **Greece:** Art. 15 Convention on judicial assistance in civil and penal matters of 24 October 1979 (OJ 1982 No 4 item 24 and 25);
- **Hungary:** Art. 16-17 Convention on judicial relations in civil, family and penal matters of 6 March 1959 (OJ 1960 No 54 and 55);
- **Italy:** Art. 5 Convention on judicial assistance and recognition and enforcement of judgments in civil matters of 28 April 1989 (OJ 1992 No 23 item 97 and 98);
- **Latvia:** Art. 13 Convention on judicial assistance and judicial relations in civil, labour and penal matters of 23 February 1994 (OJ 1995 No 110 item 534 and 535);
- **Lithuania:** Convention on judicial assistance and judicial relations in civil, labour and penal matters of 26 January 1993 (OJ 1994 No 35 item 130 and 131);
- **Malta:** The Polish-British Convention on civil and commercial procedures of 26 August 1931 applies (OJ 1932 No 32 item 324);
- **Romania:** Art. 6 Convention on judicial assistance and judicial relations in civil matters of 15 May 1999 (OJ 2002 No 63, item 301 and 302); .
- **Slovakia:** Art. 15 Convention on judicial assistance and judicial relations in civil, family, labour and penal matters of 21 December 1987 (in succession of Czechoslovakia) (OJ 1989 No 39 item 210 and 211);
- **Slovenia:** Art. 61 Convention on judicial relations in civil and penal matters of 6 February 1960 (in succession de Yugoslavia) (OJ 1963 No 27 item 162 and 163); and
- **United Kingdom:** Art. 47-48 Convention on civil and commercial procedures of 26 August 1931 (OJ 1932 No 32 item 324) and the Consular Convention of 23 February 1967 (OJ 1971 No 20, item 192).

### 1.3.5. Romania

Romania has concluded **9** bilateral agreements with other EU Member States:

- **Austria:** Art. 25 and 26, Ch. 5 Convention on legal assistance in civil and family law matters of 17 November 1965;
- **Belgium:** Art. 3 from the Additional Protocol to Convention regarding legal assistance in civil and commercial matters of 30 October 1979;
- **Bulgaria:** Art. 13 Treaty on legal assistance in civil, family and criminal matters of 3 December 1958;
- **Czech Republic:** Art. 23 Treaty on legal assistance in civil matters of 11 July 1994;
- **France:** Art. 9 and 10 Convention on legal assistance in civil and commercial matters, of 5. November 1974;
- **Germany:** previously Art. 20 Treaty with the former GDR (DDR) of 19 March 1982, which, however, ceased to apply after the German reunification;
- **Hungary:** Art. 13, Treaty on legal assistance in civil, family and criminal matters of 7 October 1958;
- **Poland:** Art. 6 Treaty on legal assistance and legal relationships in civil matter of 15 May 1999;
- **Slovakia:** Art. 13 Treaty on legal assistance in civil, family and criminal matters of 25 October 1958 (in succession of Czechoslovakia); Protocol concerning the validity of

treaties, agreements, conventions and other deals concluded by Romania and Czechoslovakia of 16 April 1999; and

- **Spain:** Art. 8 Complementary Convention to Hague Convention on civil procedure (1.3.1954) of 17 November 1997.

### 1.3.6. Sweden

Sweden has not concluded any bilateral agreements regulating the circulation of authentic instruments.

### 1.3.7. United Kingdom

- **France:** British-French Agreement of 3 April 1937 (Art. 1) - in force since 3.6.1937;
- **Poland:** Art. 47-48 Convention on civil and commercial procedures of 26 August 1931 and the Consular Convention of 23 February 1967.

## 1.4. National rules

National rules only apply where there is neither an EC Regulation nor an applicable international agreement.

- None of the four civil law countries covered by this study has any national statutory provision on the recognition of foreign authentic instruments. They regulate only the requirement of **legalisation or apostille**.
- **Only France and Romania have a rule on the enforcement** of foreign authentic instruments (besides the rules implementing EC Regulations).

### 1.4.1. France

In France, there is **no statutory rule on the recognition** of foreign authentic instruments<sup>276</sup>.

The presumption of authenticity applies only to domestic authentic instruments (Article 1317 Civil Code). For foreign authentic instruments, genuineness has to be proven.

- Generally, genuineness has to be proven by **legalisation**<sup>277</sup>.
- Instead of legalisation, an **apostille** suffices, if the instrument is covered by the Hague Apostille Convention.
- No proof of genuineness (**neither legalisation nor apostille**) is required where the European Legalisation Convention and the other above-mentioned international agreements apply<sup>278</sup>.

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<sup>276</sup> For the debate on the circulation of authentic instruments, see: CALLÉ, *L'acte public en droit international privé*, éd. Economica; CALLE, 'Acte notarié – acte notarié établi à l'étranger (droit international privé)', *J.-Cl. Notarial*, Fasc. 310; CALLE, 'L'acte authentique établi à l'étranger. Validité et exécution en France', *Rev. Crit. DIP* 2005, 377; DECORPS, 'La circulation de l'acte notarié et son efficience dans le commerce juridique international', *JCP éd. Not et Imm.* 2002, 1282; GORE, 'L'acte authentique en droit international privé', *Trav. Comité fr. DIP* 1998-1999, p. 23; NOURISSAT, 'L'acte authentique saisi par le droit européen', Quatorzième et quinzième « Rencontres notariat-université », *Les Petites affiches*, 29 août 2007, n° spécial, n° 173; REVILLARD, *Droit international privé et communautaire : pratique notariale*, 6<sup>th</sup> edition, Defrénois, 2006.

<sup>277</sup> FONGARO, 'Force probante des actes de l'état civil étrangers : le renouveau de la légalisation ?', *Droit de la famille*, 2008, comm. 50.

<sup>278</sup> See par. 1.2.3 et seq. and 1.3.

Based on Article 509 of the French Code of Civil Procedure, foreign authentic instruments that may be granted **exequatur** and therefore be enforced in France are also outside of the scope of the relevant EC Regulations and international instruments.

#### 1.4.2. Germany

In Germany, there is also **no rule on the recognition** of foreign authentic instruments.

The use of a foreign authentic instrument generally requires **proof of genuineness**. A presumption of genuineness applies only to domestic authentic instruments.

- For foreign authentic instruments, genuineness has to be proven by **legalisation** (§ 438 ZPO).
- Where the Hague Apostille Convention applies, an **apostille** suffices.
- Several bilateral agreements **exempt** some or all types of authentic instruments **completely** from any proof of genuineness (that is from legalisation and apostille requirements).

There is also **no rule** – and therefore no possibility – about **how to enforce** a foreign authentic act except the three EC Regulations mentioned above<sup>279</sup>.

#### 1.4.3. Poland

The rules of the Polish Code of Civil Procedure on the recognition or enforcement of foreign judgments<sup>280</sup> **do not apply to authentic instruments**. Thus, foreign authentic instruments cannot be enforced in Poland where the above-mentioned EC Regulations and international agreements do not apply.

In Poland, under Article 1138 of the Code of Civil Procedure, foreign authentic instruments enjoy the same probative value as domestic authentic instruments. As a general rule, **no legalisation** is required. Only for some types of authentic instruments is legalisation necessary, particularly for transfers of immovable property situated in Poland. Also if there is a doubt as to the genuineness of a foreign authentic instrument, the Polish authorities may require legalisation.

#### 1.4.4. Romania

In Romania, the rules on the recognition and enforcement on foreign judgments, contained in Articles 165-178 of the Romanian Private International Law Act<sup>281</sup>, also apply to foreign authentic instruments, as Article 165 explicitly regulates.

<b>Scriune a IV-a</b> <b>Efectele hotărârilor străine</b>  <b>Art. 615</b>	<b>Section IV</b> <b>Effects of foreign decisions</b>  <b>Article 165</b>
În sensul prezentei legi, termenul de hotărâri străine se referă la actele de jurisdicție ale	For the purposes of this law, the term foreign decisions refers to acts of jurisdiction of the courts

<sup>279</sup> For a discussion of the literature on § 722 ZPO, see par. 3.3.2.

<sup>280</sup> Articles 1145 and 1150 Polish Code of Civil Procedure.

<sup>281</sup> Romanian Private International Law, Act No 105/1992.

instanțelor judecătorești, notariatelor sau oricăror autorități competente dintr-un alt stat.	of notaries or any other competent authority of another state. <sup>282</sup>
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Articles 166-172 of the Romanian Private International Law Act regulate the **recognition** of foreign decisions (and indirectly of foreign authentic instruments containing a decision):

- Foreign decisions referring to the **civil status** shall be recognised in Romania if they have been issued by the State of which the party is a national or, if they have been issued in a third state provided that they have been first recognised in the state of which the party is a national. Decisions referring to the legal status or to the capacity of a Romanian citizen will be denied recognition if the result of the decision is different from the result under Romanian law<sup>283</sup>.
- The recognition of **other decisions** can be rejected only on very limited grounds, in particular if the decision violates the Romanian public order (*ordre public*)<sup>284</sup>.

The **probative value** is regulated by Article 161(1) of the Romanian Private International Law Act:

Art. 161	Art. 161
Mijloacele de probă pentru dovedirea unui act juridic și puterea doveditoare a înscrisului care îl constată sînt cele prevăzute de legea locului încheierii actului juridic sau de legea aleasă de părți, dacă ele aveau dreptul să o aleagă.	The means of evidence for a legal act and the probative value of a document, which ascertains a legal act shall be governed by the law of the place where the legal act was concluded or by the law chosen by the parties, if they had the right to choose the applicable law.
Proba faptelor se face potrivit legii locului unde ele s-au produs.	The proof of the facts shall be done according to the law of the place where they were produced.
Cu toate acestea, va fi aplicabilă legea română, dacă aceasta admite și alte mijloace de probă decît cele prevăzute de legile arătate la alin. 1 și 2. Legea română este aplicabilă și în cazul în care ea îngăduie proba cu martori și cu prezumții ale instanței, chiar dacă aceste mijloace de probă nu sînt admisibile potrivit legii străine.	However, Romanian law will be applicable, if it permits other forms of evidence than those provided by the laws referred to in paragraphs 1 and 2. Romanian law is also applicable for the proof by witnesses or by circumstantial evidence, even if such evidence is not admissible under foreign law.
Dovada stării civile și puterea doveditoare a actelor de stare civilă sînt reglementate de legea locului unde s-a întocmit înscrisul invocat.	Proof of civil status and the probative value of civil status documents are governed by the law of the place where the registration has taken place.
Administrarea probelor se face potrivit legii române.	The taking of evidence is governed by Romanian law.

As a general rule, **legalisation** is required for the use of a foreign authentic instrument as such in Romania, unless otherwise provided in the EC Regulations or in international agreements (Article 162 Private International Law Act).

Art. 162	Art. 162
Actele oficiale întocmite sau legalizate de către o autoritate străină pot fi folosite în fața instanțelor	Official documents issued or authenticated by a foreign authority cannot be used before Romanian

<sup>282</sup> Own translation.

<sup>283</sup> RO Art. 166, 168(2) Private International Law Act.

<sup>284</sup> RO Art. 168(1) Private International Law Act.



române numai dacă sînt supralegalizate, pe cale administrativă ierarhică și în continuare de misiunile diplomatice sau oficiile consulare ale României, spre a li se garanta astfel autenticitatea semnăturilor și sigiliului.	courts unless they have been legalised in the administrative hierarchy and afterwards by the Romanian diplomatic missions or consular officials, to ensure the authenticity of the signatures and the seal.
...	...

#### 1.4.5. England and Sweden

In **England and Sweden**, there are **no provisions** in national law concerning the cross-border use of foreign authentic instruments (other than provisions implementing the EC Regulations or international conventions).

## 2. Conditions and procedure for the cross-border use of authentic instruments in general

### 2.1. EC Regulations

Brussels I, II bis and the EEO Regulations deal with the cross-border enforcement of authentic instruments only. The specific prerequisites in this regard will be analysed *infra sub par.* 3. With regard to the general conditions for cross-border use of authentic instruments, it seems noteworthy to state that within their respective scope of application, all three Regulations **exempt from the legalisation requirement** (and the requirement of apostille as well).

### 2.2. Apostille (Hague Apostille Convention)

The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (hereinafter: “Hague Apostille Convention”) **exempts from legalisation** all authentic instruments emanating from other Member States, because all Member States have ratified the convention (and no Member State has raised an objection against the application to another Member State).

### 2.3. Waiver of apostille

For some types of documents and for some States of origin, an apostille is not required, and foreign authentic documents are recognised without any procedure.

- The **European Legalisation Convention** applies so far only to **5 EU Member States**<sup>285</sup>.
- The relevant multilateral conventions (the Convention on the issue of multilingual extracts from **civil status records** of 8 September 1976 and the European Convention on **diplomatic and consular Instruments** of 7 June 1968) so far have only been ratified by 11 or 14 Member States out of a total of 27. The majority of Member States has not yet ratified or signed these conventions<sup>286</sup>.
- As stated above, **bilateral agreements** waiving the requirement of apostille exist only between some civil law countries – covering only a minority even of the civil law countries<sup>287</sup>.

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<sup>285</sup> See par. 1.2.3.

<sup>286</sup> See par 1.2.4. and 1.2.5. respectively.

<sup>287</sup> See par. 1.3.

<b>Table: waiver of apostille</b>						
	France	Germany	Poland	Romania	Sweden	United Kingdom
extracts from civil status records (Vienna CIEC-Convention of 8.9.1976)	exempt from apostille	exempt from apostille	exempt from apostille	apostille required	apostille required	apostille required
diplomatic and consular instruments (European Convention of 7.6.1968)	exempt from apostille	exempt from apostille	exempt from apostille	apostille required	exempt from apostille	exempt from apostille
notarial instruments (European Legalisation Convention or bilateral agreements)	exempt only instruments from Austria, Belgium, Denmark, Germany, Ireland and Italy	exempt only instruments from Austria, Belgium and France	exempt for most other EU Member States however apostille required for: Germany, Luxembourg, Netherlands, Portugal, Spain	exempt only notarial instruments from Austria, Belgium, Bulgaria, Czech Republic, France, Hungary, Poland, Slovakia and Spain	apostille required	apostille required

## 2.4. Other procedural requirements

Beside the apostille (or legalisation for certain non-EU Member States to which the Hague Apostille Convention does not apply) there are **no other procedural requirements** for the cross-border use of foreign authentic instruments in any of the six States covered by this study.

## 2.5. Comparative Result

Thus, in the four civil law countries covered by this study, the **presumption of genuineness**, which is granted to domestic authentic instruments does not generally apply to foreign authentic instruments.

- Instead, as a general rule, the genuineness of foreign authentic instruments has to be proven by **legalisation** (that is, in the wording of Article 2 of the Hague Apostille Convention “the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears”.) Only in Polish law, legalisation is necessary only for some types of acts or in case of doubts of the Polish authority to which the foreign instrument is being produced.
- An **apostille** is sufficient to prove genuineness within the scope of application of the Hague Apostille Convention. Since all EU Member States have ratified the Convention, an apostille always suffices for authentic instruments emanating from other Member States.

- **Neither legalisation nor apostille** are required within the scope of the bilateral agreements on authentication, the European Convention on Diplomatic and Consular Instruments of 7 June 1968 and the CIEC conventions, in particular the Vienna Convention of 1976. However, all of these instruments apply only to a minority of EU Member States.

In England and Sweden, as countries representing the Common Law system and the Nordic system respectively, the national authorities might also require the proof of genuineness of foreign authentic instruments by legalisation (or in the scope of the Hague Apostille Convention by apostille), unless international agreements suppressing the requirements of legalisation and/or apostille require otherwise. However, in practice, at least in Sweden, legalisation and apostille are very rarely, if ever, demanded by the Swedish authorities.

### 3. Conditions and procedure for the cross-border enforcement

#### 3.1. EC Regulations

##### 3.1.1. Synoptic table

The cross-border enforcement of authentic instruments is regulated by the above mentioned three EC Regulations and by the Lugano Convention:

<b>EC instruments on enforcement of authentic instruments and the Lugano Convention</b> (in the order of the time of conclusion or enactment)					
		<b>Lugano Convention</b>	<b>Brussels I Regulation</b>	<b>Brussels II bis Regulation</b>	<b>Regulation on European Enforcement Order</b>
applicable to States		Iceland, Norway, Switzerland (not yet for Liechtenstein)	EU Member States (incl. parallel agreement with Denmark)	EU Member States (except Denmark)	EU Member States (except Denmark)
Scope of application		civil and commercial matters (Art. 1) (exceptions e.g. status/legal capacity, matrimonial property, succession/wills, bankruptcy, social security, arbitration)		divorce (legal separation/ marriage annulment) parental responsibility (Art. 1)	civil/commercial matters (Art. 2): claim for payment of a specific sum of money that has fallen due/ for which the due date is indicated in the instrument (Art. 3)
Date of application		1.10.1997 (Art. 54)	1.3.2002 (Art. 66) (for older instruments: Brussels Convention)	1.3.2001/1.3.2005 (Art. 64)	21.1.2005 (Art. 26)
Recognition		no provision on the recognition of authentic instruments		Article 46	no provision on the recognition of authentic instruments
E n f o r c	Legalisation	Art. 49: no legalisation required	Art. 56: no legalisation required	Art. 52: no legalisation required	no legalisation required
	State of origin	no certificate	Art. 57: certificate in form of Annex VI (optional)	Art. 39: certificate similar to forms Annexes I/II (mandatory)	Art. 25: certificate as European Enforcement Order (Annex III)

e m e n t	State of enforcement	declaration of enforceability (Art. 50, 46 ss.)	declaration of enforceability (Art. 57, 38 ss.)	declaration of enforceability (Art. 46, 28 ss.)	no further procedure required (Art. 5: abolishment of exequatur)
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### 3.1.2. Evolution from exequatur to certificate of the State of origin

The table which orders the four instruments by their date of origin shows an evolutionary process with regard to the **exequatur**: While such a declaration of enforceability is still necessary under Brussels I and II bis Regulations, it is not required under the EEO Regulation where only a simple certificate has to be issued by the State of origin.

- The **Brussels Convention** as well as the **Lugano Convention** (which was basically modelled upon the Brussels Convention) do **not yet** include any certificate issued by the State of origin.
- All three EC regulations provide for such a certificate. However, the function of the certificate is quite different in the three EC Regulations.
- In **Brussels I Regulation**, the certificate is just an **option**. It serves merely as an aid to the authority of the State of enforcement, which has to decide whether to declare the decision or the authentic instrument enforceable.
- In **Brussels II bis Regulation**, the certificate is already a **mandatory requirement**. However, enforceability still has to be declared by the state of enforcement.
- For the **European Enforcement Order**, the certificate of the issuing State is the only requirement for enforceability in the other Member States. All procedures in the State of enforcement have been abolished.

### 3.1.3. Implementation or application by national law

A table of the competent authorities has already been given<sup>288</sup>.

Since there are no authentic instruments in England and Wales, the British legislator has not instituted any authorities for issuing the certificate as a European Enforcement Order.

## 3.2. Lugano Convention

Article 50 of Lugano Convention repeats the wording of Article 50 of Brussels Convention. The main difference with the current Article 57 of Brussels I Regulation is that the Lugano Convention and the Brussels Convention did not provide for a certificate in the State of origin. Otherwise, the declaration of enforcement is basically the same.

## 3.3. National Provisions

### 3.3.1. France

<sup>288</sup> See par. 1.1.2.

France is one of the two studied Member States, whose national law grants cross-border enforcement to instruments that are not covered by the relevant EC Regulations and international agreements.

Based on Article 509 of the French Code of Civil Procedure, **exequatur** is granted to enforce foreign authentic instruments under the following requirements<sup>289</sup>:

- Exequatur is granted by the French **court** where the debtor has his residence or where the property is situated, against which enforcement is requested by the creditor.
- Exequatur is denied, if the foreign authentic instrument has been issued by someone who has **competence** under French law in the matter in question: E.g. only an official of the French registry of births, marriages and deaths (*officier d'état civil français*) can certify a birth etc. which happened in France<sup>290</sup>. The fact that one or both parties is a French national does not in itself confer exclusive jurisdiction on the French authorities<sup>291</sup>.
- The authenticating authority must have been by someone who was **competent under national law**<sup>292</sup>.
- Otherwise, the **international competence** of the foreign authenticating authority is **not controlled** by the procedure for exequatur (differently from the exequatur for court decisions)<sup>293</sup>.
- The enforcement of the foreign authentic instrument must not contradict the French **ordre public international**<sup>294</sup>.
- However, there is **no control** over whether the foreign authenticating authority applied the same law, which also would have been applicable under **French private international law**<sup>295</sup>.

### 3.3.2. Germany

In Germany, cross-border enforcement of authentic instruments is regulated by the three EC Regulations and the Lugano Convention mentioned above (and other international treaties) only. National law, thus, does not deal with this issue.

- **§ 722 ZPO**, which requires an exequatur for the enforcement of foreign judgments, is - according to the legal practice and to the majority opinion - **not applicable to foreign authentic instruments**<sup>296</sup>.

<sup>289</sup> MAYER/HEUZÉ, *Droit international privé*, 8th edit., No 364 ss.

<sup>290</sup> Cass. civ. (= *Cour de cassation* - highest French Court in civil matters), 1st civil chamber, decision of 9.1.1974, *Rev. crit. DIP* 1975, p. 257 s.: An officer of the civil register of Kiev had established a birth certificate stating Nice as the place of birth.

<sup>291</sup> Cass. civ., 1st civil chamber, decision of 23.5.2006, case Prieur, *D.* 2006. 1846 for Article 15 Civil Code; 1st civil chamber, decision of 22.5.2007, No 05-20.473, confirmation of decision Prieur; 1st civil chamber, decision of 22.5.2007, *Rev. crit. DIP* 2007. 610 for Article 14 Civil Code.

<sup>292</sup> BATIFFOL/LAGARDE, *Droit international privé*, volume 1, note 722.

<sup>293</sup> GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe. Règlement n° 44/2001. Conventions de Bruxelles et de Lugano*, LGDJ, 3 edit. 2002, note 471.

<sup>294</sup> For the verification of this condition for the exequatur of an authentic instrument, see: CA (Appellate Court) Paris, 22.2.1990, *D.* 1990, inf. rap. p. 108, *Rev. crit. DIP* 1991, p. 854, somm. HEUZE; CA (Appellate Court) Aix-en-Provence, 2.3.2000, *Rev. crit. DIP* 2001, p. 163, note LÉGIER.

