***The liberalisation of notarial services from an economic law perspective, between public interest, competition, and European constraints***

**Riccardo de Caria**

Abstract

The liberalisation of notarial services has special characteristics, since notaries have a dual function: on the one hand, they are highly competent legal and tax advisers; on the other, they are public officials charged with public functions that are incumbent on their clients. Liberalising the notarial profession clashes with the asymmetry between the beneficiary of the services and the person responsible for paying for them. The State has always "compensated" the notaries for these services, with a closed number, activity reserves and compulsory tariffs. Adopting a neutral approach, the article proposes a market-friendly reform path that takes account of the specific characteristics of the notarial profession. In this sense, notarial exclusivity and the quota system could be reduced or abolished, while avoiding the reintroduction of minimum fees. On the other hand, the State could eliminate notarial services free of charge or compensate notaries for such services, leaving competition on tariffs free.

Keywords: notaries, notaries public, notarial services, competition, professional services, liberalisations

**Summary**

1. Introduction: notarial services in the context of the European process of liberalisation of services. - 2. Origins and legal-economic value of the function of "public faith" of the Latin notariat. - 3. Statalisation of the notariat and the progressive acquisition of a duplicity of functions. - 4. The public nature of the notariat to the test of competition. - 5. Conclusion: future perspectives and some possible coordinates for reform

# 1. Introduction: notarial services in the context of the European process of liberalisation of services

Historical experience at an Italian and international level has shown that the processes of liberalisation can vary a great deal according to the context: each economic sector has its own peculiarities, which can determine the success or failure of the initiatives aimed at opening up the market in that given area. The legal-economic reasons for liberalisation are essentially always the same on a theoretical level, but in certain cases external circumstances, the regulatory context, the specific structure of a given market make it more difficult on the one hand for the legislator to remove the obstacles to free private initiative, and on the other hand for consumers to perceive the benefits.

In this context, the professional services market is a very particular market[[1]](#footnote-1), where liberalisation in Italy has been, as we know, rather timid and where, in a cause and effect relationship with the inertia of the legislator, the drive for reform on the part of public opinion seems to be less than in other sectors: think, for example, of non-scheduled public services, or rail transport[[2]](#footnote-2).

But within the variegated world of the ordained professions, an event with very peculiar traits is that of the notaries, with reference to whom some liberalisation initiatives have been recorded. The unique characteristics of this professional figure, and the reactions of the notariat to this process, as will be seen quite eccentric in comparison with the traditional model of the "lobby" undermined in its exclusivity[[3]](#footnote-3), make it a particularly interesting case study.

As is well known, this drive to open up this market was in part considerably exogenous: the impetus that led Italy to introduce measures to increase the level of competition in professional services, and in particular in notarial services, came, in the first instance, from the European institutions, starting with the Commission[[4]](#footnote-4). The Competition and Market Authority itself, which has played an important role in this process, has drawn strength from this clear indication of European policy. Under EU law, professionals are unequivocally to be regarded as businesses[[5]](#footnote-5), and this has inevitable consequences at the regulatory level, starting with the strong doubts as to the legitimacy of numerical quotas[[6]](#footnote-6), even if this equation, which is indisputable *de iure condito* , has in itself met with much resistance in the domestic legal system, and therefore has not so far been fully implemented.

In the following paragraphs, I shall first approach the subject from an historical perspective, giving some necessary background information on how the figure of the notary came into being and evolved, and on what public functions he has progressively assumed (§ 2). This will lead to show how the notary ended up being drawn into the orbit of the public administration, within which he has a very peculiar position, given the contemporary nature of private professional (§ 3.). In the long term, however, the unresolved knots inherent in this duality of roles have come to light, leading the notariat to a crisis of identity and in some ways also of economy: the notariat has in fact found itself caught between contradictory competitive pressures on the one hand, and fidelity to a professional system of marked statist imprint, still in force, which certainly does not have among its inspiring principles that of competition (§ 4.). In the final paragraph I will summarize the analysis carried out, offering a possible prospect of reform that, taking into account the peculiarities identified, can hopefully aspire to an effective redefinition of the regulatory framework of this ancient profession and very much in need of an adjustment to the changed economic and social context (§ 5.).

# 2. Origins and legal-economic value of the function of "public faith" of the Latin notariat

It seems opportune to begin the analysis with a brief introduction to the first origins of this profession, without which it is difficult to understand how it came to be the notary's office of Latin tradition, widespread mainly in countries governed by *civil law* (therefore in most European countries, including Italy, France, Spain, Germany; not in the Scandinavian countries) and in South America, but also in China, Japan, Indonesia, and not, however, in *common law* systems such as the United Kingdom, the United States, Australia (and Canada, apart from Quebec)[[7]](#footnote-7). In fact, even among jurists there does not seem to be, at times, full awareness of the notarial function in civil law systems where notaries are present, so it is necessary to reconstruct the origins of this figure in advance.

The notary is one of the most ancient professions, dating back even to Roman law of the Republican era, even if there are records of people in charge of document preservation among the ancient Hebrews, Egyptians and Greeks. In the Roman world, in reality, a function similar to that of the modern notary was rather that exercised by the "*tabelliones*", officials with a sort of public authorisation to exercise their activity, whose task was to give written and legal form to private agreements, and above all to give them public faith[[8]](#footnote-8).

