

XXVI International Congress of Notaries Marrakesh, Morocco 2010

TOPIC I

“ Collaboration of the Notary and the State in facing the new challenges of society: transparency of financial markets, money laundering, urban development and the environment”

CONCLUSIONS

The Latin or civil-law notary, as a public functionary or officer exercising public certifying authority delegated to him by the State, is a reliable independent party ideally placed to collaborate with the State in dealing with the new challenges facing society, sustainable development and the common good.

The corporate notarial organizations, which receive and classify the information forwarded to them by the notaries, offer an ideal channel of institutional communication through which to implement that collaboration.

The preventive legal certainty resulting from a notarially certified public document prevails over unregulated documentary systems which fail to guarantee the effectiveness of the rights concerned.

I.-TRANSPARENCY OF FINANCIAL MARKETS

As regards the transparency of financial markets, the Commission is of the opinion that:

1.- THE NOTARY IS NOT A PRINCIPAL PLAYER IN FINANCIAL MARKETS.

2.- FINANCIAL MARKETS SHOULD BE REGULATED AND SUBJECT TO EFFECTIVE CONTROL.

3.- REGULATION IS NO OBSTACLE TO THE MARKETS.

The common good cannot be based on financial instruments created in a self-regulated, unregulated or poorly-regulated market, **on the mistaken assumption that rules represent a hindrance to the efficiency of the system and that the absence of rules “lubricates” the market.**

On the contrary, the Commission believes that:

The absence of rules (or lack of control of the rules) encourages opportunist practices that pursue selfish goals and are detrimental to honest individuals, the common interest and sustainable or balanced economic development.

4.- FINANCIAL MARKETS SHOULD BE SUBJECT TO THE RULES OF EFFICIENCY, TRANSPARENCY AND VERACITY, AND IT IS THE DUTY OF THE STATE TO CONTROL FINANCIAL ACTIVITY.

5.- ASSOCIATIONS AND ORGANIZATIONS OF NOTARIES COOPERATE WITH THE STATE IN ASSURING THE CERTAINTY OF TRANSACTIONS, AND OFFER THEIR COLLABORATION IN FINANCIAL MATTERS.

6.- THE NOTARIALY CERTIFIED PUBLIC DOCUMENT IS THE PREFERRED INSTRUMENT FOR THE ESTABLISHMENT OF MORTGAGES AS AGAINST A SYSTEM LACKING PREVENTIVE LEGAL CERTAINTY, AS EVIDENCED BY THE *SUBPRIME* FINANCIAL CRISIS IN THE USA, WHICH HAS REVEALED:

Defects and inaccuracies in the title documents.

Ignorance of the content of the contracts on the part of the borrowers.

Obscurity and complexity of the contracts.

THESE SITUATIONS DO NOT ARISE WHERE A NOTARY IS INVOLVED.

7.- THE GRANTING OF MORTGAGE LOANS DEMANDS PRUDENCE ON THE PART OF THE FINANCIAL ENTITIES AND REFLECTION ON THE PART OF THE BORROWERS.

As a consumer protection guarantee, borrowers should be allowed a pre-contractual period of reflection before signing the notarial document, and should be acquainted with the content of the contracts they accept, which is explained to them by the notary.

8.- PROPERTY TO BE MORTGAGED TO BANKS SHOULD BE THE SUBJECT OF A PRIOR OBJECTIVE VALUATION BY AN INDEPENDENT ENTITY.

9.- NOTARIES REJECT A TWO-SPEED SYSTEM:

The total guarantee and certainty provided by the intervention of a notary in the sale of properties or the establishment of mortgages, as against the complete absence of any formal obligations for the transfer of financial and company securities.

A full underlying reality in mortgage transactions certified by a notary, as against the separation and disconnection, as a result of successive securitizations, between the title being transferred and the real property that supports it.

10.- THE NEW TECHNOLOGIES ARE A SUITABLE INSTRUMENT FOR THE PRACTICE OF THE NOTARY'S ACTIVITY.

II.- MONEY LAUNDERING

Given that the service which the notary offers to society typically includes the checking of documents, acts and public registers to establish the documentary record or *paper trail*, and that he acts as the guardian of the “entrance gate to the circuits of legality”, identifying the contracting parties in legal transactions, detecting “warning signals”, and cooperating to guarantee the public interest and security and order in the marketplace;

Given that anti-laundering control by the notary should be possible, bearing in mind the obligation incumbent upon him of endeavouring to ascertain the structure of ownership and control and to identify the actual ultimate or beneficial owner;

Given that this system should not impose upon the notary the obligation of obtaining investigational results, since this function is typically reserved to the police;

The Commission recommends:

1. That thought be devoted to the advantages of the cooperation of notaries with the State and with society as a whole, and to the disturbing increase in criminality and its penetration of financial structures, since the notary’s specific qualifications permit him to perform a major service in the control of legality, as a result of his independence and specialist skills.
2. That the intervention of the notary as a functionary or public officer, and a subject bound by the law, be recognized as being of vital importance to the State in its fight against money laundering, tax fraud and terrorism.
3. That arrangements be made to set up, within the corporate notarial organizations in each country, **CENTRALIZED BODIES FOR THE PREVENTION** of money laundering.