<sup>295</sup> Cass. civ., 1st civil chamber, 20.2.2007, case Cornelissen, No 05-14.082, *D.* 2007. 1115.

<sup>296</sup> LG Hamburg IPRspr. 1982, 180; GOTTWALD, *ZZP* 103 (1990), 268; BAUMBACH/LAUTERBACH/ALBERS/HARTMANN, § 722 ZPO note 3; MünchKommZPO/Gottwald, § 722 ZPO note 13; MUSIELAK/LACKMANN, § 722 ZPO note 3; STEIN/JONAS/MÜNZBERG, § 722 ZPO note 11.

- Only a minority opinion in the literature wants to apply § 722 ZPO to foreign authentic instruments<sup>297</sup>. However, the courts have not followed this approach.

As a result, authentic instruments from countries that are neither EU Member States nor belong to the European Economic Area and with which no bilateral agreements have been concluded cannot be enforced in Germany.

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<sup>297</sup> GEIMER, DNotZ 1975, 464; GEIMER, *Internationale Durchsetzung vollstreckbarer Urkunden*, in: RECHBERGER, *Die vollstreckbare Urkunde*, 2002, p. 69, 75; SCHÜTZE, *Internationales Notarverfahrensrecht*, DNotZ 1992, 66, 81; ZÖLLER/GEIMER, § 722 ZPO note 10.



### 3.3.3. Poland

In Poland, the situation is the same as in Germany. Foreign authentic instruments can only be enforced where the existing EC Regulations and international agreements apply, in particular the Lugano Convention.

### 3.3.4. Romania

In Romania, like in France, foreign authentic instruments can be enforced in the same way as foreign court decisions. The rule on the enforcement of foreign judgments (Article 174 Romanian Private International Law Act<sup>298</sup>) applies to foreign authentic instruments as well (Article 165 Private International Law Act<sup>299</sup>).

### 3.3.5. England and Sweden

England and Sweden do not have any national rules on the enforcement of foreign authentic instruments, besides the respective EC Regulations (and the Lugano Convention).

## 3.4. Comparative Results

Thus, in **four out of six countries**, covered by this study, (DE, EN, PL, SE), execution of foreign authentic instruments can only be based upon the three relevant **EC Regulations** (Brussels I Regulation, Brussels II bis, EEO Regulations) or on international agreements, in particular the Lugano Convention.

Of the six countries, covered by this study, only in **France** and **Romania** can foreign authentic instruments also be enforced outside the scope of EC Regulations and the Lugano Convention, provided that they have been granted an **exequatur**.

This highlights the **utmost importance of EC legislation** in relation to the enforcement of authentic instruments established in other Member States; without the existing EC legislation (or previously without the Brussels Convention), in most Member States authentic instruments established in other Member States could not be enforced.

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<sup>298</sup> RO Act No 105/1992.

<sup>299</sup> For the wording and a translation of Article 165 Romanian Private International Law Act, see par. 1.4.4.

## 4. Effects of the cross-border use foreign authentic instruments

In this final section of Part Two we analyse if foreign authentic instruments, whether they have been legalised, had an apostille to them or are exempted from legalisation, have the same legal effects as an authentic instrument issued by national authorities, in particular concerning their

- probative value;
- enforcement; and
- formal requirements.

### 4.1. Probative value

#### 4.1.1. France

In France, foreign authentic instruments enjoy the full probative value of domestic authentic instruments, if their genuineness has been proven (by way of legalisation or apostille) or if no proof of genuineness is required (due to international agreements).

If the genuineness of a foreign authentic instrument has not been proven, it is not completely deprived of any probative value. However, the *Cour de cassation* (the highest French court in civil matters) has required that copies or extracts of civil status registers established by foreign authorities have to be legalised in order to be used in France, unless international agreements dispense of such legalisation<sup>300</sup>. If a document has not got a legalisation, it is within the discretion of the judge to evaluate its evidentiary value<sup>301</sup>.

According to a decision of the *Cour de cassation* (the French supreme Court in civil matters), the content of the proof depends on the law applicable to the substance of the contract or legal act which has been recorded in the instrument, not on the law applicable to the authentication procedure and not on the *lex fori*<sup>302</sup>.

#### 4.1.2. Germany

Foreign authentic acts have the **same probative value** as national authentic acts<sup>303</sup>.

- §§ 415 ss. ZPO, in particular the rules of §§ 415, 417, 418 ZPO on the probative value, apply to domestic German as well to foreign authentic acts.

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<sup>300</sup> See in particular Cass. civ. 1st civil chamber, 14.11.2007, No 07-10.935, *Droit de la famille* n° 4, comm. 50, note FONGARO.

<sup>301</sup> However, according to a dissenting opinion, the absence of legalisation does not reduce the validity or probative value of the instrument. See DURANTON, “Poncifs autour de la légalisation des actes provenant de l'étranger et destinés à produire effet en France”, *Cahiers du Cridon Lyon*, n° 50-2007.

<sup>302</sup> Cass. civ., 1st civil chamber, 28.6.2005, No 00-15.734; see also GROUD, note sous Cass. civ., 1st civil chamber, 28.6.2005, *Gaz. Pal.* 2006, No 55-56, p. 2; contrary to: Cass. civ., 1st civil chamber, 12.2.1963, *D.* 1963. 325, note HOLLEAUX, *Rev. crit. DIP* 1964. 121, note LAGARDE.

<sup>303</sup> BVerwG BayVBl 1987, 123 = IPRspr 1986, Nr 159 = NJW 1987, 1159 = NVwZ 1987, 492; OLG Hamm IPRspr 2001, 176; ZÖLLER/GEIMER, § 438 ZPO note 2.

- However, genuineness is only presumed for domestic German authentic acts (§ 437 ZPO). Unless differently provided, **genuineness has to be proven** for foreign authentic instruments by way of legalisation or apostille.

Once they have been declared enforceable, foreign authentic acts have the same enforceability and may be enforced in the same way as domestic (national) authentic acts.

#### **4.1.3. Poland**

In Poland, foreign authentic instruments have the **same probative value** as domestic authentic instruments, provided that their genuineness is proven either by legalisation or apostille or that no proof of genuineness is required due to an international agreement.

#### **4.1.4. Romania**

For Romania, the same applies as for Germany and Poland.

#### **4.1.5. England**

In England, there are no authentic instruments under English law. Therefore, **no special probatory force** is granted to foreign authentic instruments either. It is up to the judicial discretion to evaluate the probative value of a foreign authentic instrument.

#### **4.1.6. Sweden**

In Sweden, the situation is basically the same as in England. There are no domestic authentic instruments. As a consequence, foreign authentic instruments do not enjoy any special probatory force either. It is up to the discretion of the judge to evaluate their probative value in the respective case.

#### **4.1.7. Comparative Analysis**

In comparative analysis, there is a clear division between the civil law countries on one hand and the non civil law countries on the other hand:

- In **civil law countries**, foreign authentic instruments enjoy heightened **probatory force** to the same extent as national instruments (or as in their country of origin), provided that their genuineness is out of dispute.
- In non civil law countries, foreign authentic instruments **do not enjoy any special probatory force**, because there are no rules on domestic authentic instruments. One might say that authentic instruments established in civil law countries lose their special probatory force when they cross the borders of a non civil law country.

### **4.2. Formal requirements**

#### **4.2.1. France**

In general, if a foreign authentic instrument meets all the formal requirements under the law of the State of origin, then it does not need any additional formalities to produce effects in France. However, the foreign instrument must also meet the requirements of the substantive law applicable to the act.



#### 4.2.2. Germany

As a general rule, foreign authentic acts may fulfill the **formal requirements** of national law, if they are **equivalent** (DE *gleichwertig*)<sup>304</sup>. The BGH (*Bundesgerichtshof* – Federal Court of Justice = German Supreme Court in Civil, Commercial and Criminal Matters) has stated the requirements for equivalence with a German notarial authentication in the following terms:

<p>„Gleichwertigkeit ist gegeben, wenn die ausländische Urkundsperson nach Vorbildung und Stellung im Rechtsleben eine der Tätigkeit des deutschen Notars entsprechende Funktion ausübt und für die Errichtung der Urkunde ein Verfahrensrecht zu beachten hat, das den tragenden Grundsätzen des deutschen Beurkundungsrechts entspricht“<sup>305</sup>.</p>	<p>„Equivalence requires, that the foreign authenticating official by reason of his legal education and his position in the legal system performs a function similar to the activity of the German notary, and that he has to follow a procedural law which corresponds to the main principles of the German law on authentication.“<sup>306</sup></p>
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Thus equivalence is required both for the authenticating official as well as for the authentication procedure.

- First, the **legal education** of the foreign notary has to be similar to that of the German notary.
- Second, the foreign **notary’s position in the legal system** has to be similar to that of the German notary.
- Thirdly, the foreign **authentication procedure** must meet the main principles of the German authentication procedure.

Thus, the courts want to make sure that the foreign authentication meets an **equivalent standard** and grants the parties involved **comparable protection** as under the German law of Authentication.

Thus, in German **court decisions** so far, equivalence of the authentication has been assumed for authentications established by civil law notaries from various Swiss cantons<sup>307</sup>, but has been denied for US public notaries<sup>308</sup>.

#### 4.2.3. Poland

A foreign authentic instrument established in compliance with the law of authentication of the State of origin can replace a **domestic instrument**. The question whether a specific foreign instrument is equivalent to a Polish authentic instrument has not yet been raised.

<sup>304</sup> KEHE/SIEGHÖRTNER, Einl. (introduction) U notes 381, 384 ss.; generally: ARNOLD, DNotZ 1975, 581, 585; ARMBRÜSTER, in HUH/VON SCHUCKMANN, § 1 BeurkG note 78; STAUDINGER/HERTEL, Before §§ 127a/128 BGGB notes 735 ss. and § 129 BGB note 134; WINKLER, BeurkG, Einl. (introduction) note 88

<sup>305</sup> BGHZ 80, 76 = DNotZ 1981, 451 = JZ 1981, 400 = NJW 1981, 1160 = WM 1981, 376 = ZIP 1981, 402; see case notes by GEIMER, DNotZ 1981, 406; HOHLOCH, JuS 1981, 846; compare also HECKSCHEN, GmbHR 1991, 25; LERCH, DB 1992, 670; SCHERVIER, MittBayNot 1992, 66; SCHERVIER, NJW 1992, 593.

<sup>306</sup> Own translation.

<sup>307</sup> BGHZ 80, 76 = DB 1981, 983 = DNotZ 1981, 451 = NJW 1981, 1160 = WM 1981, 376 = ZIP 1981, 402; BGH GmbHR 1989, 25 = ZIP 1989, 1052, 1055 (canton Zürich); OLG München NJW-RR 1998, 758 = ZNotP 1998, 120 (half canton Basel city); OLG Frankfurt/Main DNotI-Report 2005, 78 (both half cantons Basel city and Basel county); OLG Düsseldorf DB 1989, 569 = GmbHR 1990, 169 = NJW 1989, 2200 = WM 1989, 643 (undecided for Dutch notaries).

<sup>308</sup> OLG Stuttgart DB 2000, 1218 = GmbHR 2000, 721, 725 = MittRhNotK 2000, 350 = OLG-Report 2000, 265 = RIW 2000, 629.

#### 4.2.4. Romania

According to Article 161(1) of Romanian Private International Law Act, the means of evidence for a legal act and the probative value of a document which ascertains a legal act shall be governed by the law of the place where the legal act was concluded or by the law chosen by the parties, if they had the right to choose the applicable law.

#### 4.2.5. Comparative Analysis

Thus, generally there appears to be a growing tendency among Member States to allow domestic authentic instruments to be substituted by foreign authentic instruments provided the latter are **equivalent** to their domestic counterparts with respect to the authenticating official as well as the authentication procedure

### 4.3. Enforcement

#### 4.3.1. France

A foreign authentic instrument may obtain the **exequatur** like a foreign judgment and be enforced in France under the same conditions as domestic authentic instruments, provided that it is enforceable in its State of origin (Article 509 Code of Civil Procedure)<sup>309</sup>.

#### 4.3.2. Germany

Once they have been declared enforceable (or if they are enforceable without exequatur, such as under the EEO Regulation), foreign authentic acts have the same enforceability in Germany as national authentic acts.

#### 4.3.3. Poland

For Poland, the same applies as for Germany.

#### 4.3.4. Romania

For Romania, the same applies as for France.

#### 4.3.5. England

Foreign authentic instruments are only enforceable to the extent regulated by the three relevant EC Regulations (Brussels I Regulation, Brussels II bis Regulation, EEO Regulation) or by international treaties (in particular by the Lugano Convention).

Outside the scope of application of these Regulations, foreign authentic instruments cannot be enforced in England.

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<sup>309</sup> See SAGAUT/CAGNIART, *Regard notarial sur le titre exécutoire européen : Règlement (CE) n° 805/ 2004 du Parlement européen et du Conseil du 21 avril 2004 pour les créances incontestées, JCP éd. N et Imm. N° 44*, 4 novembre 2005, 1441.

#### **4.3.6. Sweden**

For Sweden, the same applies as for England.

#### **4.3.7. Comparative Analysis**

As a result, only in France and in Romania may foreign authentic instruments be enforced outside of the scope of the three relevant EC Regulations. Thus, in France and in Romania, authentic instruments emanating from non-European States can also be enforced.

In the other four countries covered by this study, foreign authentic instruments may be enforced only if they fall within the scope of one these EC Regulations (or international agreements such as the Lugano Convention).





## Part Three

### REGULATORY INTERVENTION BY THE EUROPEAN UNION

After having analysed the existing national provisions on authentic instruments in Part One and the existing rules on the circulation of authentic instruments, this study deals in the following Part Three with the question of whether legislative action at EU level is needed to promote the free circulation of authentic instruments in cross-border cases – and if so, how such legislation should be framed.

We have divided Part Three into **three chapters**:

- Chapter I is dedicated to the question of whether legislative action is **needed**.
- Chapter II deals with the **legal basis** and the kind of possible legislative action.
- Chapter III finally attempts to describe the **scope and content** of possible legislation.

#### Chapter I

##### Need for regulatory intervention

Any analysis of whether there is a need for regulatory intervention by the EU with regarding the recognition and enforcement of authentic instruments needs to start with careful consideration of the current European *acquis (acquis communautaire)* that exists in this area.

- First, we have to address the fact that the concept of authentic instruments is not uniformly recognised throughout the European Union.
- Secondly, we will look at the current **definition** of authentic instruments in EC Regulations.
- Thirdly, we will analyse the three **existing EC Regulations** that deal with the circulation of authentic instruments, namely the Regulations Brussels I, Brussels II bis and No 805/2004.
- Fourthly, we also have to take into consideration ongoing **legislative projects** on maintenance, matrimonial property and succession.
- In the fifth section we will **evaluate** this *acquis communautaire* (including those legislative projects). We will consider which aspects of the **circulation** of authentic instruments within the European Union should continue to be regulated. In particular, we will take into account the fragmentation of existing EC Regulations and the lack of rules on the recognition of authentic instruments.
- In the sixth and final section we will continue our evaluation by looking at the possible impact of new EC legislation by **subject matter**.

## 1. Concept of authentic instrument not uniformly recognised throughout the EU

The findings in Parts I und II reinforce the traditional notion that the **concept of preventive justice**, while being recognised in all Member States adhering to the Civil Law System, is **not at all recognised in those countries belonging to the Common Law or Nordic legal systems**. Consequently, the **authentic instrument** that is the core legal means and very foundation of the whole concept of preventive justice, has been found **not to exist in the latter sets of countries**. In spite of many interconnections between Common Law and Civil Law in general, both legal families have developed along separate paths in this respect.

The study confirmed this finding by taking the situations in **England** and **Sweden** as examples. For England, the study found that in line with academic opinion among the representatives of the Common Law, there is no instrument like the authentic instrument. Rather, the activities of English general notaries for the most part boil down to mere certifications that fall short of producing authentic instruments.

As the study found, since the concept of the authentic instrument is not recognised by Common Law systems, in consequence there is no need for transferring those provisions of Community law into national law that deal with the cross-border recognition and enforcement of authentic instruments as far as the establishment of such instruments is concerned. Consequently, the **Commission's European Judicial Civil Atlas** rightly points out, with regard to the establishment of a European enforcement order in England, based on an authentic instrument according to Article 25 of the Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims:

„While Authentic Instruments from other Member States will be enforced in England and Wales they are not produced in England and Wales. Therefore there is no need to designate an authority to certify them.”<sup>310</sup>

This also applies to the other Common Law countries and to the Nordic countries. In fact, for **Sweden**, the study found that there does **not even exist a legal term** that would serve to adequately translate the notion of the authentic instrument into the Swedish language without running the risk of provoking far-reaching incoherence within the Swedish legal system.

Against this background, one might well question from the outset whether there is any need for regulatory intervention on the Community level with regard to authentic instruments in the first place, as long as those fundamental differences in the **organisation of national judicial systems** exist in the Member States. With authentic instruments being produced on the Continent, but not in the Common Law or Nordic countries, the Common Law or Nordic countries already feel at a certain disadvantage since, under existing Community legislation with regard to the circulation of authentic instruments<sup>311</sup>, they have to accept the cross-border circulation and enforcement of foreign authentic instruments without being able to issue such instruments themselves.

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<sup>310</sup> Commission's European Judicial Atlas in Civil Matters:  
[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/rc\\_information\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/rc_information_en.htm)

<sup>311</sup> See *infra* par. 3.

Consequently, it might be argued that any further Community intervention might even deepen this gulf between the Common Law/Nordic approach on the one hand, and the Continental-European model on the other. As a matter of fact, the English national reporters of this study pointed to this concern very explicitly and suggested excluding the Common Law countries and the Nordic countries from the scope of application of any further Community action on the free circulation of authentic instruments. However, that being a mainly political question, this study will from this point refrain from dealing with this issue in greater detail.

## 2. Acquis communautaire: The definition of authentic instruments

Subject to the aforementioned reservation, any analysis of whether there is a need for regulatory intervention by the EU regarding the recognition and enforcement of authentic instruments needs to start with the a careful consideration of the current *Community acquis* in this regard.

### 2.1. Brussels Convention and the Unibank judgment of the European Court of Justice

#### 2.1.1. Brussels Convention

In the relation of the Member States of the European Community, the term “authentic instrument” was first contained in Article 50 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (hereinafter called “**Brussels Convention**”). Article 50 of Brussels Convention framed the term authentic instrument basically in the same wording as Article 57 of Brussels I Regulation now does, as may be seen from the following synoptic table:

<b>Brussels Convention of 1968</b>	<b>Brussels I Regulation No 44/2001</b>
<b>TITLE IV AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS</b>	<b>CHAPTER IV AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS</b>
<b>Article 50</b>	<b>Article 57</b>
A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided for in Article 31 et seq. The application may be refused only if enforcement of the instrument is contrary to public policy in the State addressed.	1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.
	2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.
The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.	3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.
The provisions of Section 3 of Title III <sup>312</sup> shall apply as appropriate.	4. Section 3 of Chapter III <sup>313</sup> shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or

<sup>312</sup> Title III deals with “Recognition and Enforcement”, Section 3 of Title III contains “Common Provisions”.

<sup>313</sup> Chapter III deals with “Recognition and Enforcement”, Section 3 of Title III contains “Common Provisions”.

	registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.
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So the term “authentic instrument” is defined by the wording: “a document which has been formally drawn up or registered as an authentic instrument”. Also it is required that the “instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin” (Article 50(2) Brussels Convention).

### 2.1.2. ECJ Unibank judgment

The European Court of Justice (ECJ) had to deal with this definition of authentic instruments in the **Unibank** case<sup>314</sup>.

The Court had to decide on whether a Danish enforceable acknowledgment of indebtedness that had been drawn up without the **involvement of a public authority** constituted an authentic instrument. In its decision, the European Court of Justice set out the main characteristics of authentic instruments under Community law. Referring to the *Jenard-Möller* Report the Court found:

“15. Since the instruments covered by Article 50 of the Brussels Convention are enforced under exactly the same conditions as judgments, the authentic nature of such instruments must be established beyond dispute so that the court in the State in which enforcement is sought is in a position to rely on their authenticity. Since instruments drawn up between private parties are not inherently authentic, the **involvement of a public authority** or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments.

16. That interpretation of Article 50 of the Brussels Convention is supported by the **Jenard-Möller Report** on the Lugano Convention (OJ 1990 C 189, p. 57, hereinafter ‘the Jenard-Möller Report’).

17. Paragraph 72 of the Jenard-Möller Report states that the representatives of the Member States of the European Free Trade Area (EFTA) requested that the conditions which had to be fulfilled by authentic instruments in order to be regarded as authentic within the meaning of Article 50 of the Lugano Convention should be specified. In that connection the report mentions three conditions, namely: ‘the authenticity of the instrument should have been established by a public authority; this authenticity should relate to the **content of the instrument** and not only, for example, the signature; the instrument has to be **enforceable** in itself in the State in which it originates’.

18. According to the same report, the involvement of a public authority is therefore essential for an instrument to be capable of being classified as an authentic instrument within the meaning of Article 50 of the Lugano Convention”<sup>315</sup>.

In other words, the Court considers that three conditions need to be met simultaneously in order for an instrument to be regarded as authentic:

- The instrument must have been established by a **public authority**.
- The authenticity must relate to the **content** of the instrument and not only to the signature.

<sup>314</sup> European Court of Justice (ECJ), judgment of 17 June 1999 - C-260/97, *Unibank*, ECR 1999, p. I-3715.

<sup>315</sup> Highlights in bold print have been inserted by the authors of the study.

- An instrument can only be enforced in the receiving state, if it is also **enforceable in the issuing state**. Thus, the instrument must satisfy all national prerequisites necessary under the national law of the issuing state in order to be enforceable.

## 2.2. Brussels I Regulation

Article 57 of Brussels I Regulation uses the same wording for the term “authentic instrument” as its predecessor, Article 50 of Brussels Convention. It is thus beyond dispute that the interpretation of the term as found by the ECJ in the **Unibank judgment**<sup>316</sup> for the Brussels Convention also applies to Brussels I Regulation.