The "*notarius*", on the other hand - curiosity of semantic evolutions - was rather a slave-stenographer with functions of mere registration and documentation, quite similar to the "*notary public*" of Anglo-Saxon law, that is, a figure who performs limited functions of identification and certification, certainly not among the most prestigious in the legal field[[9]](#footnote-9).

The term "notary", understood in its modern meaning, then progressively came to designate, instead, the person who fulfilled the function that was precisely that of the *tabelliones*, i.e. a highly qualified expert in the drafting of legal documents, assisted by the power to give public faith to them: in other words, what the notary claims to have happened in front of him, for the law actually happened, and there is very limited room to revoke in doubt this certainty.

The countries of the Romanesque tradition and those of the Lombard tradition in fact experienced a gradual convergence towards a common conception of the notary as an authorized extender of documents endowed with "public faith", a concept already defined at the beginning of the twelfth century. Around this time, the notaries, in various towns, were organised into guilds, each with its own statute regulating access to the profession, the drafting of documents, with its own set of ethical rules to all effects, and with its own internal schools that prepared future notaries. Thus the notariat took on more definite contours and a framework of rules within which to operate. The medieval notary was also called upon for agreements outside the strictly economic sphere, as, for example, for the exchange of marriage vows. But it was above all in economic dealings that the evolution of the notarial profession moved towards the assumption of a central role, in parallel with the transformation of the European socio-economic context from the eighteenth century onwards, from an aristocratic class society to a society characterised by market relations in a bourgeois and capitalist context. In this world, the notary is inserted with functions of guarantor of the certainty of property and its transfers[[10]](#footnote-10).

Naturally, the presumption of truth that attaches to the notary's words does not extend to the content of the declarations made by the parties before him: the notary only attests to the identity of the parties and their declaration or the signing of a document presented to him. If that statement or that document contains false statements, this is outside the scope of the notary's verification. In fact, the Latin notary will then progressively add a part that falls entirely within his competence, i.e. that relating to mortgage, cadastral and building surveys, which distinguishes his figure from the Anglo-Saxon notary *public* mentioned earlier.

But this presumption of truth of the facts affirmed by the notary, as they occurred in front of him, even if contained in the terms just described, obviously has a crucial value on the economic level: on it is based the circulation of all the goods of greater economic value, which precisely from a certain moment onwards cannot circulate (in fact and then by law) without the intervention of a notary to give certainty to the transaction (also assisting the parties in giving a correct legal form to the same).

This certainty serves the parties in their relations with each other, as well as with third parties: the previous notarial intermediation in the steps upstream guarantees, in fact, third parties on the goodness of their purchase, which is not likely to be overwhelmed by disputes, deception, or claims relating to previous purchases.

In this way, the notary satisfies a need for certainty in commercial traffic: today's notary figure has become the fulcrum of documentary activity by spontaneous evolution, to which is not extraneous, moreover, the ever greater importance that was attributed to paper with respect to orality, and in response to a need for market certainty, that is, to have certainty of legitimate titles of ownership, in order to facilitate their circulation.

# 3. Statalisation of the notariat and the progressive acquisition of a duplicity of functions

Born in response to a need for commercial traffic, the Latin notariat was gradually drawn under the orbit of the state.

This evolution began substantially with the French Revolution. In the Kingdom of Italy, the French notarial system was transposed by a law of 1803, which introduced the first public statute of the notariat. But in the second half of the 19th century the notarial profession experienced further significant changes in its organisation and in its relations with the State and society, regulated by the first unitary law regulating the notarial profession (of 1875) and then by the subsequent reform of 1913, which is still in force.

In particular, if we review the main functions attributed to the Notary by Law 89/1913 and Royal Decree-Law 1666/1937, we find, first of all, that of "receiving deeds between living persons and of last will, attributing them public faith, preserving their deposit, issuing copies, certificates and extracts", and then a series of other competences such as the signing of appeals for voluntary jurisdiction, the receipt of notarial acts, declarations in matters of inheritance and asseverations, the performance of acts delegated by the judicial authority (for example, real estate execution procedures), the endorsement of commercial books, the receipt of documents in deposit, as well as, more generally, "the other powers [.... conferred by law'.

The outcome of this long process was the creation of a hybrid figure of professional, which still characterizes the Italian notary: on the one hand, a private subject, a freelancer in the traditional and ordinary sense of the term, like, for example, lawyers or other professionals in the non-legal area such as doctors or engineers. In other words, it is a subject who operates on the market in competition with his colleagues in order to gain as many clients as possible, and who offers highly qualified and specialized advice in the field of civil, commercial, tax and urban law.

Moreover, it is worth noting that, while the "notarial" function is perceived as an activity of mere and passive registration of the will of others, in truth the regulatory statute of the notary provides not only for the verification of the formal correctness of the acts submitted to his verification, but also - by express provision of the notarial law - to ensure that the will of the client is realized with the lowest possible tax outlay for him.