Such notarial bodies:

- Firstly, ensure the anonymity of the notary throughout the entire process and minimize the risk of accusations being brought against him.
- Secondly, coordinate the action of all the notaries of a State to optimize the effectiveness of the system.
- Thirdly, set standards to clarify and adapt anti-laundering regulations, cooperate in the training of notaries in this area, and assist notaries in their activity.

- Fourthly, ensure the strengthening, intensification and channelling of the notary's collaboration with the competent authorities responsible for the control of money laundering.
4. That the **UINL** foster relations with the competent international bodies to improve the service offered by notaries in the fight against money laundering.
 5. That notaries should not be required to engage in activities of investigation, which are the responsibility of the police and the judiciary. The notary's action will only be effective if his role in traceability is limited to the documentary chain, the examination and interpretation of public deeds, documents and public registers (*paper trail*).
 6. That the principles of "*proportionality and sustainability*" be respected in relation to the responsibilities of identification entrusted to notaries, and that legislators accordingly adopt models consistent with the qualifications and skills of notaries, in accordance with their specific functions and based on their ability to analyze and interpret public registers and documents.
 7. That more extensive listings of anomalous and suspicious cases, which should be as precise and objective as possible, be prepared and updated from time to time.
 8. That all provisions of legal instruments, objectives, controls and procedures should safeguard citizens' rights, based on the *preventive law principle*, according to which the public authorities may use personal data only within the framework of a specific and clearly-defined regulation of objectives and procedures, which should be appropriate and not excessive in relation to the intended purposes.
 9. That as regards the duty of secrecy, there should be a more widespread awareness and conviction that reporting dubious transactions does not constitute a violation of that duty, given that the common good takes precedence and that the duty stems from compliance with the law, based on the principle of self-regulation.
 10. That national lawmakers should ensure the anonymity of notaries, because the criminal or terrorist context makes it absolutely essential to guarantee the physical security of the notary, his assistants and relations.

III.- URBAN DEVELOPMENT AND ENVIRONMENT

For its development every country needs to attend to certain obligations, such as: demographic obligations deriving from population increase, shifts in balances, densification, social dispersion or property ownership claims.

These are relatively old problems to which states have responded by the introduction of appropriate planning regulations.

The implementation of these regulations is of vital importance for a country's sustainable development and the maintenance of social peace.

But the implementation of a carefully-planned urban development policy also pursues another objective, "*THE PROTECTION OF THE ENVIRONMENT*".

These two concepts are closely linked, because limiting urban spread permits: energy saving through the installation of better-adapted heating systems, reduced dependency on private motor-cars, and the preservation of surrounding agricultural land.

Countries should aim to ensure that their urban planning rules reflect a policy that promotes "SUSTAINABLE DEVELOPMENT".

This concept is defined as "Development meeting the needs of the present without jeopardising the ability of future generations to meet their own needs".

For many countries, this new mission is a priority which they have embodied in their Constitutions.

The notary, by his very nature and on account of the general mission entrusted to him by the State, plays an important role in the implementation of the State's different urban planning and environmental policies.

The geographical distribution of notaries over the whole of a nation's territory, including rural areas, places them in a privileged position vis-à-vis the local authorities for the preparation of urban development or environmental schemes aimed at the protection of certain vulnerable rural areas.

In questions of urban planning and the environment, the obtaining of the necessary information for the notarial act added to his knowledge of the applicable regulations makes the notary a reliable third party for each of the parties to a transaction, providing them with certainty as to the legality of the buildings or the possibility of building on the land in question and as to the environmental regulations applicable.

The notary's role in creating awareness and providing guidance is an important tool that should be encouraged and developed, since it promotes values that are important for the protection of the environment.

For this purpose, the notarial associations intend to prepare documentation designed to confirm the fact that the parties have received information on environmental issues and that the specific obligations relating to the protection of the environment have been taken into account.

The UINL proposes that all States, whether or not members of the Union, observe the **“PRINCIPLE OF ENVIRONMENTAL EQUIVALENCE”**. According to this principle, private persons, companies and other entities engaging in an economic, industrial or other activity in a given country should comply in that country with at least the same environmental requirements as are imposed in their country of origin in regard to water, air and soil treatment, and waste disposal.

These requirements will prevent the profitability of investments being based on policies that fail to protect the environment and the health of individuals.

Finally, it is essential to underline that any policy aimed at protecting the environment, especially where private individuals and companies are concerned, will only be effective if those private individuals and companies have an undisputed and unassailable title of ownership permitting them to make the necessary investments in complete security.

The international associations of notaries reassert their commitment in relation to the *“Securitization of Land”*, wherever necessary and particularly in the developing countries.