However, Article 57(2) makes an amendment concerning “arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them”. To be sure, this must not be misunderstood to mean that these **maintenance arrangements** are authentic instruments. Rather, for the purposes of the Regulation, these arrangements are only to be treated as if they were authentic instruments.

Article 57(2) of Brussels I Regulation has been inserted mainly due to the special situation in the Nordic countries. It is meant to ensure the circulation of maintenance agreements concluded and enforced by the **Swedish maintenance office**<sup>317</sup>. In fact, this addendum even supports the result found in Part One<sup>318</sup>: that the notion of authentic instruments is recognised only within Civil Law system of preventive justice, but does not exist in the Nordic (or Common Law) countries, so that enforceable titles, other than judgments and authentic instruments emanating from these countries, must be dealt with by special rules.

## 2.3. Brussels II bis Regulation

Article 46 of Brussels II bis Regulation also refers to authentic instruments using the same wording as Article 57 of Brussels I Regulation, namely as “documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State”. Due to the identical wording, it is generally accepted that the legal definition of authentic instruments within the Community since *Unibank* also applies to the Brussels II Regulation<sup>319</sup>.

## 2.4. Integration of the Unibank criteria in the EEO Regulation

The criteria of the Unibank decision have later been expressly adopted by the EC legislator and have been explicitly incorporated into Article 4(3)(a) **Regulation (EC) No 805/2004** of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (hereinafter “**EEO Regulation**”). This is not a new definition, but a mere clarification that the interpretation by the ECJ Unibank decision is also approved by the EC legislator.

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<sup>316</sup> See par. 2.1.2.

<sup>317</sup> Cf. justification of the Commission’s Draft, COM (1999) 348, p. 26.

<sup>318</sup> See Part One, par. 2.

<sup>319</sup> RAUSCHER, *Europäisches Zivilprozessrecht* (European Civil Procedure Law), 2<sup>nd</sup> edit. 2006, Art. 46 Brussels II bis Regulation note 2.

<b>Règlement (CE) N° 805/2004 Article 4 – Définitions</b>	<b>Regulation (EC) No 805/2004 Article 4 – Definitions</b>
Aux fins du présent règlement, les définitions suivantes s'appliquent: ...	For the purposes of this Regulation, the following definitions shall apply: ...
3. «acte authentique»: a) un acte dressé ou enregistré formellement en tant qu'acte authentique et dont l'authenticité: i) porte sur la signature et le contenu de l'acte authentique, et ii) a été établie par une autorité publique ou toute autre autorité habilitée à ce faire par l'État membre d'origine; ou b) une convention en matière d'obligations alimentaires conclue avec des autorités administratives ou authentifiée par celles-ci;	3. 'authentic instrument': a) a document which has been formally drawn up or registered as an authentic instrument, and the authenticity of which: (i) relates to the signature and the content of the instrument; and (ii) has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates; or b) an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them;

Article 4(3)(b) of EEO Regulation applies the rules that govern authentic instruments to enforceable **maintenance agreements** concluded with the intervention of administrative authorities. This rule runs parallel with Article 57(2) of Brussels I Regulation and has been included for the sake of completeness and coherence with Article 57(2) of Brussels I Regulation. As stated above, the distinction between Article 4(3)(a) and (b) of EEO Regulation shows, that these maintenance agreements are not authentic instruments in the proper sense (otherwise a separate definition would have been unnecessary), but are merely enforced in the same way.

## 2.5. Uniform definition in EC Regulations

Concluding our analysis of the term authentic instrument in Community law, we have thus found that the **definition** of authentic instruments, adopted by the interpretation of that term by the ECJ in the Unibank decision, **applies uniformly in the Community law**. This definition thus forms part of the Community *acquis* with regard to the European notion of authentic instruments.

## 2.6. Comparison with existing definitions in national law

The definition of authentic instruments under Community law contains the same criteria, which have been identified for the respective national notion of authentic instruments in the four civil law countries covered by this study, namely<sup>320</sup>:

- An authentic instrument is an instrument which has been established by a **public authority** or other authority **empowered** for that purpose by the Member State in which it originates within the official's **authentication competences**;
- Satisfaction of the prerequisites concerning **competence, procedure and form** required by the law of the Member State which instituted the authenticating official; and

<sup>320</sup> Compare Part One, par. 1.2.

- The authenticity must relate to the signature and the **content** of the instrument and provides **full probative value** of its content.

<b>Table: Definition of authentic instruments</b>						
		<b>France</b>	<b>Germany</b>	<b>Poland</b>	<b>Romania</b>	<b>EC Regulations</b>
statutory source		Art. 1317, 1319 CC	§§ 415, 417, 418 ZPO	Art. 244 CC	Art. 1117 CC	Art. 57 Brussels I (as interpreted by the Unibank decision), Art. 46 Brussels II bis Regulation; Art. 4(3)(a) Reg. 805/2004
legal term		<i>acte authentique</i>	<i>öffentliche Urkunde</i>	<i>dokument urzędowy</i>	<i>actul autentic</i>	authentic instrument
R e q u i r e m e n t s	issuing authority	received by public officers	by a public authority or by a person empowered with public faith	by public authorities or by other state authorities	by a civil servant	has been established by a public authority or other authority
	empowered for authentication	empowered to draw up such instruments	empowered with public faith	instituted for this purpose	having the power to authenticate	empowered for that purpose by the Member State in which it originates
	competence	at the place where the instrument was received (= within their competences)	within the limits of its competences (public authority) or within his functions (authenticating person)	within the limits of their competences	in right of office in the place where the act was made	
	procedure	with the requisite formalities	in the form required	recorded in the prescribed form	drawn up with the solemnities required by law	which has been formally drawn up or registered as an authentic instrument
	form					
L e g a l  E f f e c t s	probative value	Art. 1319: conclusive evidence of the agreement it contains between the contracting parties and their heirs or assigns	enjoy full proof of the act recorded	constitute proof of what they officially attest.	Article 1173 CC: provide full proof towards everybody about the provisions and conventions that they contain	the authenticity of which relates to the signature and the content of the instrument
	enforceability	Art. 3 Law no. 91-650	§ 794 (1)(5) ZPO	Art. 774 (4) Civil Procedure Code	Art. 66 Romanian Notarial Law	Art. 57 Brussels I, Art. 46 Brussels II bis; Art. 25 EEO Regulation



## **2.7. Interim conclusion**

A common definition of authentic instruments applies throughout Community law. This definition fits with national definitions used in those Member States, which have the Civil law concept of authentic instruments. It seems appropriate that any new EC legislative instrument should also build on this definition.

### 3. **Acquis communautaire: Existing EC Regulations on the enforcement of authentic instruments in other Member States**

#### 3.1. **Brussels I Regulation**

Article 57 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: “**Brussels I Regulation**”) deals with authentic instruments. Within the scope of this Regulation authentic instruments issued and enforceable in one Member State are declared enforceable in another Member State upon application. The provision is an expanded version of Article 50 of the previous Brussels Convention of 1968.

<b>Brussels Convention of 1968</b>	<b>Brussels I Regulation No 44/2001</b>
<b>TITLE IV AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS</b>	<b>CHAPTER IV AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS</b>
<b>Article 50</b>	<b>Article 57</b>
A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided for in Article 31 et seq. The application may be refused only if enforcement of the instrument is contrary to public policy in the State addressed.	1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.
	2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.
The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.	3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.
The provisions of Section 3 of Title III <sup>321</sup> shall apply as appropriate.	4. Section 3 of Chapter III <sup>322</sup> shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

<sup>321</sup> Title III deals with “Recognition and Enforcement”, Section 3 of Title III contains “Common Provisions”.

<sup>322</sup> Chapter III deals with “Recognition and Enforcement”, Section 3 of Title III contains “Common Provisions”.

### 3.1.1. Scope of application

The Regulation's scope is broadly defined. According to Article 1 it basically covers the entire field of “**civil and commercial matters**”, traditionally widely interpreted by the ECJ<sup>323</sup>. Only a few clearly defined areas are expressly excluded according to Article 1(2). Among the subject matters excluded, the status of natural persons, rights in property arising from matrimonial relationships, as well as the area of wills and succession, should be particularly emphasised. However, maintenance matters are included in the scope of the Regulation, as can be seen in the synopsis with Article 5(2).

In this context it is also important that the provisions on **competence** in Chapter II do not cover the execution of authentic instruments in the meaning of Article 57. This was already the case under the Brussels Convention, the predecessor of the Brussels I Regulation. This may be concluded from the restriction in section 3 of the preamble to the Convention on ‘legal’ competence<sup>324</sup>. In particular, recitals No 2 (sentence 1) and No 6 of the Regulation show that the limitation of the provisions on competence to judicial acts continues to be the case after the change from the Convention to an EC Regulation. In other words the Regulation governs neither international nor local competence to authenticate.

### 3.1.2. Procedure for declarations of enforceability

As is well known, Brussels I Regulation does not completely renounce the exequatur procedure for judgments or for authentic instruments. Rather, according to Article 57(1), authentic instruments are also subject to **declarations of enforceability as regulated in Article 38 and ff.**, which applies to authentic instruments in the same way that it applies to judgments.

The exequatur procedure, however, is **extremely streamlined**:

- During the application procedure the exequatur court merely has to check if the instrument is an **authentic instrument** in the sense of Community Law and if it originates from another Member State where it was drawn up in accordance with applicable rules (cf. para. 3: ‘satisfy the conditions necessary to establish its authenticity’).
- There is no **public policy** (*ordre public*) test by the enforcing State at this stage. Only in case of a subsequent legal appeal, according to Article 43 et seq., can the court refuse or revoke a declaration of enforceability on the grounds that it is obviously contrary to public policy in the enforcing Member State (Member State of enforcement).

The **competent authority** for the declaration of enforceability has deliberately not been regulated in the Brussels I Regulation, but has been left to the **Member States** to determine

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<sup>323</sup> Compare ECJ judgment of 14 October 1976 - 29/76 (*LTU Lufttransportunternehmen/Eurocontrol*), ECR 1976, p. 1541, 1550 note 3; ECJ judgment of 14 July 1977 - joined cases 9/77 and 10/77 (*Bavaria Fluggesellschaft/Eurocontrol*), ECR 1977, p. 1517, 1526 note 7; ECJ judgment of 22 February 1979 - 133/78 (*Gourdain/Nadler*), ECR 1979, p. 733, 743 note 4; ECJ judgment of 16 December 1980 - 814/79 (*Netherlands State/Rüjffer*), ECR 1980, p. 3807, 3819 note 7; ECJ, judgment of 21 April 1999 - C-172/91 (*Sonntag/Waidmann*), ECR 1993, p. 1963, 1996 note 16; ECJ, judgment of 28 March 2000 - C-7/98 (*Krombach/Bamberski*), ECR 2000, p. I-1935, 1967 note 30; ECJ judgment of 14 November 2002 - C-271/00 (*Gemeente Steenbergen/Baten*), ECR 2002, p. I-10489, 10519 note 28..

<sup>324</sup> For details cf. STAUDINGER, in: RAUSCHER, *Europäisches Zivilprozessrecht*, Art. 57 Brussels I Regulation note 2.

(Article 39(1): “court or competent authority”). This is a consequence of the subsidiarity principle. For better control of the proper enforcement of Community law by Member States, these authorities are to be made transparent through their inclusion in Annex II of the Regulation<sup>325</sup>.

Otherwise, enforceability of an authentic instrument in another Member State is speeded up by a **certificate issued under Article 57(4)** sentence 2. The competent authority of the State of origin may issue such a certificate using the standard form in Annex VI of the regulation. In that certificate the competent authority, which does not have to be the same one that drew up the instrument, confirms in the language of the enforcing State that the instrument is enforceable in the Member State of origin<sup>326</sup>.

Brussels I Regulation governs only the conditions under which titles from one Member State are enforceable in other Member States. The actual enforcement procedure, is, however, determined by the *lex fori* of the Member State of enforcement. This conforms to the established European enforcement system in use since the Brussels Convention.

### 3.1.3. Abolition of legalisation and apostille

Apart from the exequatur, a separate procedure of **legalisation is no longer necessary**. According to Article 56 of Brussels I Regulation, the exequatur proceeding requires “neither legislation nor any similar formalities”. An identical rule was already contained in Article 49 of the previous Brussels Convention (and also in the parallel provision in Article 49 Lugano Convention).

## 3.2. Brussels II bis Regulation

The second Community instrument that is relevant to a consideration of authentic instruments is Article 46 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter “Brussels II bis Regulation”). Pursuant to Article 46 of Brussels II bis Regulation, authentic instruments, concerning matters within the scope of the regulation that have been drawn up and are enforceable in one Member State are enforceable within the EC in the same manner as judgments are enforceable under the Regulation:

<b>CHAPITRE III- RECONNAISSANCE ET EXÉCUTION</b>	<b>CHAPTER III - RECOGNITION AND ENFORCEMENT</b>
<b>SECTION 5 - Actes authentiques et accords</b>	<b>SECTION 5 - Authentic instruments and agreements</b>
<b>Article 46</b>	<b>Article 46</b>
Les actes authentiques reçus et exécutoires dans un État membre ainsi que les accords entre parties exécutoires dans l'État membre d'origine sont reconnus et rendus exécutoires dans les mêmes	Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded

<sup>325</sup> For a tabular summary of the competent authorities for the declaration of enforceability of authentic instruments, see Part Two, par. 1.1.2.

<sup>326</sup> For a tabular summary of the competent authorities for issuing the certificate in the Member State of origin according to Annex VI Brussels I Convention, see Part Two, par. 1.1.2.

conditions que des décisions.	shall be recognised and declared enforceable under the same conditions as judgments.
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### 3.2.1. Scope of application

Brussels II bis Regulation replaced Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (hereinafter “Brussels II Regulation”) which had just come into force on 1.3.2001. The predecessor provision to Article 46 of Brussels II bis Regulation on authentic instruments was Article 13(3) of Brussels II Regulation. While Brussels II Regulation governed only **matrimonial matters**, and connected custody matters, Brussels II bis Regulation also covers all decisions on **parental responsibility** (custody and visitation rights). Consequently, Brussels II bis Regulation covers those agreements on parental responsibility that have been recorded in an authentic instrument and contain an enforceable obligation.

On the other hand, not all other matrimonial and parental legal matters are covered, in particular the marital property regime, including pension rights, the personal effects of marriage, descent, marital and child names. Excluded altogether are questions of civil status arising neither through marriage nor filiation.

In the same way as Brussels I Regulation, Brussels II bis Regulation does not regulate international or local **competence to authenticate**. Its numerous provisions on competence (Articles 3 et seq.) apply only to court decisions, not to the cross-border enforceability of authentic instruments.

### 3.2.2. Establishment in a Member State

In accordance with Brussels I Regulation, as well as the system of recognition and enforcement of judgments, Brussels II bis Regulation also restricts its coverage of authentic instruments in Article 46 to those that have been drawn up in a Member State. Such instruments must have been drawn up by a competent authority that is affiliated to the respective Member State, irrespective of the domicile and the nationality of the parties. The issue of an instrument by consular authorities of a Member State in third countries means the instrument has been drawn up in the respective Member State to which the consular official belongs.

### 3.2.3. Procedure for declarations of enforceability

In contrast to Article 57 of Brussels I Regulation, Brussels II bis Regulation does not declare authentic instruments enforceable on their own, but includes these instruments in the system of recognition of judgments in Article 21 et seq. Thus, the grounds for non-recognition of judgments (Article 22 et seq.) also apply against declarations of enforcement of authentic instruments (Article 46)<sup>327</sup>.

As with Brussels I Regulation, the requirement for cross-border enforceability of an authentic instrument is that it is **enforceable in the Member State of origin** – or more precisely, that the instrument can be enforced directly in the State of origin **without further legal**

<sup>327</sup> RAUSCHER, *Europäisches Zivilprozessrecht*, Art. 45 Brussels II bis Regulation, note 1.

**enforcement proceedings.** It is not sufficient for an instrument to be enforceable in the State of enforcement if it is not enforceable in the State of origin.

Brussels II bis Regulation does not dispense with the enforceability procedure for authentic instruments either, but refers to **exequatur proceedings**, which apply equally to judgments according to Article 28 et seq. The narrow nature of the criteria for non-enforcement referred to in Article 31(2) (by reference to the reasons listed in Articles 22, 23 and 24) means this is a narrowly confined procedure. The possibilities of restricting the efficacy of an enforcement declaration, though, go beyond such a restriction solely for an obvious violation of public policy as per Brussels I Regulation.

There are certain practical difficulties connected with the provisions in Article 37(1)(b) and Article 39 because the **standard forms** in Annex I and II, are not designed for authentic instruments. In addition, it is not clear which authority in the State of origin is responsible for issuing enforceability certificates for authentic instruments, because the authorities are not listed in an annex to the Regulation. The competences, of course, are regulated by national law.

### 3.3. Regulation (EC) No 805/2004 creating a European Enforcement Order

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (hereinafter “EEO Regulation”) contains a rule regarding authentic instruments. Under Article 25(2) an authentic instrument which has been **certified as a European Enforcement Order** in the Member State of origin may be enforced in other Member States without the need for a declaration of enforceability and without any possibility of challenging its enforceability.

Article 25 Actes authentiques	Article 25 Authentic instruments
1. Un acte authentique relatif à une créance au sens de l'article 4, paragraphe 2, exécutoire dans un État membre, est, sur demande adressée à l'autorité désignée par l'État membre d'origine, certifié en tant que titre exécutoire européen en utilisant le formulaire type figurant à l'annexe III.	1. An authentic instrument concerning a claim within the meaning of Article 4(2) which is enforceable in one Member State shall, upon application to the authority designated by the Member State of origin, be certified as a European Enforcement Order, using the standard form in Annex III.
2. Un acte authentique certifié en tant que titre exécutoire européen dans l'État membre d'origine est exécuté dans les autres États membres sans qu'une déclaration constatant la force exécutoire soit nécessaire et sans qu'il soit possible de s'opposer à son exécution.	2. An authentic instrument which has been certified as a European Enforcement Order in the Member State of origin shall be enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its enforceability.
3. Les dispositions du chapitre II, à l'exception de l'article 5, de l'article 6, paragraphe 1, et de l'article 9, paragraphe 1, et du chapitre IV, à l'exception de l'article 21, paragraphe 1, et de l'article 22, s'appliquent en tant que de besoin.	3. The provisions of Chapter II, with the exception of Articles 5, 6(1) and 9(1), and of Chapter IV, with the exception of Articles 21(1) and 22, shall apply as appropriate. <sup>328</sup>

<sup>328</sup> Chapter II deals with the “European Enforcement Order”, Chapter IV with “Enforcement”.



### 3.3.1. Scope of application

By Article 2 of EEO Regulation (similar to Article 1 Brussels I Regulation), the instrument must therefore relate to **civil and commercial matters** and should not fall within the areas excluded in paragraph 2. Excluded are – as in Brussels I Regulation – in particular status and legal capacity of natural persons, rights in property arising out of matrimonial relationship as well as the area of wills and succession.

The Regulation applies to authentic instruments regarding money claims in the sense of Article 4(2), these are claims for a **specific sum of money** that has fallen due or for which the **due date** is indicated in the authentic instrument. Therefore non-cash benefit claims are not included. A specific amount need not necessarily be set out in the claim; it is sufficient that the amount of the claim, for example for interest, can be derived from the calculation given in the claim.

If a claim is for a specific sum of money is based on a number of separate rights, which are only partially covered by the scope of the regulation (e.g. maintenance claims in contrast to equalisation of accrued gains or pension right adjustments) it is necessary to divide the various claims, if that is possible. If it is not, it is generally considered that the scope of the Regulation will be extended and all claims under the instrument will be covered<sup>329</sup>.

### 3.3.2. Establishment in a Member State

The previous statements regarding Brussels II bis Regulation apply in this context too.

### 3.3.3. Certification as an European Enforcement Order

The only additional condition for the certification as an Enforcement Order is that the authentic instrument is **enforceable in the Member State of origin**. In other words that it has the character of an “enforcement title” under national law. Other conditions need not be examined, particularly not the minimum standards for an orderly procedure for the protection of the debtor as set out in Article 12 and following. The Regulation assumes by implication that adequate instruction and standards of care obligations have already been put in place by the Member States for the establishment of authentic instruments so that the debtor is sufficiently protected<sup>330</sup>. Whether this assumption holds true for all authorities in all Member States that are entitled to draw up enforceable instruments cannot be further examined in this study.

Otherwise the certificate is given upon application by the creditor to the competent authority in the Member State of origin by using the **standard form** provided in **Annex III** of the Regulation. To what extent a hearing attended by the debtor is conducted before issuing a certificate depends on the national provisions for the implementation of the Regulation<sup>331</sup>.

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<sup>329</sup> More details appear in RAUSCHER/PABST, in: RAUSCHER, *Europäisches Zivilprozessrecht* Art. 4 EEO Regulation note 18.

<sup>330</sup> The original version of the Commission’s proposal still envisioned an instruction and monitoring requirement; this was however later deleted, cf. COM(2002) 159, 32.

<sup>331</sup> For a tabular summary of the competent authorities for issuing the certificate in the Member State of origin, see Part Two, par. 1.1.2.



### 3.3.4. Abolition of the exequatur procedure

The EEO Regulation abolishes the exequatur procedure for both judgments and authentic instruments (Article 5). Any form of challenge, review or other controls in the State of enforcement is forbidden by Article 5, which states: “without any possibility of opposing its recognition“. The only possible objection by the debtor is on the grounds that the title certified as a European Enforcement Order is irreconcilable with an earlier judgment given in any Member State or in a third country (Article 21). Public policy controls in the enforcing State are no longer possible. The certification of the instrument as an Enforcement Order in the State of origin leads to automatic and mandatory enforceability in the enforcing State designated by the creditor. The underlying rationale is that the debtor has not contested the claim (Article 3(1)). The resulting abandonment of any safeguards against extreme cases has been heavily criticised<sup>332</sup>.

### 3.3.5. Right of appeal

Article 10 applies to the right of appeal against the certification as an Enforcement Order. The orders on appeal are limited to a **rectification** (Article 10(1)(a)) or a **withdrawal** (Article 10(1)(b)), depending on whether there is a discrepancy between the instrument and the certificate due to a material error, or if the requirements for granting the certificate were clearly absent. The decision is delivered by the court of appeal designated by the respective national law.

### 3.3.6. Relationship to other EC Regulations

As shown in Article 27 et seq. the creditor’s ability further to seek enforcement of an authentic instrument under other Community Laws, especially under Brussels I Regulation, remains unaffected. Therefore, the EEO Regulation deliberately does not have the character of a *lex specialis*, but only offers an **additional option** for cross-border enforceability within its scope. Basically, the creditor is free to choose those enforcement proceedings which seem best suited to any given case.

## 3.4. No rules on recognition of authentic instruments in the existing Regulations

The general concept underlying the EU approach with regard to the free circulation of judgments within the Community is that of mutual recognition and enforcement. While the foregoing shows that this also applies to the cross-border enforceability of authentic instruments, the question arises whether the concept of mutual recognition as part of this general approach is likewise applicable to authentic instruments.

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<sup>332</sup> See WAGNER, *Vom Brüsseler Übereinkommen über die Brüssel I-Verordnung zum Europäischen Vollstreckungstitel*, IPRax 2002, 75, 90, with further references; STADLER, *Das Europäische Zivilprozessrecht - Wie viel Beschleunigung verträgt Europa? Kritisches zur Verordnung über den Europäischen Vollstreckungstitel und ihrer Grundidee, (Rolf Stürner zum 60. Geburtstag)*, IPRax 2004, 2, 7; KOHLER, in: BAUER/MANSEL (Editors), *Systemwechsel im europäischen Kollisionsrecht - Fachtagung der Bayer-Stiftung für deutsches und internationales Arbeits- und Wirtschaftsrecht am 17. und 18. Mai 2001, (Change of systems in European collision laws)*, 2002, p. 147, 160.

### 3.4.1. Brussels I Regulation

Brussels I Regulation deals with the recognition and the enforcement of court judgments in two separate sections (Articles 33 ss. and Articles 38 ss.). For authentic instruments, rules only deal with enforcement, not recognition. **Article 57(4) Brussels I Regulation** merely declares which common provisions of Section 3 of Chapter III are applicable as appropriate. However, it does not refer to the specific rules on the recognition of court decisions contained in Section 1 of Chapter III (Articles 33 ss.).

That was already the case under the **Brussels Convention** and furthermore is so under **Article 50 of the Lugano Convention** (as well as under Article 57 of the new Lugano Convention).

An explanation for this can be derived from the very concept of **recognition as used for judgments**. Recognition of judgments concerns **res judicata** that is the preclusive, constitutive and interventive effect or third party notice<sup>333</sup>. The enforceable instrument does not have these effects.

### 3.4.2. EEO Regulation

In the **EEO Regulation**, Article 5 deals with the recognition and enforcement of judgments whereas the otherwise identical Article 25(2) regulates only the enforcement of authentic instruments, not their recognition.

### 3.4.3. Brussels II bis Regulation

Only Article 46 of Brussels II bis Regulation provides for both the recognition and enforcement of authentic instruments. However, it seems quite clear that the Community legislator did not thereby intend positively to lay down, that authentic instruments are capable of mutual recognition in the same way as judgments. Rather, the underlying **legislative intent** appears to have been to apply the **grounds for non-recognition** (Article 22 ss.) also to the enforcement and thus to limit further the cross-border enforcement of authentic instruments that deal with the status of persons and maintenance disputes<sup>334</sup>.

However **unintended** by the Community legislator, the application of the concept of recognition in general to authentic instruments has effects well beyond the actual aim of merely strengthening the obstacles to their enforcement. As a consequence, the wording of Article 46 also requires now that legal acts, which otherwise would have been subject to proof of validity under substantive law according to the relevant private international law, must now also be recognised so far as their material content is concerned, for example with regard to their **constitutive legal effect**<sup>335</sup>.

### 3.4.4. No recognition for lack of res judicata

One important finding therefore is that the concept of mutual recognition cannot simply be transferred from judgments to **authentic instruments** since authentic instruments **do not**

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<sup>333</sup> Cf. GEIMER, *Internationales Zivilprozeßrecht* (International Civil Procedure Law), 4<sup>th</sup> edit. 2001, notes 2788 ss.

<sup>334</sup> For more detail see RAUSCHER, *Europäisches Zivilprozessrecht*, Art. 45 Brussels II bis Regulation note 1.

<sup>335</sup> For details to this problem see RAUSCHER, *ibid.*

**have res judicata effect**<sup>336</sup>. Authentic instruments record contracts or other legal acts of the parties with probative value and make them enforceable, however the authentic instrument does not preclude court proceedings attacking the validity of the instrument or the underlying transaction.

Nevertheless, authentic instruments could be “recognised” in a narrow sense relating to the specific legal effects of the instrument. So the provision in Article 57 Brussels I Regulation on the enforcement is by and large the same as a specific provision on the recognition of the enforceability effect of the instrument. Similarly, one can speak of recognising the genuineness of an instrument in terms of its origin from a competent authority, its date and the parties involved, as well as of recognising the probative value attached to the instrument. However, these effects are ultimately only preconditions for the enforceability of the instrument, since the instrument will not be enforceable if it is a fake instrument or if the preconditions to its probative value are not met. For this reason, Article 57(3) of Brussels I Regulation stipulates that an instrument relied upon must satisfy the conditions necessary to establish their authenticity in the Member State of origin.

In any case, in order to prevent misunderstandings or inconsistencies like those described above with regard to Brussels II bis, in the context of authentic instruments it is strongly recommended not to use the term “recognition” in an abstract way. Rather, in a future legislative instrument, the term “recognition” should always be defined by associating it with specific legal effects of the authentic instrument (e.g. probative value, enforceability, presumption of genuineness), which effects are to be “recognised” in case of the instrument’s cross-border circulation.

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<sup>336</sup> For the concept of recognition, limited to res judicata, see: BUREAU/MUIR WATT, *Droit international privé*, vol. I, PUF, 2008, p. 227; CALLE, *L’acte public en droit international privé*, édition Economica 1993; MAYER, Les méthodes de la reconnaissance en droit international privé, in: *Mélanges en l’honneur de Paul Lagarde*, Dalloz, 2005, p. 547; LAGARDE, La reconnaissance mode d’emploi, in: *Mélanges en l’honneur de Hélène Gaudmet – Tallon*, Dalloz, 2008, p. 2008; differently – for recognition in a broader sense: PAMBOUKIS, *L’acte public étrangère en droit international privé*, Paris, 1993; FERNANDEZ ROZAS/LORENZO, *Derecho Internacional Privado*, Madrid, 2004, p. 177; BALLARINO/MARI, Uniformità e riconoscimento. Vecchi problemi e nuove tendenze della cooperazione giudiziaria nella Comunità europea, in: *Rivista di diritto internazionale*, 2006, p. 6; NOODT TAQUELA, Reconocimiento de documentos públicos extranjeros, in: *Derecho internacional privado de los estados del Mercosur*, Buenos Aires, 2003, p. 430; PASQUALIS, Attuazione ed esecuzione forzata in Italia degli atti pubblici provenienti dall’estero, in: *Trattato di Diritto Civile del Consiglio Nazionale del Notariato*, Napoli 2007.

## 4. Analysis of ongoing EC legislative action regarding free circulation of authentic instruments

An investigation into the need for a further European measure in the area of the free circulation of authentic instruments would not be complete if it only considered the Community acts already in force. Equally important are those legislative proposals that already contain a sufficiently concrete content.

### 4.1. Maintenance obligations

Free circulation of authentic instruments is also dealt with in Articles 37 and 38 of the proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (COM (2005)649 of 15 December 2005)<sup>337</sup> (hereinafter proposal for a **Maintenance Regulation**). The draft Regulation covers all existing forms of maintenance obligation in the Member States, first and foremost those involving children.

#### 4.1.1. Purpose and status of the Proposal

The draft aims at implementing the conclusions reached by the **European Council** at the conference of **Tampere** in the year 1999<sup>338</sup>. There, the Council of the European Union was asked to work out specific procedural provisions to simplify and speed up the settlement of cross-border disputes in the area of maintenance obligations.

The **European Parliament** adopted a legislative resolution on the proposal on 13 December 2007<sup>339</sup>. Also, the Committee on “Civil Liberties, Justice and Home Affairs” started its debate on the draft report by Mrs. Grabowska<sup>340</sup>.

The Committee’s draft was the subject of a consultation between the Member States present in the related working group of the **Council** of the European Union. The Council of the Justice Ministers has recently reached agreement on a draft Regulation on the rules relating to jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations<sup>341</sup>. Thus the legislative procedure could be finalised in the foreseeable future.

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<sup>337</sup> For the state of the decision-making process see Prelex:

[http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=193665](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=193665)

<sup>338</sup> Presidency Conclusions, Tampere European Council, 15-16 October 1999, internet:

[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm)

<sup>339</sup> Legislative resolution of 13 December 2007 on the proposal for a Council regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (COM(2005)649 – C6-0079/2006 – 2005/259(CNS)).

<sup>340</sup> For the procedure file in the EP Legislative Observatory, see:

<http://www.europarl.europa.eu/oeil/file.jsp?id=5299842>

<sup>341</sup> 2899<sup>th</sup> Council meeting Justice and Home Affairs, Luxembourg, 24 October 2008. See press release:

<http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/299&format=HTML&aged=0&language=EN&guiLanguage=en>

#### 4.1.2. Relationship with the Brussels I Regulation

Brussels I Regulation already covers the enforcement of maintenance decisions and of authentic instruments on maintenance<sup>342</sup>. Therefore, a **material expansion is not** the objective of the proposal.

However, enforcement would become easier if the proposal were adopted as “maintenance titles” (that is enforceable titles containing maintenance obligations) would become **enforceable without any requirement of exequatur** procedure in the Member State of enforcement (unlike the present requirements under the Brussels I and Brussels II bis Regulations).

This resembles the basic concept of enforcement under EEO Regulation, which requires just a certificate issued in the Member State of origin for the title to become enforceable in another Member State. However, even a certificate would no longer be required under the proposed Regulation on maintenance obligations. Instead, an **extract of the maintenance decision** or authentic instrument (together with a copy of the decision or instrument) would be the basis of enforcement (Article 28 and Annex I).

In contrast to the EEO Regulation, the proposal also aims at including contested “titles” and, unlike current Community acts in the area of cross-border on enforcement titles, the proposed Regulation would ultimately unify the provisions of procedural law connected to the rules of recognition and enforcement with the rules of **private international law** in order to harmonise the law applicable to maintenance orders.

#### 4.1.3. Rules on Authentic Instruments

The proposal also deals with the enforcement of authentic instruments. The legal **definition** of the authentic instrument (Article 2(4)(a)) would be reaffirmed unaltered and modeled on Article 4(3)(a) of EEO Regulation. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them would also be treated as authentic instruments (Article 2(4)(b) of the proposal).

**Enforcement** of authentic instruments which are enforceable in the Member State of origin would follow the same rules as those applying to the enforcement of court decisions (Article 37), that is without the requirement of exequatur, merely based on an extract from the act being enforced (Annex II).

The **recognition** of authentic instruments is mentioned in the proposal. However, it is not clear what the proposal mean by the term. According to Article 38 of the proposal, the provisions of the chapter on the enforcement of court decisions “shall apply as appropriate to the recognition and enforcement of authentic instruments and agreements between the parties that are enforceable.” The term may be just superfluous for the recognition as an “enforceable title”. “Recognition” could also mean that authentic instruments could not be reviewed as to its substance in another Member State during the enforcement procedure (a prohibition which applies to the review of court decisions under Article 32(1) of the proposal). However, that would not make sense. Authentic instruments are not capable of *res judicata*. In any case, it would be better if the word “recognition” were clarified in the proposal.

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<sup>342</sup> See Part Three, Chapter I, par. 3.1.1.

#### 4.1.4. Abolition of Legalisation

Within its scope, the proposal expressly envisages the elimination of all forms of legalisation (including apostille) for court decisions and authentic instruments (Article 31).

### 4.2. Succession

#### 4.2.1. Purpose and status of the Proposal

Wills and succession issues are among the **few remaining areas** that are **excluded** from the scope of currently existing Community instruments on the mutual recognition and enforcement of decisions and authentic instruments. This gap would be filled with this proposal.

The adoption of a European instrument relating to succession was one of the priorities of the **1998 Vienna Action Plan**<sup>343</sup>. The programme of measures for implementation of the principle of mutual recognition of decision in civil and commercial matters adopted by the Council and the Commission at the end of 2000 provides for an instrument to be drafted. More recently, the Hague Programme<sup>344</sup> called on the Commission to present a Green Paper covering a whole range of issues – applicable law, jurisdiction and recognition, administrative measures (certificates of inheritance, registration of wills).

A **group of experts** appointed by the Commission has recently ended their work. According to public statements by the Commission's staff, a first draft of a Regulation on succession should be introduced to the public in the year 2009 and taken into the legislative procedure.

#### 4.2.2. Rules on authentic instruments

Also the Regulation on wills and succession will contain provisions on the enforcement of authentic instruments. The Green Paper on succession and wills asked explicitly a question concerning the recognition and enforcement of authentic instruments<sup>345</sup>.

Regarding cross-border **enforcement**, there are two options as may also be seen from the questions in the Green Paper. The first option is based on the concepts of the Brussels II bis Regulation<sup>346</sup>. The second would adopt the rules in the Brussels I Regulation<sup>347</sup>. Whichever option the Regulation chooses in the end, it appears clear that cross-border enforceability of authentic instruments in the area of succession will be ensured.

Certificates of inheritance are also, in many cases, authentic instruments. The Green Paper envisages the introduction of a **European certificate of inheritance**<sup>348</sup>.

Concerning the **formal validity of foreign testaments** or other dispositions mortis causa, most respondents to the Green Paper proposed to refer to rules of the Hague Convention of 5

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<sup>343</sup> OJ C 19, 23.1.1999.

<sup>344</sup> Presidency conclusions, Brussels European Council, 4-5 November 2004.

<sup>345</sup> Green paper, Succession and wills, COM(2005) 65 (final) of 1.03.2005, par. 4.2. and question 27; internet: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0065en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0065en01.pdf)

<sup>346</sup> See above, par. 3.2.3.

<sup>347</sup> See above, par. 3.1.2.

<sup>348</sup> Green Paper, par. 5 and questions 33-35.

October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (hereinafter called “**Hague Testamentary Form Convention**”)<sup>349</sup>.

### 4.3. Matrimonial property

#### 4.3.1. Purpose and Status of the Proposal

Finally, a Regulation on matrimonial property is also being prepared at the moment. Modelled on the proposals for the regulations on maintenance and on succession, it proposes regulating private international law as well as the international competence, mutual recognition and enforcement. This would close the **regulatory gap** regarding the circulation of titles in international family law left by the Brussels I and Brussels II bis Regulations and the proposal for a maintenance Regulation<sup>350</sup>.

Following publication of a **Green Paper**<sup>351</sup>, the European Commission has recently appointed a group of experts. Thus the project is still in its early stages.

#### 4.3.2. Rules on Authentic Instruments

There is no text of any draft proposal yet. However, it is to be expected that a future Regulation on marital property will also contain provisions on authentic instruments.

- This has been suggested in the Green Paper<sup>352</sup>.
- As with the previously described proposals on maintenance and on succession law, the project is part of the Commission’s so-called PMR-programme and consequently it also part of the programme of measures for the implementation of mutual recognition of decisions in civil and commercial matters. Irrespective of further progress of work it can be assumed that, within its scope, the envisaged regulation, following the traditional pattern, will again contain at least provisions on the cross-border enforceability of authentic instruments.

Thus, the free circulation of authentic instruments on matrimonial property should therefore be sufficiently ensured.

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<sup>349</sup> Internet: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=40](http://www.hcch.net/index_en.php?act=conventions.text&cid=40)

<sup>350</sup> The reform of the Brussels IIa Regulation (also called Rome III) currently under way does not deal with the free movement of authentic instruments and can hence be disregarded here.

<sup>351</sup> Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition (COM (2006)400 final, (SEC(2006) 952).

<sup>352</sup> Green Paper, par. 2.4.2. and question 17.

## 5. Evaluation and interim conclusion on the need for and on possible objectives of regulatory intervention

In the following, the findings on the *acquis communautaire* will be evaluated. The goal is to **identify gaps**, inconsistencies or other problems inherent in the current EC Regulations, which might require regulatory intervention.

### 5.1. Definition of authentic instruments

The evaluation of the *acquis communautaire* concerning authentic instruments shows that the definition of authentic instruments does **not need any material changes**. Although Article 57 of Brussels I Regulation and Article 46 of Brussels II bis Regulations and Article 4(3)(a) of EEO Regulation contain different wording, the content of the definition is the same. In the EEO Regulation, the EC legislator merely adapted the more detailed interpretation given by the European Court of Justice in the *Unibank* case.

This definition is fully consistent with the definitions in the various national legal systems as has been shown<sup>353</sup>.

### 5.2. Rules on enforcement

#### 5.2.1. Existing rules are overall satisfactory

As described in Part One in more detail<sup>354</sup> authentic instruments fulfill a main function within the continental European system of preventive justice in that they act as enforcement titles, which the State offers its citizens as an effective and cost saving alternative to the assertion of claims through legal action. Where this title quality of authentic instruments is concerned, it appears that Community Law has already covered practically all the relevant areas with existing or projected legal acts. Additional areas in which rights to benefits are evidenced by an authentic instrument that cannot already be enforced by the creditor on the basis of current or projected Community instruments – provided, of course, that the national enforcement law of the enforcing State recognises the relevant claim to benefits – are hardly imaginable.

As far as **money claims** are concerned, the EEO Regulation provides a **fast and easy enforcement** procedure for the most important practical obligations contained in authentic instruments. The procedure for money claims could hardly be made faster or easier.

Most other enforceable authentic instruments may be enforced under Brussels I Regulation, some also under Brussels II bis Regulation. Although an *exequatur* is required, the reasons for denying the *exequatur* are rather limited. So the enforcement of **other claims consumes some more time and effort** than that of money claims, but is still efficient overall.

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<sup>353</sup> See par. 2.6.

<sup>354</sup> See Introduction, par. 3.



### 5.2.2. Different approaches taken by the various EC Regulations

The differing rules on enforcement in the various EC Regulations could justify a legislative intervention for the purpose of harmonizing the general approach.

- Article 57 of Brussels I Regulation and Article 46 of Brussels II bis Regulation both require an **exequatur** in the Member State of enforcing State.
- Under Article 25 of EEO Regulation, a **certificate** established in the Member State of origin suffices for enforcement.
- The proposal for a Maintenance Regulation would let a mere **extract** of the instrument suffice for execution (which is close, although not completely the same as the certificate under the EEO Regulation).

### 5.2.3. Evolution towards abolition of exequatur

The differing rules also show an **evolution in time**: The more recent the Regulation is, the more limited are the procedural requirements for the enforcement of titles established in other Member States.

- First, following the traditional approach, a declaration of enforceability by the Member State of enforcement is the only requirement for enforcement.
- Then, a **certificate** which is established by the state of origin has been **added**, first optional, then mandatory, in order to speed up the declaration of enforceability.
- Finally, the **declaration of enforceability** in the Member State of enforcement is **abolished**. The certificate or the extract issued in the state of origin becomes the only requirement for enforcement.

This evolution may be illustrated by the following table:

<b>Evolving rules of enforcement under the different EC instruments and the Lugano Convention</b> (in the order of the time of conclusion or enactment) <sup>355</sup>					
	previous Brussels Convention = (present) <b>Lugano Convention</b>	<b>Brussels I Regulation</b> (= new Lugano Convention)	<b>Brussels II bis Regulation</b>	<b>Regulation on the European Enforcement Order</b>	<b>proposal for Regulation on Maintenance Agreements</b>
Legalisation	Art. 49: no legalisation required	Art. 56: no legalisation required	Art. 52: no legalisation required	(no legalisation required)	Art. 31: no legalisation required
State of origin	no certificate	Art. 57: <b>certificate</b> in form of Annex VI ( <b>optional</b> )	Art. 39: <b>certificate</b> similar to forms Annexes I/II ( <b>mandatory</b> )	Art. 25: <b>certificate</b> as European Enforcement Order (Annex III)	Art. 37, 28: <b>extract</b> of the decision or act Annexes I/II ( <b>mandatory</b> )

<sup>355</sup> For a more comprehensive comparison of the various EC instruments, see Part Two, par. 3.1.

enforcing State	<b>declaration of enforceability</b> (Art. 50, 46 ss.)	<b>declaration of enforceability</b> (Art. 57, 38 ss.)	<b>declaration of enforceability</b> (Art. 46, 28 ss.)	no further procedure required (Art. 5: abolition of exequatur)	no further procedure required (Art. 25: abolition of exequatur)
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Given today's advanced state of European integration with regard to the free circulation of enforcement titles the time may be ripe for one single and uniform rule **abolishing the exequatur** procedure for all authentic instruments, not only for those on money claims (either following the model of the European Enforcement Order or the extract proposed for the future Regulation on Maintenance Agreements). This being a mainly political question, however, this study refrains from dealing with it in greater detail.

The general abolition of the exequatur procedure is already being discussed within the framework of the **revision of the Brussels I Regulation**<sup>356</sup>. If exequatur were to be abolished for judgments, then it should also be abolished for authentic instruments.

### 5.3. No rules on recognition

Currently, Community law does not regulate the recognition as such of authentic instruments, except for some very specific situations covered by Article 46 of Brussels II bis Regulation<sup>357</sup>. The reason, as we have seen, is because "recognition" in the proper sense of recognising the **res judicata effect** (as it applies for judgments) does not make sense for authentic instruments, because authentic instruments lack the res judicata effect. So one may only talk about "recognition" in the sense of giving foreign authentic instruments specific effects such as probative value and enforceability<sup>358</sup>.

That is why it was pointed out that if the term "recognition" were to be used in the context of the circulation of authentic acts it should always be associated with specific legal effects of instruments in the context of their cross-border recognition.

#### 5.3.1. Exemption from the apostille requirement

The **only procedural requirement** for the use of authentic instruments in other Member States is the apostille. This does not flow from EC law, but from the Hague Apostille Convention and other international treaties.

- According to the basic rule of national law in the Civil Law countries studied, the genuineness of foreign authentic instruments is not presumed (as it is for domestic authentic instruments), but has to be proven - generally by way of **legalisation**.
- The **Hague Apostille Convention** of 5 October 1961, which applies between all EU Member States, exempts authentic instruments emanating in one Member and destined for the use in another Member State from the requirement of legalisation in favour of a more simplified approach, the apostille.

<sup>356</sup> See the Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03) by Rupprecht-Karls-Universität Heidelberg of September 2007, internet: [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/study_application_brussels_1_en.pdf)

<sup>357</sup> See par. 3.4.

<sup>358</sup> See par. 3.4.4.

- A **complete exemption** not only of the legalisation, but also of the apostille requirement applies only for some countries and not for all authentic instruments on the basis of international, particularly bilateral agreements<sup>359</sup>.

In order to further the free circulation of authentic instruments within the European Union, consideration might be given to **abolishing the apostille requirement completely** for all authentic instruments emanating from other Member States.

- Such abolition of procedural requirements is consistent with the logic of the existing Community instruments, according to which a “judgment given in a Member State shall be recognised in the other Member States without any special procedure being required”<sup>360</sup>. Applying this logic to authentic instruments would mean that an authentic instrument issued in a Member State should be recognised in other Member States without any special procedure being required.
- Existing international agreements on the abolition of the apostille show that such a step is generally **feasible** and that Member States **trust** the functioning of the authentication system of other Member States (whereas some Member States have opposed the coming into force of the Hague Apostille Convention in relation to European non EU Member States<sup>361</sup>).

### 5.3.2. Probative value

One of the very core legal qualities of authentic acts is, as has been shown in Part One, their **probative value** in the sense that they provide full and comprehensive evidence of the facts and declarations they record.

“Recognition” of the probative value of foreign authentic instruments has not (yet) been regulated by EC law. This study has shown that the **national procedural laws** of the Civil Law countries studied already contain a rule granting foreign authentic instruments generally the same probative value as domestic authentic instruments<sup>362</sup>.

### 5.3.3. No exemption from the application of substantive law

Recognition, however, **cannot mean** that foreign acts would be **exempted from substantive requirements** of the applicable law. For instance, if for a renunciation of a future interest under a succession take effect, the applicable substantive law requires an authentication of the renunciation in the testator’s presence<sup>363</sup>, then a foreign authentic instrument will only suffice if the testator participated in the act (irrespective of whether the law of the place of authentication also requires the testator’s presence). This is not a question of recognition, but of substantive law applicable to the act.

### 5.3.4. Authentic instruments subject to registration in public registers

Whereas the enforcement of authentic instruments has already been quite comprehensively dealt with at the Community level, authentic instruments which are subject to **registration in**

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<sup>359</sup> For a more detailed analysis, compare Part Two, par. 2.

<sup>360</sup> Article 33(1) Brussels I Regulation; Article 21(1) Brussels II bis Regulation. Article 5 EEO Regulation (Abolition of exequatur) contains a similar provision, although focused on execution.

<sup>361</sup> See Part Two, par. 1.2.2.

<sup>362</sup> For a more detailed analysis, compare Part Two, par. 4.1.

<sup>363</sup> e.g. DE § 2347(2) BGB.

**national public registers** (civil status register, land register, companies' register) are generally not covered by EC legislation.

With regard to the need for regulatory intervention, the question arises whether this is mainly due to a mere accident on the part of the EU legislator or based on well-founded grounds.

Generally, public registers offer comprehensive and reliable information. The public's confidence in the completeness and correctness of information recorded in these registers is often legal protection ("publicity" or "**good faith**")<sup>364</sup>. The reliable information provided by the public registers, saves the parties from the time and cost of intensive research on the correctness and reliability of register entries and protects consumers as well as entrepreneurs from unnecessary costs.

Such an effective register system, which also helps lowering transaction costs, does not exist in the Common Law and Nordic countries, which are not familiar with the system of preventive justice with its core means, the authentic instrument<sup>365</sup>. Even within the various Civil Law Member States, the **national public register systems differ widely** both in structure, organization and proceedings as well as in the extent of public faith assigned to register entries. Thus, registers reflect the diversity of European legal cultures in a special way. The large variety of registration procedures is due to the close interconnection with the respective substantive national law (which shows larger differences between the Member States, in particular in land law) and, particularly, with the national tax law.

The functional capacity of the continental European registration model requires a **review of the content of applications** for registration. In order to ensure permanent functional capacity of this register system, Member States with Civil Law systems have integrated their register institutions into the system of preventive justice. They require that the legal transactions underlying the registrations must be established in the form of authentic instruments<sup>366</sup>. Thus the authentication official has to ensure the correct formulation of the registration documents, examine the identity of the applicants as well as the authenticity of their declarations.

The **role of authentication** and of the authentication official **varies** according to the different functions of the respective national register<sup>367</sup>.

These differences in the register systems procedure strongly suggest that the inclusion of the registration of authentic instruments into the scope of European regulatory intervention should only be considered after careful examination of the specifics of each register. This will remain necessary as long as the national registers remain within the regulatory domain of the Member States. The study will later<sup>368</sup> tackle this issue in greater detail for the various registers.

#### **5.4. The approach to mutual recognition for authentic instruments**

<sup>364</sup> See for civil status documents DE § 66 in connection with §§ 60(1), 11 PStG (Civil Status Act); RO Article 31(2) Law No 119/1996 on civil status documents; for land registers DE § 892 BGB; PL Article 3 KWH; RO Article 41 Law No 7/1996 on the cadastre and on real estate publicity; for commercial registers DE § 15 HGB (German Commercial Code), § 32 GBO; PL Article 17 KRS; RO Article 4 Law No 26/1990.

<sup>365</sup> See BORMANN/APFELBAUM, *Handelsregister und GmbH-Gründung in Deutschland als "best practice" im Vergleich zum anglo-amerikanischen Rechtskreis*, ZIP 2007, 946.

<sup>366</sup> See Part One, par. 3.1.

<sup>367</sup> See Part One, par. 5.13. and 5.14.

<sup>368</sup> See par. 6.

Concluding our evaluation, we think that the **concept of mutual recognition** that is in place for judgments cannot be applied in its current form to authentic instruments, but this is not to say that specific legal effects of the instruments should not have cross-border effects. Such legal effects should encompass the instrument's genuineness, its probative value and its enforceability. Thus, if the term "recognition" is used, it has to be clearly defined in this sense. This approach would also be consistent with the existing EC Regulations on the enforcement of authentic instruments emanating from other Member States.

Considering the registration of authentic instruments in **public registers** (civil status register, land register, commercial register), a careful consideration has to be given to the specific functions of authentications for the purpose of registration. Careful consideration still needs to be given to the various types of registers and the relevant authentic instruments.

## 6. Possible impact of new EC legislation by subject matter

It can be concluded from the above that the free circulation of authentic instruments in terms of cross-border enforceability under existing and projected EU instruments is already ensured in a number of fields of law that are of great practical importance. The question arises whether there **other areas remain** which should be included in the existing Community Regulations, or which might benefit from new rules on the free circulation of authentic instruments. With this question in mind, we will focus on the identification of the types of authentic instruments that are **significant in cross-border transactions**.

### 6.1. Contracts in general

Until now, **existing EC Regulations** on authentic instruments have only covered the **enforceability** aspect of such instruments. Besides, as we have shown, existing EC Regulations lack a consistent approach with regard to exequatur. Neither the genuineness, nor the probative value of authentic instruments, however, are dealt with sufficiently at Community level.

Thus, specific rules on the recognition of these effects of authentic acts would **promote the circulation** of authentic instruments relating to the whole range of contracts in civil and commercial matters.

### 6.2. Certificates on civil status

European Union citizens moving to another Member State often have to prove their civil status through certificates on civil status or extracts from civil status registers emanating from the home country. E.g.:

- Married couples who, after moving to another Member State, must prove their **marital status** to authorities there;
- Parents, who have moved to another Member State must furnish proof to the authorities about the **birth** of their child in another country; or
- Relatives of a deceased who are winding up a cross-border estate must supply evidence of the **death** of their relative to the authorities of another Member State.

Often, proof is required in the form of an **authentic instrument**. Generally, civil status certificates issued by competent authorities are authentic instruments. However, for the use in another Member State, an apostille may be required.

Civil status certificates, and the civil status registers on which they are based, are generally characterised by comparatively minimal complexity both as regards their formulation procedure and their content. The competent authority entrusted with their formulation regularly authenticates in the certificate the existence of one or more simple facts – sometimes on the basis of direct perception (as in the case of marriage); sometimes or on the basis of the perception of witnesses (as in the case of death or birth certificates). Difficult legal questions typically do not arise. The procedure for issuing these certificates is comparatively simple.

### 6.2.1. No EC legislation

So far, the mutual recognition of civil status certificates has not been regulated by EC legislation.

#### 6.2.1.1. ECJ case *Dafeki*

However, the issue was before the **European Court of Justice** in the case of “**Dafeki**”. Here, the ECJ decided: “In proceedings for determining the entitlements to social security benefits of a migrant worker who is a Community national, the competent social security institutions and the courts of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.”<sup>369</sup>

The **facts** of the case were the following. Mrs *Dafeki*, a Greek citizen living in Germany had applied for early retirement benefits, for which she was qualified if she had reached the age of 60. Her civil status documents and an old extract from the register of births dated her birth in the year 1933. However, in 1986, she had obtained both the birth register and a court judgment correcting her birth to the year 1929. The German pension fund did not trust the corrected certificates and denied the application. Under German law, the presumption of authenticity did not apply to foreign status documents. So the German court would have applied a rule, according to which, in the event of inconsistency between several documents of differing dates, the document, which prevails, is generally, in the absence of other sufficient evidence, the one closest in time to the event, and hence, in this case, the first extract from the register of births.

The ECJ decided that both the prohibition of discrimination contained in the provisions of the EC treaty regarding **freedom of movement of workers**<sup>370</sup> and the **social security system**<sup>371</sup> prevented Member States from disregarding civil status documents emanating from other Member States. Taking into account the “significant differences between the Member States as regards the provisions governing the maintenance and rectification of registers of civil status”, the Court reasoned that the general and abstract presumption of superiority of the earlier document could not justify refusal to take account of a rectification made by a court in another Member State:

“18. Consequently, the administrative and judicial authorities of a Member State are **not required under Community law to treat as equivalent** subsequent rectifications of certificates of civil status made by the competent authorities of their own State and those made by the competent authorities of another Member State.

19. Nevertheless, exercise of the rights arising from freedom of movement for workers is not possible without production of documents relative to personal status, which are generally issued by the worker's State of origin. It follows that the administrative and judicial authorities of a Member State **must accept certificates** and analogous documents relative to personal status issued by the competent authorities of the other Member States, **unless their accuracy is seriously undermined** by concrete evidence relating to the individual case in question.”<sup>372</sup>

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<sup>369</sup> ECJ judgment of 2.12.1997 – C-336/94 (*Dafeki*), ECR I 1997, 6761.

<sup>370</sup> ex Article 48 ECT – now Article 39.

<sup>371</sup> ex Article 51 ECT – now Article 42.

<sup>372</sup> Highlights in bold print have been inserted by the authors of the study.

### 6.2.1.2. Evaluation of the Dafeki decision

The ECJ decision in the Dafeki case does **not require full mutual recognition** of civil status certificates emanating from other Member States.

- First, the ECJ decided on a **specific fact pattern** concerning social security benefits, which cannot necessarily be applied to other circumstances.
- More importantly, the ECJ did **not require** that foreign certificates of civil status be treated as **equivalent** to domestic ones, even though the receiving Member State is generally required to accept such documents if issued by the competent authorities.
- Finally, the Dafeki case does **not discuss the issue of authentic instruments**, but concerns civil status certificates in general, whether or not they are authentic instruments under their respective national law.

### 6.2.2. No general application of CIEC conventions

Against this background, it is not surprising that, for some time now, efforts have been made on an intergovernmental level to harmonise civil status entries and to ease the free circulation of authentic instruments based on these.

The General Assembly of the International Commission on Civil Status (CIEC) adopted a recommendation for the harmonisation of civil status registrations in 1987 in Lisbon<sup>373</sup>. A further recommendation for the harmonisation of extracts from civil status registrations was adopted by the General Assembly in 1990 in Madrid<sup>374</sup>. These recommendations are limited to advising Member States on the minimum content and form of civil status certificates. This should facilitate translation, intelligibility and electronic data capture of civil status entries in intergovernmental transactions<sup>375</sup>.

There are a number of area-specific treaties on civil status that exclude the use of foreign civil status instruments from the necessity of legalisation or similar certification formalities thus requiring positive proof of the genuineness of these instrument only in cases of serious doubt. The abolition of legalisation or apostille requirements has been regulated by **four CIEC conventions**, namely<sup>376</sup>,

- Article 5 Paris Convention of 1956;
- Article 4 Luxembourg Convention of 1957;
- Article 8 Vienna Convention of 1976; and
- Article 2 Athens Convention of 1977.

These recommendations of the CIEC address the design of national civil status certificates and do not intend to introduce certificates that would compete with international civil status certificates established on the basis of intergovernmental agreements. Of particular interest in this context, is the Vienna Convention of 8. September 1976 to establish multilingual extracts of civil status certificates. Civil status certificates established under this convention re free of any kind of formality, especially legislation or apostille procedures, in the other contract States. However, to date **only a few States have signed** the agreement. Among these States

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<sup>373</sup> For details see BORNHOFEN, StAZ 1988, 241.

<sup>374</sup> For details see BORNHOFEN, StAZ 1991, 20.

<sup>375</sup> A tabular summary of the CIEC-treaties can be found in internet on the CIEC homepage:  
<http://www.ciec1.org/index.htm>

<sup>376</sup> See Part Two, par. 1.2.5.



are Belgium, Bosnia-Herzegovina, Germany, France, Italy, Croatia, Luxembourg, Macedonia, Montenegro, the Netherlands, Austria, Poland, Portugal, Switzerland, Serbia, Slovenia, Spain and Turkey.

Thus, **only 11 out of the 27 EU Member States** have ratified the Vienna Convention of 1976 (and additionally one or more of the other conventions)<sup>377</sup>.

### **6.2.3. Need for regulatory intervention**

The above explanations show that successful efforts have already been made in the inter-country area to facilitate the circulation of civil status documents. They also show that as a result a large degree of harmonisation has been achieved in the formulation of civil status documents between several States. The decision by the Court of Justice at the same time shows the remaining gaps arise from a lack of a uniform Community-wide rule in this area. In particular, to date there is no regulation on the Community-wide recognition of the probative value of civil status instruments properly drawn up by the competent authority of a Member State.

In connection with this is the procedure of legalisation. The recognition of the probative value of the civil status certificates requires a genuine instrument. Providing evidence of genuineness is the purpose of the legislation. It is true, that in the meantime, all Member States have entered into the Hague Apostille Convention so that within the Community, legalisation only requires the issue of an apostille. Even this simplified procedure, though, still involves an outlay of time and money by citizens, which limits the free circulation of instruments. As described in part I, there are currently only few intergovernmental agreements that also release authentic instruments from the apostille requirement in cases where the Hague Convention does not apply. On the other hand, a Community-wide release from the requirements of the apostille, as envisaged here, would be consistent with the approach of existing European instruments regarding the freed movement of enforceable decisions and authentic instruments.

It therefore seems worth contemplating a regulation that, in the interest of the freed movement of civil status documents, would release these documents from the need for an **apostille** in Community-wide legal transactions on the one hand, and at the same time would provide for the recognition of such document's probative value in the receiving State.

## **6.3. Commercial and company law**

### **6.3.1. Powers of attorney**

#### **6.3.1.1. Significance in cross-border transactions**

**Powers of attorney**, i.e. instruments by which a person – the agent – is being authorised legally to represent another party – the principal – play a significant role in daily legal business, including cross-border transactions. Partly, they are executed when there is a particular legal need during which the principal does not want to or cannot act himself. These proxy instruments are also drawn up as unlimited powers of attorney that authorise an agent the authority to represent his principal.

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<sup>377</sup> See Part Two, par. 1.2.4.

As far as the **form of a legally valid power of attorney** is concerned, we encounter a wide array of different rules in the Member States. Sometimes, the form depends on the nature of the envisaged legal affair for which it is being granted; sometimes the power of attorney can be in any form in the absence of special provisions to the contrary. Sometimes, powers of attorney need to be in authenticated deeds; sometimes a mere certification of signatures is sufficient. In general, it seems fair to state that, as with other legal affairs, rigid forms of authentication become more necessary the more important are the personal or economic consequences of the agent's actions to the principal.

#### **6.3.1.2. Need for regulatory intervention**

For the time being there are no specific Community provisions on the furtherance of the cross-border circulation of authentic power of attorney documents. Since these documents are not enforceable as such, they fall outside the scope of the existing EC Regulations on the free movement of titles (Brussels I, Brussels II bis, EEO Regulations). As far as authentic instruments on power of attorney or proxies with certified signature are concerned, obstacles to their free cross-border movement can arise in two ways: for one thing, the procedures for verification of the instrument's genuineness (legalisation or apostille) are a certain burden, since they come at an expense both in terms of time and money. In addition, for authentic instruments on power of attorney there is the possibility that the heightened probative value attached to the instrument in the state of establishment might not automatically be recognised by all authorities in other Member States given the lack of a clear-cut Community provision on the issue.

Overall, thus, it can be stated that the **apostille-procedure** for verification of an instrument's genuineness poses an obstacle to the free movement of power of attorney documents. As pointed out earlier, there are only a few bilateral treaties in place between the Member States that abolish the necessity of an apostille for the cross-border legal affairs between the signatory states. Along the lines of the existing provisions on the mutual recognition and enforcement of judgments and on the enforcement of authentic instruments, it might therefore seem appropriate to exclude also power of attorney deeds from any legalisation. A reason for this is that the risk of forgery can hardly be more serious than in the case of authentic power of attorney deeds than it is with regard to authentic instruments and judgments falling within the scope of the European instruments on mutual recognition and enforcement.

This reasoning also applies to powers of attorneys or proxies with certified signatures where the involvement of a public official has been restricted to certifying the signature under what is and remains otherwise a private proxy. Here, the legal application of the apostille is to the certification note only and not the text of the document. Since again no particularly higher risk of falsification attaches to such a certification, any general abandonment of the apostille should therefore also include powers of attorney and proxies with certified signature as long as the certification is delivered by a public official. Otherwise, there would arise the somewhat contradictory result that apostilles are being abolished for authentic instruments containing a power of attorney while still being required for powers of attorney with certified signatures which – being the less rigid form – do not merit as much legal protection as an authenticate document.

It seems advisable to ensure that any special probative value attaching to an authentic instrument that has been drawn up in accordance with the applicable rules in its state of issue should also be recognised by the receiving State. Since such recognition may certainly not lead to a foreign instrument being granted a legal effect that is wider than that of comparable

domestic instruments, any such rule would also need to provide that the recognition of such probative value should be in line with the probative value attached to domestic instruments.

### 6.3.2. Extracts of commercial registers

If a company acts outside its jurisdiction of incorporation, it often has to prove its existence and the authority of its representatives by reference to extracts from commercial registers. These excerpts, which in many countries are authentic instruments, are **not yet regulated** by the existing EC Regulations because they are not enforceable.

Also in practice, **recognition** of such extracts sometimes seems to **encounter difficulties**. One reason for this seems to be the varying format and content of these extracts in various Member States. The second reason seems to be that some extracts are hardly recognisable as valid extracts.

The latter problem could be addressed by a legislative clarification of the probative force of extracts from commercial registers. Thus, these extracts should also be included in any future EC legislation and dealt with in the same way as documents containing powers of attorney.

### 6.3.3. Authentic instruments subject to entry into commercial registers

#### 6.3.3.1. Significance in cross-border transactions

Many Member States require **authentic instruments** to effect important transactions under corporate law, such as the founding of limited liability companies, amendments to their articles of association, their transformation (change of form, merger, and division) or capital measures. This is to ensure that only valid companies participate in these legal transactions. At the same time, the State fulfils its responsibility for ensuring the proper functioning of the public commercial register by protecting the register from false entries.

As far as the significance of authentic instruments related to company law in **cross-border transactions** is concerned, it is, however, important to make a number of distinctions. Instruments that are to be used in a Member State other than the one in which they are issued are mostly those that are not recorded as such in a public register. Rather, they confirm specific facts based upon entries in the register, such as the existence of a company, or kind and scope of its managing director's authority to represent the company, or they officially attest facts that are not recorded in a public register, such as the company's having granted powers of attorney. These documents are of substantial importance since even small and medium-sized companies are increasingly active within the internal market. Those activities require them to be able to prove with certain what authority their directors have to bind them. These instruments have already been discussed above<sup>378</sup> and the need for further EU regulation been analysed.

The situation is harder to evaluate with regard to authentic instruments in company law that are subject to **registration** in national commercial registers. For the most part, these instruments are drawn up in the register's state itself, and are rarely used in a cross-border context. The reasons for this are similar to those relating to real estate instruments subject to entry into the national property register. The necessity carefully to adapt the instrument to the national peculiarities of registration law, the need to communicate with local authorities in the

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<sup>378</sup> See par. 6.3.1.

State of registration (e.g. to obtain authorisations and clearance certifications) before or immediately after registration (e.g. tax authorities) and, frequently, the wish to get the transaction executed as soon as possible by registration of the underlying documents in the register in the format required by that register – the latter is particularly relevant if electronic communication with the register authorities is not possible. All this leads to the result that instruments subject to registration are still for the most part drawn up in the State of registration.

Knowing the **local peculiarities** of the registration law, and being as a rule in close contact with the relevant local authorities and the local court of registration, the authenticating official can thus ensure a smooth and quick registration. Besides, also for liability reasons (delays in the register procedure due to errors in the application procedure can cause significant damages to a company, in particular in company law) the foreign authenticating official himself has usually little interest in drawing up a document destined to be registered in a foreign register. And finally, if the management of a company is based in the State of registration, having the authentic instrument be drawn up on the spot is often the most practical solution.

#### **6.3.3.2. Need for regulatory intervention**

As a matter of fact, though, the wish for authentication abroad may well increase to the extent that the company's shareholders are habitually resident abroad, or where the company's head office on the one hand, and the company's registered seat on the other, are located in different Member States. Currently, an increasing tendency in this respect can clearly be observed, as is evidenced by the evolution of the European Company Law and the Case law of the European Court of Justice. Against this background, it seems reasonable to include also authentic instruments, which are subject to entry into commercial registers in a future legislation in the same way as we recommended in relation to power of attorney documents and commercial extracts.

### **6.4. Family law**

In Civil Law States, authentic instruments are often required, because of the importance of legal acts concerning the status of person or the marital relations or the spouses. Some practically important **enforceable acts** in this field have already been covered by Brussels I Regulation and EEO Regulation (namely maintenance agreements) or by Brussels II bis Regulation (e.g. enforceable agreements on child custody). Expanding the scope of enforceability might add some, but not many more cases.

A greater impact would rather be achieved by rules on the **recognition** of the **genuineness** (i.e. abolition of apostille) and the **probative value** of authentic instruments in the area of family law (e.g. considering status acts such as the recognition of paternity).

### **6.5. Succession**

In wills and succession, the circulation of authentic instruments will, as has been shown, be regulated by the **new sectoral instrument** under consideration. This instrument will also contain special rules on the **formal validity of foreign testaments** and on the introduction of a **European Certificate of Inheritance**<sup>379</sup>. Both questions can only be regulated by special

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<sup>379</sup> See par. 4.2.

rules. The first is a rule of private international law, not of recognition. The second creates a new type of European certificate and thus goes beyond a mere question of recognition. Besides, the enforceability of authentic instruments – and according to the present draft also their recognition<sup>380</sup> - will also be dealt with by the up-coming legislative instrument.

Thus, overall, in the field of wills and succession, any new general regulatory intervention would have a **rather limited impact**.

## **6.6. Land law**

### **6.6.1. Significance of cross-border use of authentic instruments**

As seen in part I, the authentic instrument – here in the form of a notarial instrument – also plays an important role in the conveyancing of real property in most Member States. In the area of preventive justice the underlying policy is to accommodate the particularly personal and financial significance associated with the purchase of property for many citizens. The consultation and comprehensive instruction connected with the authentication should fulfil all of the parties' legal needs in relation to the purchase. At the same time the authentic instrument is the basis in these States for registering the change of ownership in the real property register, which reliably records the title to, and the liabilities, attaching to a property. As already described above, a number of special local legal provisions play a role especially in property law that must be considered when drawing up conveyancing documents to ensure their validity and legality. As a rule, in Member States following the civil law approach of preventive justice this task has been entrusted by the State to the civil law notary as a public official in order to relieve the registration authorities of this task.

In cross-border legal transaction property purchases by citizens from other Member States is gaining in significance. Much less important, however, is the cross-border transfer of the authentic conveyancing instruments. Of the 8.000 – 9.000 legal questions addressed to DNotI, the German Notarial Institute<sup>381</sup>, just about 20-25 concern contracts on immovable property situated outside Germany. These 20-25 questions are just about 1% of the more than 2.000 questions on private international law or foreign law or just about 0,25% of all questions addressed to DNotI per year<sup>382</sup>. In fact, these few cases do not even all concern the cross-border use of authentic instruments in land conveyancing but rather deal with any issue arising in the context of the purchase of real property outside Germany (e.g. the use of powers of attorney). The significance of a cross-border circulation of an authentic conveyancing deed is thus even smaller still.

There are multiple reasons for such minor significance of cross-border use of authentic conveyancing instruments.

#### **6.6.1.1. Land transaction as a fundamentally local matter**

Land transactions are fundamentally “local” matters due to the immovable nature of the object purchased and subject to a multitude of special legal and registration directives as well as to the need to involve the local authorities in the preparation and conclusion of the purchase. There is a clear contrast here with the purchase of movables.

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<sup>380</sup> See par. 4.2.2.

<sup>381</sup> DNotI, Deutsches Notarinstitut, internet: [www.dnoti.de](http://www.dnoti.de).

<sup>382</sup> The numbers have been based on the database which DNotI keeps of all its legal expertise.



### 6.6.1.2. National registration system

This applies all the more due to the close ties between a land conveyance and its registration in the local registration system. There is no such thing as a uniform registration system in the Member States. Rather, just like with real property law in general, the real property registers differ significantly between the Member States in terms of organisation, content and legal effect of the entries. Consequently these differences also have an impact on how the authentic instrument that is subject to registration needs to be designed. The content of the registers, for example, is not the same in all Member States. Furthermore, there are significant differences both as concerns the conditions and the legal effects of registration. A large number of Member States provides for a material validity check prior to registration; some do not. In some Member States registration only has a declaratory effect, thus allowing for the transfer of title to become effective irrespective of the registration (**declaratory effect**)<sup>383</sup>, whereas in other Member States title passes only at the time of registration (**constitutive effect**)<sup>384</sup>. Moreover, protection of ‘good faith’ in the facts registered in the land registry varies between the Member States to a considerable degree.

### 6.6.1.3. Application of the law of the situs (*lex rei sitae*)

Furthermore, for ownership and rights in rem of land, universally the law of the state where the land is situated applies (*lex rei sitae*). This principle applies in Community law<sup>385</sup> as well as in the various national legal systems<sup>386</sup>. In addition, this principle is binding upon parties to the effect that they cannot derogate from the *lex rei sitae*.

The principle is based, on the one hand, on **public policies**. Valuable land – since not increasable - should always be submitted to domestic legal control. Even more important, though, is the protection of the sensible balance of national property law. In fact, unlike most other legal areas, property law is distinguished by a wide array of particular national institutions and legal phenomena that have evolved gradually throughout centuries along the lines of a specific cultural and historic background. This delicate balance might well be disturbed by permitting incompatible foreign legal provisions to enter. The principle of *lex rei sitae* is thus also designed to help preserve this balance. This applies all the more since land law is closely intertwined with many other areas of national law, in particular zoning law and building permits, statutory preemption rights, historic rights *in rem*<sup>387</sup>, agricultural law and tax law.

### 6.6.1.4. Rules on jurisdiction

On the procedural level, concerning jurisdiction, the state in which the property is located has **exclusive competence** to adjudicate in proceedings which have as their object the ownership of land or other rights *in rem* in the land. This rule is also enshrined in **Article 22(1) Brussels I Regulation**. Agreements conferring jurisdiction have no legal force if they purport to exclude the exclusive jurisdiction of the courts of the state in which the land is situated (Article 23(5) Brussels I Regulation).

<sup>383</sup> E.g. in France for all entries; in Poland for the transfer of ownership.

<sup>384</sup> E.g. in Germany (§§ 873, 925 BGB); in Poland for the registration of mortgages.

<sup>385</sup> Article 11(5) Regulation (CE) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the applicable law to contractual obligations (Rome I Regulation).

<sup>386</sup> FR Cass. Civ., 1<sup>st</sup> civil chamber, 25.2. 1986, Bull. Civ., No 38; DE Article 43 EGBGB (Introductory Law to the German Civil Code); PL Article 24 Private International Law Act; RO Article 49 Private International Law Act;

<sup>387</sup> E.g. in Scotland, the remaining parts of feudal law have just been abolished a couple of years ago. In particular for rural property, traditional, non-registered rights in rem might exist in many countries.

#### 6.6.1.5. The role of local financing of the transaction

In addition, a property purchase usually requires outside financing (and valuation) for which predominately local banks and credit institutions are used. Since the security for the financing (the mortgage) is also usually granted through authentic instruments<sup>388</sup> and, for financing reasons, often established in the immediate context of the purchase agreement, and since the form of financing also has to be considered when drawing up the conveyancing instruments, credit institutions are as a rule also interested in having the instruments drawn up in situ.

#### 6.6.1.6. Different control functions of the authenticating official in land law

Finally, whereas the functions of the authenticating authority in the various countries in relation to the parties is similar during the authentication procedure itself, their role differs widely concerning their role in helping the parties prepare, execute and perform the contract and – most important – in state control.

- The most obvious example is the authenticating official's duties concerning **tax collection**. In some countries, the notary is only obliged to notify the tax authorities, whereas in others he has to retain the taxes and is personally liable for their payment<sup>389</sup>. These duties are part of the authenticating official's duties and thereby would **not apply to a foreign authenticating official**.
- Also, the notary's role in obtaining **administrative permits** which are necessary for the performance of the contract or in checking the legal situation of the property sold (**building permit, zoning law** etc.) is quite different in the various Member States<sup>390</sup>.

Therefore, the contractual parties typically have the necessary authentic instruments drawn up and executed at the location of the property irrespective of their nationality or permanent residence. This way it is ensured that the instruments actually comply with the partly local provisions as well as the local registration procedures and can thus be entered into the land register quickly. At the same time this facilitates communication with the local authorities involved in the preparation and processing of the purchase. Since sellers and buyers usually spend some time, at least temporarily, on their property for use and maintenance, they typically do not incur substantial expenses when the authentic instruments are drawn up in situ.

This explains the comparatively minor significance of cross-border use of authentic conveyancing instruments.

#### 6.6.2. Need for regulatory intervention

Against this background, there does not seem to be any need for regulatory intervention related to the cross-border circulation of authentic real estate instruments, at least at this stage. Authentic instruments dealing with rights *in rem* in immovable property that are the basis of registration in a public real estate register of a Member State should therefore be **excluded from the scope of application** of a EU regulatory intervention destined to further facilitate cross-border circulation of authentic instruments.

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<sup>388</sup> See Part One, par. 3.1.

<sup>389</sup> Compare Part One, 5.13.3.

<sup>390</sup> Compare Part One, 5.14.2.



## 6.7. Certificates in the form of authentic instruments

### 6.7.1. Significance in cross-border transactions

As has already been pointed out in the context of corporate law, official certificates in the form of authentic instruments play a significant role in cross-border transactions. Excerpts from the companies register may prove the existence of a company and the authority of its directors to bind it. Some national systems grant the same probative force to notarial certificates, which are based on entries in the register (but which might include legal conclusions drawn from the entries in the register)<sup>391</sup>.

The competency to draw up such authentic instruments falls, as a rule, with the registry courts and/or civil law notaries. These certificates or confirmations have to be distinguished from the authentication of a person's declaration of intention. Rather, they are some kind of a legal expert opinion by the authentication official delivered e.g. on the basis of entries in public registers. Nevertheless, many Member States attach to such documents also the legal qualities of an authentic instrument. Besides, these certificates also fulfil the European criteria for authentic instruments since they are drawn up by a public authority or a public official with the authentication also referring to the content of the instrument.

### 6.7.2. Need for regulatory intervention

As for the need for regulatory intervention, what has been stated above in the context of powers of attorney deeds also applies here *mutatis mutandis*. There are no specific European provisions to ensure an unhindered circulation of such authentic instruments. Existing EC regulations on the circulation of titles are not applicable because these instruments are not enforceable. It is true that there are no reliable data as to the kind and extent of problems in cross-border recognition of the probative value of such instruments. However, at least the **apostille** procedure places a certain burden on the free movement of these authentic instruments. In this respect, it seems difficult again to think of grounds why the renunciation of the apostille brought about in the scope of the EC regulations on the free movement of titles shall not be extended to cover also authentic certificates and confirmations.

For the rest, what has been stated above on the recognition of probative value attached to an authentic instrument also applies here. At least for the sake of clarification such a rule should be provided.

## 6.8. Other Authentic Instruments

### 6.8.1. Types of subject matter

Apart from the above-mentioned kinds of authentic instrument that, from a practical point of view, deserve primary attention, there is a range of further subjects that may also be dealt with by authentic instruments. Whether this actually is the case varies, though, significantly within the Member States<sup>392</sup>. In certain Member States authentic instruments are e.g. also made use of regarding such different things as **drawings, lists of assets, escrow, affixing and removing seals, public sales or the taking of oaths**.

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<sup>391</sup> E.g. DE § 21 BNotO.

<sup>392</sup> Compare Part One, par. 3.1.

### 6.8.2. Significance in cross-border transactions

Given that those kinds of authentic instruments are not uniformly employed in all Member States in the system of preventive justice, it seems **hard to evaluate their cross-border significance**. Reliable statistical data do not exist. Judging by the subject matter of these authentic instruments, which is usually more related to local events it seems fair, though, to expect that these instruments are seldom designed for cross-border use in the Community.

### 6.8.3. Need for regulatory intervention

Therefore there does not really seem to be a significant need for Community intervention with regard to these kinds of authentic instrument. On the other hand, the possibility of one of these instruments being made use of in a Member State different from the one in which it was issued cannot be ruled out completely. Specific EC rules on their unhindered circulation do not exist for the time being. To the extent these instruments lack enforceability of their content they do not fall within the scope of the existing regulations on the free circulation of enforcement titles.

Just as there is no reliable data on the extent to which these instruments play any significant cross-border role within the Community in the first place, we lack well-founded empirical evidence as to the kinds of problems that may arise in any such cross-border case. At any rate, here too, the apostille procedure places without doubt a burden on the free circulation of these instruments so that it seems justifiable to extend the scope of the abolition of the apostille already prevailing under the European regulations on the free movement of enforcement titles to these kinds of authentic instruments. In addition, it seems reasonable to have the heightened probative value attached to these instruments in their state of establishment generally recognised in the receiving State, thus enabling their use as authentic instruments there.

## 6.9. Interim conclusion on the legal areas relevant for regulatory intervention

To sum up our findings on the need for Community intervention, this study began by tackling an issue of general concern in this context. This is that as authentic instruments are the product of the continental European system of preventive justice they are not produced in those legal systems following the common law approach like England and Wales, Ireland, and the Nordic countries. Based on the concerns pointed out in the English country report, the study thus raised the question whether any regulatory intervention on the part of the Community that specifically deals with the circulation of authentic instruments might even serve to deepen the already existing gulf between the civil law Member States and the common law States, in that the latter would have to recognise and enforce foreign authentic instruments without being able to produce them themselves. This study found this to be a primarily political issue, though, and therefore refrained from dealing with it in greater detail.

This issue aside, the study found that one has to differentiate between kinds of authentic instrument. As regards the function of **authentic instruments as enforcement titles** the various EC regulations enabling a free movement of titles already existing or at least about to be enacted already seem to cover most situations. Nevertheless, an aspect that might deserve further attention on the part of the Community legislator is the **diversity of rules regarding the exequatur**. As analysed above, the older regulations Brussels I and Brussels II bis, still provide for some form of simplified exequatur, whereas the newer EEO Regulation does

away with any kind of exequatur. The study found reasons that given today's advanced state of European integration with regard to the free circulation of enforcement titles the time may be ripe for one single and uniform regulation substituting all existing instruments and repealing within its scope of application the exequatur.

As regards **authentic instruments subject to registration in national public registers** the study found that they are generally not covered by European legislation. The study found, though, that Community legislator's reluctance in this field does not come by mere accident but rather is based on certain well-founded grounds. In particular, the differences both in structure, organization and proceedings of the various national public register systems in place in the Member States including the differences regarding the nature and extent of public faith assigned to register entries as well as the close interconnection between those peculiarities of national registration law on the one hand and the way of drawing up an authentic instrument subject to entry into a public register on the other strongly speaks against including such instruments within the scope of EU regulatory intervention. This seems to be true at least as long as the national registers remain within the regulatory domain of the Member States.

The study thus concluded that for the time being there is no need for regulatory intervention particularly with regard to authentic instruments dealing with **rights in rem in immovable property** that are the basis of registration in a public real estate register.

With regard to authentic instruments dealing with **company law** matters the study with similar reasoning came to doubt the need for intervention for instruments subject to registration. Against the current development of European company law and the ever-increasing need for companies to do cross-border business, though, the study decided in favour of incorporation of authentic instruments in this area into future regulatory intervention by the Community.

Also, given the already more-advanced state of European integration for authentic instruments on **civil status** the study found reasons speaking in favour of Community intervention to further facilitate the free circulation of these instruments. In particular, the study pointed to apostille procedures and the related cross-border recognition of the instrument's heightened probative value.

With regard to **authentic instruments not subject to entry into national public registers** the study found that here, too, repealing the apostille procedure and substituting it by an ex-post facto control in cases of serious doubt as to the authenticity of the instrument, as well as providing for a general cross-border recognition of the instrument's probative value, might contribute to further facilitating the free circulation of authentic instruments.

It needs to be pointed out, though, that a serious evaluation of the issue of need of regulatory intervention ultimately remains difficult given the lack of well-founded reliable data both on the extent of today's cross-border use of authentic instruments and on the kind of possible problems connected to any such cross-border use in any given case.

## Chapter II

### Legal basis and kind of regulatory intervention by the EU

To the extent that any need for Community intervention is recognised, the question of the legal basis and form of appropriate intervention arises. The following questions must be addressed:

- What should be the **legal basis** for a regulatory intervention of the European Union?
- If a measure is taken, should it take the form of a **legislative initiative** or should it be limited to **soft law** instruments?
- If a legislative action is chosen, should it be a **directive** or a **regulation**?
- If a regulation is chosen, should it be a new horizontal instrument or rather an amendment to the existing sectoral instruments?

#### 1. Legal basis

The competences of the European Union in the field of judicial cooperation are regulated in articles 61(c), 65 and 67(5) EC:

Article 61 EC	Article 61 CE
In order to establish progressively an area of freedom, security and justice, the Council shall adopt: (a) ...	Afin de mettre en place progressivement un espace de liberté, de sécurité et de justice, le Conseil arrête: a) ...
(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65; (d) ...	c) des mesures dans le domaine de la coopération judiciaire en matière civile, visées à l'article 65; d)

Article 65 EC	Article 65 CE
Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:	Les mesures relevant du domaine de la coopération judiciaire dans les matières civiles ayant une incidence transfrontière, qui doivent être prises conformément à l'article 67 et dans la mesure nécessaire au bon fonctionnement du marché intérieur, visent entre autres à:
(a) improving and simplifying: — the system for cross-border service of judicial and extrajudicial documents, — cooperation in the taking of evidence, — the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;	a) améliorer et simplifier: — le système de signification et de notification transfrontière des actes judiciaires et extrajudiciaires; — la coopération en matière d'obtention des preuves; — la reconnaissance et l'exécution des décisions en matière civile et commerciale, y compris les

	décisions extrajudiciaires;
(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;	b) favoriser la compatibilité des règles applicables dans les États membres en matière de conflits de lois et de compétence;
(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.	c) éliminer les obstacles au bon déroulement des procédures civiles, au besoin en favorisant la compatibilité des règles de procédure civile applicables dans les États membres.

Article 67 EC	Article 67 CE
1. ...	1. ...
5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251: — ... — the measures provided for in Article 65 with the exception of aspects relating to family law.	5. Par dérogation au paragraphe 1, le Conseil arrête selon la procédure visée à l'article 251: — ... — les mesures prévues à l'article 65, à l'exclusion des aspects touchant le droit de la famille.

### 1.1. Enforcement

The mutual enforcement of authentic instruments is already regulated by Community Regulations (namely Brussels I and Brussels II bis Regulations and the EEO Regulation). So there is no doubt about Community competence in this respect.

### 1.2. Probative value of authentic instruments

Granting authentic instruments from other Member States the same probative value as national authentic instruments is the procedural equivalent in the law of evidence of that which has been already regulated in the law of enforcement. So the same legal basis and the same arguments cited for the Community competence to legislate on enforcement can also be cited for the Community competence to legislate on the recognition of the probative value.

### 1.3. Abolishing the apostille requirement

Brussels I and II bis Regulations and the EEO Regulation have already abolished the requirement of legalisation and apostille as a precondition for enforcement. As far as we can see, the Community competence to regulate the abolishment of apostille in this context has not been questioned.

## 2. Soft instruments like recommendations and furtherance of cross-border networking systems

Legislation remains important in some areas but may not always be necessary or proportionate. In some cases, better results can be achieved by using non-binding tools as a complement or alternative to legislation. Article 211 of the EC Treaty, e.g., entitles the

Commission to adopt a broad range of non-legislative measures. The question hence is whether the issue of furtherance of the free circulation of authentic instruments within the Community might best be addressed not by way of binding EU legislation but rather by an alternative approach taking into consideration also possible “soft-law” solutions.

The use of non-binding tools at the Community level has come under criticism. In particular, the European Parliament has challenged the use of so-called 'soft law' by the Commission on grounds of institutional balance and democracy<sup>393</sup>. Without going into a detailed analysis of this criticism, it should be pointed out that there are a variety of non-binding tools, each having a specific content and purpose, the general usefulness of which should not categorically be rejected from the outset. In fact, instruments like recommendations by the Commission or the furtherance of existing cross-border networking systems may in a given case be even more helpful to achieve the objective than legislation.

Especially against the background of the gulf analysed above between the Member States following the civil law system of preventive justice and hence knowing the authentic instrument and the common law States where such instruments are not produced one might indeed consider some kind of a “soft” Community-based development of networking systems rather than a binding legislative measure.

In fact, the realm of preventive justice has not yet been adequately incorporated into the **European Judicial Network** in civil and commercial matters, though non-conflictual legal proceedings are priority issue in Community politics within the area of civil justice. Hence, any further development of the forms of cross-border co-operation already in place today between competent officials in Member States for drawing up authentic instruments<sup>394</sup> may serve to help establish on the Community level a well-functioning coordinated co-operation in cross-border transactions in the area of preventive justice. The fact that well-founded data, both with regard to the extent of today's cross-border use of authentic instruments in the first place, as well as to the specific kind of problems arising in any such cross-border case, is indeed hard to obtain might also speak in favour of any kind of soft approach rather than a legislative action.

On the other hand, it seems hard to imagine how such a soft law approach could sufficiently solve the problems addressed in this study. If, as suggested by the study, the apostille should be abolished and the probative value of authentic instruments as well as their enforceability be recognised cross-border, this objective can hardly be achieved by any means other than **legislative action**.

### 3. Directive or Regulation?

There seem to be no reasons why, contrary to the traditional approach (Brussels I and Brussels II bis Regulations, EEO Regulation) as well as the envisaged up-coming regulations on maintenance obligations and on succession, any new instrument should be enacted in the form of a Directive rather than a **Regulation**. Since one of the core aims of such an

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<sup>393</sup> Cf. the European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments (2007/2028(INI)). Internet:  
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0366>

<sup>394</sup> Cf. e.g. the European Notarial Network at <http://www.cnue-nouvelles.be/en/reseau-notarial-europeen-en/001/index.html>

instrument would be to harmonise the existing regulations as far as the authentic instruments are concerned, a regulation certainly would seem to be the adequate legal instrument for this.

## 4. Amendment of existing EC Regulations or new legislative act?

One could then think of either amending the existing EC law in certain respects or else setting up a new legislative act.

### 4.1. Small option: Amending Brussels I Regulation

The first option – we may call it the “small option” – would be to amend Brussels I Regulation. This would be **consistent with the sectoral approach** taken by the Community legislator with view to the existing Regulations as well as the up-coming projects in family law and succession.

**Brussels I Regulation** is designed as the basic Regulation on recognition and enforcement. Thus one might expect to find here also the basic rules on the free circulation of authentic instruments. In fact, the envisioned provisions concerning abolition of apostille, harmonisation of the exequatur approach and recognition of the probative value of authentic instruments could well be dealt with without difficulty by way of amending Art. 57. Besides, from a somewhat practical point of view, another reason in favour of this approach might be, that a revision of the Brussels I Regulation is already under consideration<sup>395</sup>.

This option might be accompanied by parallel changes in the other sectoral Regulations, especially in Brussels II bis Regulation in order to extend the changes to family law. Regarding the future Regulation on succession, a rule on the formal validity of testaments made in other Member States is already included in the internal draft.

### 4.2. Large option: A new horizontal Regulation

However, more convincing might be the reasons in favour of the large option, in the sense of a new horizontal Regulation. It has already been pointed out that the existing sectoral regulations on the cross-border enforcement of authentic instruments are not fully consistent with each other in that there are two different types of exequatur in Brussels I and Brussels II bis Conventions, whereas the EEO Regulation abolished any kind of exequatur. It thus seems hardly possible to tackle the issue by amending one regulation while leaving the others untouched. In fact, one core added value that might arise from a new legislative act might be the possibility of repealing existing rules on the circulation of authentic instruments and substituting them with a harmonized horizontal pattern equally applicable within its scope of application to all authentic instruments.

An issue of general concern, though, remains with regard to the instruments already in the political process of legislation (esp. regulations on maintenance obligations and on succession). Here any new instrument would have to see that no frictions or even contradictory provisions arise for these up-coming regulations.

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<sup>395</sup> See the Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03) by Rupprecht-Karls-Universität Heidelberg of September 2007, internet: [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/study_application_brussels_1_en.pdf).



## Chapter III

### Scope and content of a possible legislative instrument

#### 1. Scope of the instrument

##### 1.1. Legal areas

The proposed provisions should cover authentic instruments in **civil and commercial matters**.

Unlike Brussels I Regulation the proposed new rules should also apply to authentic instruments concerning the **status** or legal capacity of natural persons, rights in property arising out of a **matrimonial relationship, wills and succession** (Article 1(2)(d) of Brussels I Regulation). If a sectoral approach is chosen (“small option”), the latter provisions should be included in the respective Regulations. If a new horizontal Regulation is enacted, this would not contradict the proposals on sector specific regulations for matrimonial property and succession, but merely complement them.

##### 1.2. Exclusions from applicability of the instrument

###### 1.2.1. Exemptions according to Brussels I Regulation

Following Article 1 of Brussels I Regulation (and Article 1 EEO Regulation No 805/2004 as well), the proposed regulation should not apply to:

- **revenue**, customs or **administrative** matters (which are not civil and commercial matters);
- **bankruptcy**, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings (which have been regulated by the Regulation (EC) No 1346/2000 on insolvency proceedings);
- **social security**; or
- **arbitration**.

###### 1.2.2. Immovables

In this study, we have examined in detail the particular problems arising from the interconnections between the authenticating authority and the registration authority in the procedures for registration in public registers<sup>396</sup>. These problems also exist for commercial registers (concerning the creation, merger or change of charter of companies), but they are much greater in the area of land law. Therefore, we suggest an **exemption of immoveable property** from the application authentic instruments, which are **registered** or which are the

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<sup>396</sup> See Part Three, par. 6.6.

basis of a registration in a public register. This would run parallel to the exclusive jurisdiction of the situs for immovable property in Article 22(1) of Brussels I Regulation.

This rule might also be formulated taking inspiration from Articles 8 and 11 of **Regulation (EC) No 1346/2000 on Insolvency Proceedings**. Thus, for rights in immovable property, a ship or an aircraft subject to registration in a public register, the requirements for registration, including the form of the instruments necessary for registration and the intervention of an official of the register State in establishing the instrument, are governed by the law of the State under the authority of which the register is kept (*lex rei sitae*).

### 1.3. Cross-border element

The proposed regulation would cover the use of any authentic instruments issued in one Member State (**state of origin**) in another Member State (receiving state or **state of destination**). The regulation would not require any specific reason (e.g. residence or nationality of one of the parties) why the authentic instrument has been issued not in the state of destination, but in another Member State.

## 2. Geographic scope

One of the main political decisions will be whether or not the proposed new rules should regulate only the mutual recognition and enforcement of authentic instruments within the Civil Law Member States, or whether also the **Common Law** and the **Nordic Member States** should be required to recognise and enforce authentic instruments.

We propose that the new rules should apply to all Member States (except Denmark, but including the United Kingdom if it chooses so). This is the approach of all existing and proposed Regulations. The Common Law and the Nordic Member States are **already obliged to enforce** authentic instruments under the Brussels I and II bis Regulations and the EEO Regulation. Abolishment of the apostille and the general recognition of the probative value of authentic instruments do not seem to place too high a burden on these countries.

### 2.1. Effects on the Swedish judicial system

Asked to assess the effects on the national judicial system, our **Swedish reporter**, Prof. Vogel, did **not** think it would have any **major impact**. The Swedish system, used to work with informal information (which might be verified by a phone call), would not be harmed by the influx of more formal instruments.

### 2.2. Effects on the English judicial system

Our **national reporters for England**, Prof. Murray and Prof. Watson, were **highly critical** of this approach. They favour a restriction of the new rules to the Civil Law Member States.

In their opinion, it would be too intrusive and run against existing **principles of the Common Law evidence rules** to require a Common Law judge to accept strict rules of evidence for foreign authentic instruments and to deny the judge any discretion in weighing the

documentary evidence. So applying the probative force of authentic instruments also in England etc., would introduce a completely new set of evidence rules.

### 3. The notion of authentic instrument

#### 3.1. General definition

By taking the more extensive definition of authentic instruments in **Article 4(3)(a) Regulation (EC) No 805/2004**, the legislator could provide that the interpretation of the legal notion of authentic instruments given by the European Court of Justice in the **Unibank decision** should apply to all Community Regulations:

- An authentic instrument is an instrument which has been established by a **public authority** or other authority empowered for that purpose by the Member State in which it originates;
- in the **procedure and form** required by the law of the Member State which instituted the authenticating official and in the territory of which the official authenticated the instrument within the official's **authentication competences**; and
- the authenticity of which relates to the signature and the **content** of the instrument and provides **full probative value** of its content.

#### 3.2. List of authenticating authorities

It is possible, but not necessary, to include in the regulation also a general list of the authenticating authorities to whose authentic instruments in civil and commercial matters the regulation is applicable. Such a list is contained in Article 1 Hague Apostille Convention<sup>397</sup> and also in various bilateral agreements<sup>398</sup>.

Thus, authentic instruments in the meaning of the regulation could be issued by:

- a court, including those emanating from a public prosecutor (FR *ministère public*), a clerk of a court (FR *greffier*) or a process-server (FR *huissier de justice*);
- a civil law notary;
- a diplomat or a consular authority; or
- by an administrative authority.

### 4. Recognition of authentic instruments

#### 4.1. The genuineness of authentic instruments

##### 4.1.1. The current concept of legalisation and apostille

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<sup>397</sup> See Article 1 of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, quoted in Part Two, par. 1.2.2.2.

<sup>398</sup> e.g. Article 1 European Legalisation Convention (see Part Two, par. 1.2.3.); or Article 2 of the agreements between Germany and Belgium (1975), France (1971) and Italy (1969) respectively.

Presently, the use of an authentic instrument in another Member State often requires an apostille. The apostille, being issued by an authority of the state of origin, certifies the genuineness or “authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp, which it bears” (Article 3(1) Hague Apostille Convention). The apostille is already an alleviation compared with the requirement of a legalisation “by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears” (Article 2 Hague Apostille Convention).

#### 4.1.2. Abolition of apostille

However, in a true European Area for Justice the mutual trust in the functioning of the judicial systems of the other Member States, including their authenticating authorities, and the mutual knowledge about the competent authorities are sufficiently developed to abolish not only legalisation, but also the apostille. That would enable the **circulation of authentic instruments in the whole of Europe** without any procedural requirements.

Various **bilateral agreements** have shown that it is **feasible** to abolish all procedural requirements for authentic instruments issued in other Member States. Also, within the realm of existing **Community legislation** on the free circulation of authentic instruments, the apostille requirement has already been renounced.

It thus appears reasonable to **abolish the apostille** as a general prerequisite for the cross-border use of authentic instruments.

#### 4.1.3. Specific procedure in case of serious doubts

However, a practical problem remains. Sometimes, the authorities of the receiving state do not know whether the **issuing authority was competent** to authenticate the instrument or whether the **procedure** and the **form required** by the national law of the state of origin have been complied with.

- This problem will **not be solved by the apostille** procedure because the apostille proves only the genuineness of the instrument, not the competence of the issuing authority and not compliance with procedural and formal requirements.
- Only **legalisation in the broader sense** (which may be issued by the diplomatic or consular authorities of the state of destination in the state of origin) would certify also, that the requirements concerning competence, procedure and form have been met.
- Even if the **apostille is abolished**, it will still be the case that only an authentic instrument issued by a competent authority following in the procedure and form required by the law of the state of origin can be rightly expected also to be used in the state of destination.

Here, one might consider to introducing a “**Certificate of conformity with the rules of the Member State of origin on authentic instruments**” – as a kind of streamlined version of the legalisation in the broader sense or an “**apostille on demand**”:

- The certificate would not be a general requirement for the use of authentic instruments in the Member State of destination. Only if the authorities of the Member State of destination were in **serious doubt** over whether the **issuing authority was competent** to authenticate the instrument, or whether the **procedure** and the **form required** by the

national law of the state of origin have been complied with, could they demand a certificate of compliance with the procedural law of the state of origin.

- The certificate could be issued by an authority of the **Member State of origin**. The content of the certificate could be regulated in an annex to the new regulation.
- Such a procedure is regulated in several bilateral agreements abolishing apostille<sup>399</sup>.

In **practice**, this would mean:

- Such a certificate would be particularly useful, if the issuing authority has only **limited authenticating competences** (e.g. in Germany the council scribes – *Ratsschreiber* - in Baden-Württemberg). Here it might be difficult for the authorities of the receiving state even to research the applicable legal basis for the authenticating competence.
- Normally the certificate would not be required, if the issuing authority has general authenticating competences (like a civil law notary). However, if there are doubts (e.g. as to whether there really exists a notary with this name – or if the document looks unusual), then the certificate would be an easy and effective way to resolve such doubts.

## **4.2. The probative value of authentic instruments**

### **4.2.1. Equal treatment with domestic instruments**

#### **4.2.1.1. General rule**

The **national law** of the four civil law states studied already gives foreign authentic instruments the same probative value of full and conclusive evidence as it does to domestic authentic instruments.

We propose to enshrine this rule in **Community law**. It would be a fitting step towards a European Area for Justice that the probative value should not depend on in which Member State the authentic instrument has been issued. Recognition of probative value does not require a harmonisation of national laws on authentication.

#### **4.2.2. No greater effect than in the state of origin**

On the other hand, the probative value should not be more than in the state of origin. A rule of mutual recognition should not enhance the status of an instrument to a higher level than is granted to it in the state of origin.

#### **4.2.3. No greater effect than domestic authentic instruments**

The reverse is also true, that the probative value of foreign authentic instruments should be subject to the same limits as are placed on domestic authentic instruments. E.g. if the law of the state of destination has a rule of diminished probative value in case of alteration, this rule also should also apply to foreign authentic instruments.

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<sup>399</sup> e.g. Article 4 European Legalisation Convention (see Part Two, par. 1.2.3.); Article 6 and 7 of the agreements between Germany and Belgium (1975) or France (1971) and article 4 of the agreement between Germany and Italy (1969).

Thus we might speak of a “**double limitation**” on the recognition of the probative value. Authentic instruments issued in other Member States are granted the same probative value as domestic authentic instruments in the Member State of destination, but not more than domestic authentic instruments (first limit) and not more than in the Member State of origin (second limit).

## **5. Enforcement**

### **5.1. The concept of restricted exequatur pursuant to Brussels I Regulation**

**Brussels I Regulation** requires an exequatur for the enforcement of an authentic instrument issued in another Member State. However, the criteria, which have to be checked in granting the exequatur are rather limited.

### **5.2. No exequatur for money claims**

For the **European Enforcement Order**, the certificate of the issuing state is the only requirement for enforceability in other Member States. All procedures in the enforcing State have been abolished. So for what are **practically the most important cases**, there is no need for an exequatur. Thus Regulation (EC) No 805/2004 enables a very fast and easy enforcement procedure abroad.

### **5.3. Brussels I Regulation as a basis rule**

We would propose to extend the rule of Brussels I Regulation to the authentic instruments, which are not yet covered by any specific instrument. These authentic instruments might be somewhat more complicated than the money claims covered by Regulation (EC) No 805/2004. Also, extending the general rules of Brussels I Regulation to the remaining authentic instruments is more consistent with the overall regulatory regime of the existing EC Regulations.

However, if during a reform of Brussels I Regulation, the exequatur procedure is abolished for judgments, and then it should also be abolished for authentic instruments. The same applies, if the exequatur procedure is abolished in one of the sectoral Regulations.

## **6. Pre-conditions of recognition and enforcement**

### **6.1. Quality of authentic instrument**

The recognition and the enforcement require that the instrument is an authentic instrument under the law of the Member State of origin.

### **6.2. Heightened probative value of the authentic instrument**

Under the rule of “double limitation” only authentic instruments enjoying full and conclusive probative value in the state of origin are recognized also as full and conclusive proof in the state of destination.

### **6.3. Lawful establishment of the authentic instrument**

The foreign authentic instruments must meet the following criteria:

- The authenticating authority must have been **competent** under the law of the Member State of origin.
- The authentication **procedure** must have followed the requirements of the law of the Member State of origin.
- The **form** of the authentic instrument must meet the requirements of the law of the Member State of origin.

These criteria are already contained in Article 57(3) Brussels I Regulation.

### **6.4. Enforceability of the authentic instrument**

Only if the authentic instrument is enforceable in the Member State of origin, is it also enforceable in the other Member States.

## **7. Refusal of recognition**

### **7.1. Preconditions for refusal**

An authentic instrument issued in another Member State may be refused or their probative value may be diminished in case of **serious doubts** as to the authenticating authority, the procedure or form of the instrument.

Also, recognition can be refused if the authentic instrument is contrary to the **public policy** (*ordre public*) of the state of destination. Thus a Member State is not obliged to enforce an authentic instrument issued in another Member State, if the content runs against the public policy of the state of destination.

### **7.2. Procedure for refusal**

There are two possibilities concerning the procedure for refusal. The opposing party can either choose the procedure in the state of origin, or in the state of destination. Both choices should be allowed. If authentic instruments are to circulate freely to other Member States and be used in another Member State without any procedure for recognition, then equality demands that the other party can also initiate a procedure against this use in the state of destination.

## **8. Translation requirement**

## 8.1. State of destination may demand translation

Foreign authentic instruments might be issued in a language, which is not an official language of the receiving state. Here national law usually requires a translation into an official language, or at least gives the authority of the state of destination the right to demand a translation. The proposed regulation should also give the authority of the state of destination the **power to demand a translation** into an official language of the state of destination.

## 8.2. Translations made in other Member States

Under national law, generally the translation has to be made by a translator acknowledged by the state. For the proposed regulation, a **translator acknowledged by any Member State** should suffice, be it the Member State the origin, the Member State of destination or a third Member State.

# 9. Relation to sector-specific EU legislation

## 9.1. Priority of sector-specific Regulations

If a new horizontal Regulation is chosen, then sector specific Regulations should enjoy priority over the proposed general regulation, in particular:

- Regulation (EC) No 2201/2003;
- Regulation (EC) No 805/2004; and,
- future Regulations on matrimonial property and on succession.

## 9.2. Only sectoral harmonisation of rules on private international law

The new rules enable the free circulation of authentic instruments in the European Union by recognising their genuineness (without the requirement of apostille) as well as their probative value and by enforcing authentic instruments from other Member States. However, they should not regulate **private international law** or **substantive law**, in particular the preconditions and effects of the contracts or other legal acts contained in the authentic instrument. Any harmonisation in this field, if necessary, can only be achieved by **sectoral instruments**:

- E.g. the recognition of the **formal validity of foreign testaments** can only be regulated in the context of the planned regulation on succession. It cannot be regulated isolated from other questions of succession law in a general regulation on authentic instruments.
- The same applies to other **substantive effects** of authentic instruments: E.g. the good faith in the content of specific authentic instruments is protected in several national legal systems, such as in a **certificate of inheritance** or an excerpt of the companies register. Protection of good faith is not a result that automatically follows from a document being an authentic instrument. Rather, it is part of Member States' substantive law regimes. Thus, the recognition of the character of an authentic instrument and its probative value do not include the recognition of such additional qualities arising from national substantive law. Whether a certificate of inheritance originating in another Member State



should have the same legal consequences as a national certificate can (and should) be regulated in the planned regulation on succession and not by an instrument designed to further ease the circulation of authentic instruments in general.



## Part Four

### ANNEXES

#### 1. Glossary of legal terms

EN – English terms used in the study	Legal terms in civil law systems which are equivalent to each other				SE – Swedish possible translation in Swedish
	FR - Français	DE – Deutsch	PL - Polski	RO - Română	
annex	annexe	Anhang		anexă	
apostille	apostille	Apostille	apostylla	apostilă	apostille
<i>no official equivalent – most appropriate:</i> authentic instrument - execute/issue an a.i.	acte authentique - dresser un acte authentique	öffentliche Urkunde - U. errichten/beurkunden	document urzędowy	act authentic - a încheia (un act autentic); a autentifica	<i>no equivalent in Swedish legal terminology</i>
<i>no official equivalent – most appropriate:</i> authentication - authentication official - authentication requirement - authentication procedure	authentification - officier public ayant le droit d'instrumenter - authentification obligatoire - procédure d'authentification	Beurkundung - Urkundsperson - Beurkundungserfordernis - Beurkundungsverfahren	uwierzytelnienie - uprawniony organ władzy publicznej - wymogi uwierzytelnienia - procedura uwierzytelnienia	autentificare - ofițer public având dreptul de instrumentare (or) autoritate notarială - cerința actului autentic (impunerea formei autentice) - procedură de autentificare	<i>no equivalent in Swedish legal terminology</i>
autograph	manuscrit	eigenhändig	podpis własnoręczny	personal	egenhändig
certification - certification of copy - certified copy - notarial certification - certification of signature	certification - certification de copie - copie certifiée conforme - certification notariale - certification de signature	Beglaubigung - Abschriftsbeglaubigung - beglaubigte Abschrift - notarielle Beglaubigung - Unterschriftsbeglaubigung	poświadczenie - poświadczenie zgodności z oryginałem - kopia uwierzytelniona - poświadczenie notarialne - urzędowe poświadczenie	legalizare - copie legalizată - copie certificată - certificare notarială - legalizarea de semnătură	bestyrkande - bestyrkande av kopia - bestyrkt kopia - bestyrkande av notarius publicus - bestyrkande av underskrift

EN – English terms used in the study	Legal terms in civil law systems which are equivalent to each other				SE – Swedish possible translation in Swedish
	FR - Français	DE – Deutsch	PL - Polski	RO - Română	
copy - certified copy - official copy - enforceable official copy	copie - copie certifiée conforme - (no distinction between certified and official copy in French law) - copie exécutoire (grosse)	Abschrift/Ausfertigung - Abschrift, beglaubigte - Ausfertigung - vollstreckbare Ausfertigung	kopia - kopia poświadczona - wypis aktu notarialnego - not existing in polish law	copia - copie legalizată - (no distinction between certified and official copy in Rumanian law)	avskrift/kopia/expedition - bestyrkt kopia - expedition - kopia/expedition för verkställighetsändamål
contentious jurisdiction	juridiction contentieuse	streitige Gerichtsbarkeit	sądowictwo or rozstrzygnięcie sporu	jurisdicție contencioasă	
document - authentic instrument - electronic document - private written instrument	acte - acte authentique - acte électronique - acte sous seing privé	Urkunde - öffentliche Urkunde - elektronisches Dokument - Privaturkunde	document - dokument urzędowy - document opatrzone podpisem elektronicznym - document w zwykłej formie pisemnej	act, înscris, document - act autentic - înscris electronic - act sub semnătură privată	handling - acte authentique
duty to advice	devoir de conseil	Belehrungspflicht	obowiązek udzielenia wyjaśnień i informacji	obligație de consiliere	upplysningskyldighet
enforcement - submission to enforcement	exécution - submission à l'exécution forcée	Zwangsvollstreckung - Zwangsvollstreckungsunterwerfung	wykonalność	executare silită	verkställighet/utsökning/utmätning -
genuineness (authenticity)	authenticité	Echtheit	oryginał	autenticitate	äkthet
legal act - contract - declaration of will	acte juridique - contrat - déclaration de volonté	Rechtsgeschäft - Vertrag - Willenserklärung	cynność prawna - umowa - oświadczenie woli	act juridic - contract - declarație de voință	-
legalisation (of foreign documents)	légalisation	Legalisation	uwierzytelnienie	legalizare	legalisation
minute/record	minutes	Niederschrift	oryginał aktu notarialnego	minută, încheiere, notă	protokoll
notary - civil law notary	notaire - notaire type latin	Notar - lateinischer Notar	notariusz - notariusz	notar - notar (de tip) latin	<i>no equivalent in Swedish legal terminology</i> <i>("notarius publicus" is not a</i>

					<i>civil law notary)</i>
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EN – English terms used in the study	Legal terms in civil law systems which are equivalent to each other				SE – Swedish possible translation in Swedish
	FR - Français	DE – Deutsch	PL - Polski	RO - Română	
notarial attestation	certification notariale	Bescheinigung, notarielle	poświadczenie notarialne	certificare notarială	
official duties	obligations légales	Amtspflichten	obowiązki ustawowe	obligatii legale	
<i>no official equivalent – most appropriate: preventive justice (jurisdictio voluntaria)</i>	justice préventive	vorsorgende Rechtspflege	jurysdykcja prewencyjna	justiție preventivă	<i>no equivalent in Swedish legal terminology</i>
probative value (probatory force)	force probante	Beweiskraft	wartość dowodowa	valoare probatorie (forță probantă)	
read out aloud	lire à voix haute	verlesen	odczytanie	a citi cu voce tare	uppläsning
recognition	reconnaissance	Anerkennung	uznanie	recunoaștere	erkännande
registry of births, marriages or deaths (personal status registry) - certificates of birth, marriage or death - excerpts from the registry of births, marriages or deaths	service d'état civil - actes d'état civil - extraits d'actes de naissance	Standesamt - Personenstandsunterlagen - Auszüge aus Personenstandsbüchern	rejestr aktów stanu cywilnego - akt urodzenia - akt małżeństwa - akt zgonu - wyciąg z aktu stanu cywilnego	registre de naștere, de căsătorie sau de deces (registre de stare civilă) - certificatele de stare civilă: de naștere, de căsătorie sau de deces - extrase din registrele de stare civilă	-
seal	seau	Siegel	pieczęć	ștampilă (sigiliu)	sigill
signature - electronic signature	signature - signature électronique	Unterschrift - elektronische Signatur	podpis - podpis elektroniczny	semnătură - semnătură electronică	underskrift - elektronisk signatur
textual form (text without signature)	preuve littérale	Textform	tekst / początek dowodu na piśmie	început de dovadă scrisă	
writing (private writing) - written form	acte sous seing privé - forme écrite (or forme littérale)	schriftlich (privatschriftlich) - Schriftform	pismo / document w formie zwykłej pisemnej - forma pisemna zwykła	înscriș (act) sub semnătură privată - forma scrisă	skriftligen

## 2. Relevant statutory instruments

### 2.1. Hague Conventions

- Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (hereinafter called “**Hague Testamentary Form Convention**”), internet: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=40](http://www.hcch.net/index_en.php?act=conventions.text&cid=40)
- Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (hereinafter called “**Hague Apostille Convention**”), internet: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=41](http://www.hcch.net/index_en.php?act=conventions.text&cid=41)

### 2.2. CIEC Conventions

Conventions of the CIEC - *Commission Internationale de l'État Civil* = International Commission on Civil Status, order by date of signature (internet: <http://www.ciec1.org/index.htm>):

- *Convention relative à la délivrance de certains extraits d'actes d'état civil destinés à l'étranger*  
= Convention on the issue of certain extracts from civil status records for use abroad, signed in Paris on the 27 September 1956,  
hereinafter called “**Paris CIEC-Convention of 1956**”;
- *Convention relative à la délivrance et à la dispense de légalisation des expéditions d'actes de l'état civil*  
= Convention on the issue free of charge and the exemption from legalisation of copies of civil status records, signed in Luxembourg on the 26 September 1957,  
hereinafter called “**Luxembourg CIEC-Convention of 1957**”;
- *Convention relative à la délivrance d'extraits plurilingues d'actes de l'état civil*  
= Convention on the issue of multilingual extracts from civil status records, signed in Vienna on the 8 September 1976,  
hereinafter called “**Vienna CIEC-Convention of 1976**”;
- *Convention portant dispense de légalisation pour certains actes et documents*  
= Convention on the exemption from legalisation of certain records and documents, signed in Athens on the 15 September 1977,  
hereinafter called “**Athens CIEC-Convention of 1977**”.

### 2.3. European Conventions

(ordered by date of signature)

- **European Convention on Diplomatic and Consular Instruments** of 7 June 1968;
- Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, signed in Brussels on the 27 September 1968 (hereinafter called “**Brussels Convention**”);

- Convention Abolishing the Legalisation of Documents in the Member States of the European Communities of 25 May 1987 (hereinafter called “**European Legalisation Convention**”);
- Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Lugano on the 16 September 1988 (hereinafter called “**Lugano Convention**”);
- Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, but not yet ratified (hereinafter called “**new Lugano Convention**”), OJL 339, 21.12.2007, pp. 3-41.

## 2.4. EC Regulations

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1, hereinafter called “**Brussels I Regulation**”;
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1, hereinafter called “**Brussels II bis Regulation**”;
- Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15, hereinafter called “**EEO Regulation**”.

## 2.5. England

The below listed acts are available in internet (unless otherwise mentioned):

<http://www.statutelaw.gov.uk/>

- **Civil Procedure Rules (CPR)** 1997 and 2001;
- **Companies Act** 2006;
- **Family Proceedings Rules** 1991;
- **Statute of Frauds** of 1677;
- **Notaries Practice Rules 2001**,  
internet: <http://www.facultyoffice.org.uk/Notaries4.19.html>
- **Land Registration Act** 2002  
+ **Land Registration Rules** 2003;
- **Wills Act** of 1837.

## 2.6. France

The text of the French statutes has been published in internet at: [www.legifrance.org](http://www.legifrance.org)

### 2.6.1. Codes

(in alphabetical order)

- **CC** – *Code civil* = **Civil Code**;  
English translation in internet: <http://195.83.177.9/code/liste.phtml?lang=uk&c=22>
- *Code de commerce* = **Commercial Code**;
- *Code de la construction et de l'habitation* = Code of Construction and Housing;
- **Cpc** – *Code de procédure civile* = **Code of Civil Procedure**;
- *Code général des impôts* = General Tax Code;
- *Code monétaire et financier* = Code on Money and Finances;

### 2.6.2. Other laws, decrees and ordinances

(ordered by the date of their proclamation)

- *Ordonnance de Villers Cotterêts de 1539* = **Ordinance of Villers Cotterêts of 1539**;
- *Décret du 2 thermidor An II* = **Decree of 2 thermidor Year II**;
- *Loi contenant organisation du notariat - loi du 25 ventôse an XI* = **Ventôse Law** on the Organisation of the Notariat of 1803;
- *Ordonnance n° 45-2590 du 2 novembre 1945 relative au statut du notariat* = **Ordinance No 45-2590 of 2 November 1945 on the Notariat**;
- *Décret n° 55-22 du 4 janvier 1955 portant réforme de la publicité foncière* = **Decree No 55-22 of 4 January 1955 containing reform of the land register**;
- *Décret n° 71-941 du 26 novembre 1971 relatif aux actes établis par les notaires* = **Decree on Notarial Instruments No 71-941 of 26 November 1971 concerning instruments issued by the notaries**;
- *Loi de finances pour 1972 n° 71-1061 du 29 décembre 1971* = **Finance Law for 1972 No 71-1061 of 29 December 1971**;
- *Décret n° 78-262 du 8 mars 1978 portant fixation du tarif des notaires* = **Decree No 78-262 of 8 March 1978 containing regulation of the notarial fees**;
- *Loi n° 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution* = **Law No 91-650 of 9 July 1991 containing reform of the procedure of civil execution**;
- *Loi n° 2000-230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique* = **Law No 2000-230 of 13 March 2000 containing adaption of the law of evidence to the information technology and concerning the electronic signature**;



- *Arrêté du 4 avril 2004 révisant le règlement national des notaires* = **Order of 4 April 2004** revising the Regulation on notaries;
- *Décret n° 2005-460 du 13 mai 2005 portant réforme de certaines dispositions de procédure civile* = **Decree No 2005-460** of 13 May 2005 containing reform of certain provisions of the Code of Civil Procedure;
- *Décret n° 2006-736 du 26 juin 2006 relatif à la lutte contre le blanchiment de capitaux et modifiant le code monétaire et financier* = **Decree No 2006-736** of 26 June 2006 concerning measures against **money laundering** and modifying the Code on Money and Finances;
- *Décret n° 2006-1299 du 24 octobre 2006 relatifs aux notaires salariés* = **Decree No 2006-1299** of 24 October 2006 concerning employed notaries;
- *Décret n° 2008-484 du 22 mai 2008 modifiant notamment les articles 509 et suivants du Code de procédure civile* = **Decree No 2008-484** of 22 May 2008 modifying in particular Articles 509 et seq. of the Code of Civil Procedure.

## 2.7. Germany

The text of many German statutes has been published in internet by *Juris*; the text being edited and supervised by the German Ministry of Justice (*Bundesjustizministerium*) (although it is not an official source):

- **AVAG** – *Anerkennungs- und Vollstreckungsausführungsgesetz* = Law on the application of recognition and execution of 19 February 2001 (BGBl. 2001 I, p. 288, 436), internet: [http://bundesrecht.juris.de/avag\\_2001/index.html](http://bundesrecht.juris.de/avag_2001/index.html)
- **BeurkG** – *Beurkundungsgesetz* = Law on Authentication, internet: <http://bundesrecht.juris.de/beurkg/index.html>
- **BGB** – *Bürgerliches Gesetzbuch* = German Civil Code, internet: <http://bundesrecht.juris.de/bgb/index.html>  
so far, only books 1 and 2 of the BGB have been translated into English:  
[http://bundesrecht.juris.de/englisch\\_bgb/german\\_civil\\_code.pdf](http://bundesrecht.juris.de/englisch_bgb/german_civil_code.pdf)
- **BNotO** – *Bundesnotarordnung* = Notarial Law, internet: <http://bundesrecht.juris.de/bnoto/index.html>
- **EGBGB** – *Einführungsgesetz zum Bürgerlichen Gesetzbuch* = Introductory Law to the German Civil Code (containing also the German rules of International Private Law), internet: <http://bundesrecht.juris.de/bgbeg/index.html>
- **ErbStG** – *Erbschaftsteuer- und Schenkungsteuergesetz* = Inheritance and Donation Tax Law – internet: [http://bundesrecht.juris.de/erbstg\\_1974/index.html](http://bundesrecht.juris.de/erbstg_1974/index.html)
- **EStDV** – *Einkommensteuerdurchführungsverordnung* = Regulation for the Income Tax Law – internet: [http://bundesrecht.juris.de/estdv\\_1955/index.html](http://bundesrecht.juris.de/estdv_1955/index.html)
- **FGG** – *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* = Law on Non-Contentious Jurisdiction, internet: <http://bundesrecht.juris.de/fgg/index.html>

- **GBO** – *Grundbuchordnung* = Regulation on the Land Register, internet: <http://bundesrecht.juris.de/gbo/index.html>
- **GmbHG** – *GmbH-Gesetz* = Law on Limited Liability Companies, internet: <http://bundesrecht.juris.de/gmbhg/index.html>
- **GrEStG** – *Grunderwerbsteuergesetz* = Law on Taxes on the Acquisition of Land, internet: [http://bundesrecht.juris.de/grestg\\_1983/index.html](http://bundesrecht.juris.de/grestg_1983/index.html)
- **GwG** – *Geldwäschegesetz* = Law against Money Laundering, version of 13 August 2008 (BGBl. 2008 I, 1690) (replacing the previous law of 25 October 1993, BGBl. 1993 I, 1170), internet: [http://bundesrecht.juris.de/gwg\\_2008/index.html](http://bundesrecht.juris.de/gwg_2008/index.html)
- **HGB** – *Handelsgesetzbuch* = Commercial Code, internet: <http://bundesrecht.juris.de/hgb/index.html>
- **IntFamRVG** – *Internationales Familienverfahrensgesetz* = Law on the Procedure in International Family Matters of 26 January 2005 (BGBl. I, p. 162), internet: <http://bundesrecht.juris.de/intfamrvg/index.html>
- **KonsularG** – *Konsulargesetz* = Law on Consular Activities, internet: <http://bundesrecht.juris.de/konsg/index.html>
- **LFGG** – *Landesgesetz über die freiwillige Gerichtsbarkeit* = Baden-Württemberg State Law on Jurisdiction in Non-Contentious Matters, internet: [www.landesrecht-bw.de](http://www.landesrecht-bw.de)
- **PersStG** (PStG) – *Personenstandsgesetz* = Law on Personal Status, <http://bundesrecht.juris.de/persstdg/index.html>
- **ZPO** – *Zivilprozessordnung* = Code on Civil Procedure, <http://bundesrecht.juris.de/zpo/index.html>.

## 2.8. Poland

- **ASC** – *Prawo o actach stanu cywilnego* = Act on Civil Status Certificates of 29 September 1986, Dz. U. (Official Journal) No 36, pos. 180;
- **CC** – *Kodeks cywilny* = Polish **Civil Code** of 23 April 1964, Dz. U. (Official Journal) No 16, pos. 93, internet: <http://www.lex.com.pl/bap/notariusz/Dz.U.1964.16.93.html>;
- **KPC** – *Kodeks postępowania cywilnego* = **Code of Civil Procedure** of 17 November 1964, Dz. U. 1964 No 43, pos. 296; internet: <http://www.lex.com.pl/bap/notariusz/Dz.U.1964.43.296.html>;
- **Consular Law** – Law of 13 February 1984 concerning the functions of the consuls of the Republic of Poland, consolidated version, Dz. U. 2002 No 215, pos. 1823;
- Law on the Order of the **General Law Courts** of 27 June 2001;

- KRIOP - *Kodeks rodzinny i opiekuńczy* = Family and Guardianship Code of 25 February 1964, Dz. U. No 9, pos. 59,  
internet: <http://www.lex.com.pl/bap/notariusz/Dz.U.1964.9.59.html>;
- KRS – *Ustawa o krajowym rejestrze sądowym* = Court Act of 20 August 1997, Dz. U.121, pos. 769;
- KWH – *Ustawa o księgach wieczystych i hipotece* = Act on the **land register** and mortgages of 6 Juli 1982, Dz. U. 19, pos. 147,  
internet: <http://www.lex.com.pl/bap/notariusz/Dz.U.2001.124.1361.html>;
- Law of 16 November 2000 concerning the fight against **money laundering** and against the financing of terrorism,  
Official Journal 2003 No 153, 1505; 2004 No 62, pos. 577;
- *Prawo o notariacie* = **Notarial Law** of 14 February 1991,  
internet: <http://www.prawo.lex.pl/bap/notariusz/Dz.U.2002.42.369.html>;
- *Prawo prywatne międzynarodowe* = **Private International Law** Act of 12 November 1965,  
Dz. U. 46, pos. 290.

## 2.9. Romania

Laws, ordered by year and number of proclamation:

- **Civil Code** of 1864 (in force since 1 December, 1865),  
internet: <http://www.dslex.ro/coduri/cciv1.htm> or <http://legal.dntis.ro/codcivil/index-civ.html>
- Law No 26/1990 on the trade register, published in the *Monitorul Oficial* (Official Journal) No 49 of 4 February 1998 (as subsequently amended and supplemented);
- **Private International Law** Act, No 105/1992;
- *Legea nr. 36 din 12 mai 1995, privind legea notarilor publici si a activitatii notariale* = Law No 36 of 12 May 1995 - Law on Notaries and on Notarial Activities (hereinafter called “**Notarial Law**”), published in the *Monitorul Oficial* (Official Journal) No 92 of 16 May 1995,  
internet: <http://www.uniuneanotarilor.ro/?p=6&id=84&lang=en&p=6&legi=1>;
- Regulation No 710/C/1995, implementing the Notarial Law;
- Law No 7/1996 - Cadastral and **land publicity law**;
- Law No 119/1996 regarding **civil status documents**;
- Law No 656 of 7 December 2002 on preventing and sanctioning **money laundering**;
- Law No. 573/2003 - Romanian **Fiscal Code**;
- Law No 589/2004 on the legal status of the **Electronic Notarial Activity**;
- Law No 247/2005 regarding the reform in the field of property and justice, Official Journal No 653 of 22 July 2005;

- Law No 191/2007, approving Emergency Government Ordinance No 119/2006 on measures necessary to implement certain Community regulations from the date of the **accession of Romania to the European Union**.

## 2.10. Sweden

The **Swedish Government Offices database** with legal texts in force, a selection of legal texts not in force any longer, and a selection of texts translated into English is to be found at <http://62.95.69.15/>. The translations are not officially approved, and their quality varies.

At [www.lagrummet.se](http://www.lagrummet.se), a portal for Swedish legal information is available. This portal is maintained by the Swedish Administrative Development Agency (*Verva Verket för förvaltningsutveckling*). By way of this portal, legal information is available from the **Government**, *Riksdagen* (the parliament), **Higher courts**, and some 90 Government agencies. Each agency is responsible for the content of legal information it provides, and how it is published on the Internet. Verva answers general questions about the portal via e-mail. Questions regarding the content of legal documents are answered directly by the issuing agency.

The **official gazette** for publication of Swedish legislation is *Svensk författningssamling* (SFS). Legislation is referred to by year and the current number of the leaflet in which the act, ordinance, etc. is published.

**Statutes quoted** in alphabetical order (according to their Swedish title):

- *Äktenskapsbalken* = **Marriage Code** (SFS 1987:230);
- *Aktiebolagslagen* = **Companies Act** (SFS 2005:551);
- *Aktiebolagsförordningen* = **Companies Ordinance** (SFS 2005:559);
- *Ärvdabalken* = Inheritance Code (SFS 1958:657);
- *Folkbokföringslagen* = **Population Registration Act** (SFS 1991:481);
- *Föräldrabalken* = **Children and Parents Code** (SFS 1949:381);
- *Jordabalken* = **Land Code** (SFS 1970:994)
- *Lagen angående vissa utfästelser om gåva* = Gifts Act (SFS 1936:83);
- *Lagen om behandling av personuppgifter i Skatteverkets folkbokföringsverksamhet* = Act on Handling of **Personal Information** by the Swedish Tax Agency while Performing Population Registration (SFS 2000:182);
- *Lagen om kontoföring av finansiella instrument* = **Financial Instruments Accounts Act** (SFS 1998:1479);
- *Sekretesslagen* = **Official Secrecy Act** (SFS 1980:100);
- *Tryckfrihetsförordningen* = Freedom of the **Press Act** (SFS 1949:105);
- *Utsökningsbalken* = **Code of Execution** (SFS 1981:774);

- Act (SFS 2006:74) laying down supplementary provisions on the jurisdiction of courts and recognition and international enforcement of certain decisions
  - + Ordinance containing provisions concerning recognition and international enforcement of certain decisions (SFS 2005:712) (both supplementary to Brussels I and EEO Regulations);
- Act containing supplementary provisions to Regulation **Brussels II** (SFS 2008:450)
  - + Ordinance containing supplementary provisions to Regulation Brussels II (SFS 2005:97).

## **2.11. Other**

- Code of Practice – *Code de déontologie*, which has been adopted by the assembly of CNUE (Council of the Notariats of the European Union - *Conseil des Notariats de l'Union Européenne*) on 4 April 2003,  
internet: <http://www.cnue-nouvelles.be/en/002/003.html> (French version only).

### 3. List of abbreviations

Abbreviations cited in the final report (in particular abbreviations of institutions or of legal journals, but not abbreviations of statutes):

- **AcP** – *Archiv der civilistischen Praxis* (DE);
- **BGH** – *Bundesgerichtshof* = “Federal Court of Justice” - German Supreme Court in Civil, Commercial and Criminal Matters (since 1950),  
BGHZ = official publication series of BGH,  
internet: <http://www.bundesgerichtshof.de> (with recent decisions, since the year 2000),
- **BGBI.** – *Bundesgesetzblatt* = German Federal Official Journal;
- **BT-Drucks.** – *Bundestags-Drucksache* = parliamentary material of the *Bundestag*
- **Bull. civ.** – *Bulletin des arrêts des chambres civiles de la Cour de cassation* = official publication of the most important decisions of the Cour de cassation in civil and commercial matters (FR);
- **BVerfG** – *Bundesverfassungsgericht* = German Federal Constitutional Court,  
BVerfGE = official publication series of BVerfG,  
internet: <http://www.bundesverfassungsgericht.de/>
- **Cass. civ.** - *Cour de cassation* = highest French court in civil matters;
- **DNotZ** – *Deutsche Notar-Zeitschrift* = German Notarial Journal;
- **Dz. U.** = Official Journal (PL);
- **Gaz. Pal.** – *Gazette du Palais* (FR);
- **IPrax** – *Praxis des internationalen Privat- und Verfahrensrechts* (DE);
- **JCP éd. N et Imm** – *La Semaine juridique, édition Notariale et immobilière* (FR);
- **JBl.** – *Juristenblatt* (Austria) (DE);
- **JO** – *Journal officiel* = official publication of the legislation adopted in France;
- **MittRhNotK** – *Mitteilungen der Rheinischen Notarkammer* (DE);
- **NJW** – *Neue Juristische Wochenschrift* = New Weekly Legal Journal (DE);
- **NotBZ** – *Zeitschrift für die notarielle Beratungs- und Beurkundungspraxis* (DE);
- **OJ** = Official Journal, in France: JO (*Journal officiel*); in Poland: Dz. U.; in Romania: *Monitorul Oficial*;
- **OLG** – *Oberlandesgericht* = Higher Regional Court;
- **Rev. crit. DIP** – *Revue critique de droit international privé*;
- **RG** – *Reichsgericht* = Imperial Court - German Supreme Court in Civil, Commercial and Criminal Matters up to 1945,
- **RGBl.** – *Reichsgesetzblatt* = German Official Journal up to 1945;

- **SFS** – *Svensk författningssamling* = Swedish official gazette.  
In Sweden, legislation is referred to by year and the current number of the leaflet in which the act or ordinance etc. is published;
- **StAZ** – Das Ständesamt (DE);
- **ZIP** – Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (DE);
- **ZZP** – Zeitschrift für Zivilprozess (DE).

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- ARNOLD, ‘Die Beglaubigungsverträge mit Frankreich und Italien’, DNotZ 1975, 581 (DE);
- ARNDT/LERCH/SANDKÜHLER, *Bundesnotarordnung* (BNotO), 6<sup>th</sup> edition 2008 (DE);
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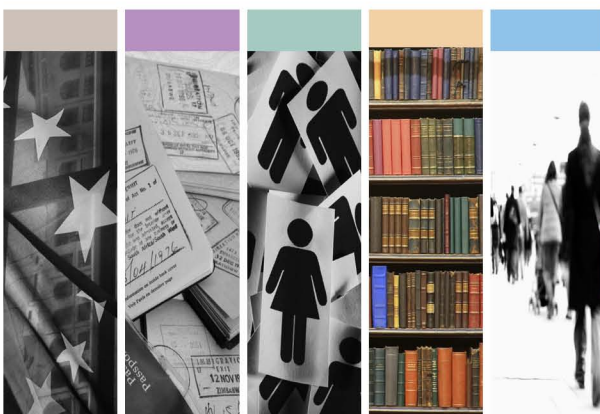
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