In fact, although this escapes the notice of the majority of the end users of notarial services, the typical activity of the notary goes beyond the mere ascertainment of the transfer of property X from party A to party B, and also goes beyond the verification in the appropriate registers - on his own personal responsibility - that A is actually the owner of property X which he is selling to B, a task which could perhaps also be easily carried out by other parties or by automated means. The many and varied needs of the parties, and the sometimes large number of solutions offered by the law to meet them, are such that there are often two or more alternative solutions to obtain a particular result desired by the client. It is the task of the Notary to suggest not the most remunerative way for himself, but the one that is most appropriate, suitable for the parties and fiscally less burdensome. In this sense, therefore, he pursues the interest of the private individual or business that turns to him, and not that of the tax authorities and more generally of the State to maximize tax revenues.

On the other hand, however, and herein lies the peculiarity and basic ambiguity of the notariat, the notary is a public official to all intents and purposes, and has a whole series of characteristics and obligations typical of the public service function assigned to him. In terms of an agency relationship, therefore, the *principal of* the notary is not only the client, but at the same time, and partly contradictorily, also the public apparatus.

In particular, to the notaries the State ends up delegating important certifying functions, in an almost exclusive regime (as will be seen) as regards the acts to be entered in the public registers, real estate and corporate. And, above all, the public administration outsources to the notaries the task of applying and collecting - always under their own personal responsibility - the taxes on the transfer of wealth which take place as a result of the deeds they notarize, amounting to several billion euro[[11]](#footnote-11). An increasingly difficult task, as the complexity of the tax regime of notarial acts increases, constantly changing over time, carried out through the management of a Telematics Network of Notaries for the transmission of data and the payment of taxes, whose installation and management costs are borne exclusively by the notariat itself.

The most relevant aspect is that if the remuneration to the notary as far as advisory services are concerned comes from the client, as it is natural that it should, for these rather burdensome functions, carried out in favour of the public administration, the remuneration does not come from the latter, but always from the client, or rather, more properly, they are not compensated directly. In fact, these tasks, in the original design of the notarial law, which has remained formally unaltered for more than a century up to the present day - while in the meantime innovation has been running ever more rampant - were reflected in a series of privileges attributed to the notariat.

First, a national open competition was established as the system of recruitment, and that competition provides (still today) for a limited number of posts set by the State, which is accompanied by a very precise distribution of posts throughout the country. The whole of the national territory must be covered, and the notary assigned to a given location is obliged to reside and practise in the same location, as well as to be present in the assigned location (and the obligation to indicate a substitute in case of absence beyond a limited number of days); moreover, in the original design the segmentation of the market into separate territorial areas was even stronger, before certain reforms partially liberalized the anti-competitive geographical barriers. Finally, the legislation provides for the prohibition to carry out other professions, considered incompatible [[12]](#footnote-12)and, at least according to case law, the notary law still prohibits the use of business brokers, considered an illegal form of competition (Cass. Civ., sez. II, July 30, 2020, n. 16433).

The underlying logic is not dissimilar to that of the so-called universal service obligations imposed on public service concessionaires, the difference being that in that case there is only one concessionaire, whereas here the notaries are each on their own account. From this point of view, they are considered as a whole, a single category to be considered as a whole[[13]](#footnote-13).

On the other hand, this same approach has led to the setting up of a guarantee fund to protect clients against unlawful acts by notaries (the typical example being the notary who collects from his client the advance payment of the taxes due for the registration of a deed, but instead of paying them he appropriates them): the unlawful conduct is evidently attributable to the individual notary, but whose fund is fed by contributions from the entire category, by virtue of a unitary and somewhat corporative vision of colleagues guaranteeing each other (not only by the legislator, but also by the notarial leadership itself, which has shown over the years particular zeal in the implementation of such fund). However, the same *reasoning* underlies the provision of a high minimum income for notaries, aimed at not disadvantaging, in a logic of category, those who are destined to low-paying seats (this provision is financed by contributions paid by the same notaries to their social security fund).

Secondly, again in the original logic of the regulation of the notarial profession, the notary was given exclusive powers for certain activities, from the circulation of real estate, to company deeds, to the publication of wills. This is connected with the public faith that notaries guarantee to documents. For certain acts, in order to safeguard the orderly movement of traffic, the attribution of public faith is the prerogative of the notaries alone. It follows indirectly, therefore, that certain acts are the exclusive responsibility of notaries, since the parties cannot carry them out effectively on their own, even with the assistance of other professionals.

In the original design of the notarial profession as a public service there was a provision for mandatory tariffs for individual services. There was therefore no scope for genuine competition between notaries. The restrictions on competition were even more evident than in the case of other professionals, since the amounts were predetermined rather rigidly, and it was forbidden from a disciplinary point of view to charge fees lower than those prescribed.

Also this aspect was part of the purely publicistic structure of the profession, where it was predetermined by law that some acts, such as special powers of attorney or the publication of wills, received, for reasons of political expediency, a rather low fee, compared to other acts, such as sales, much more profitable, in an essentially managerial logic that established in advance what was the right price of each type of activity and, indirectly, the right gain.

This approach was also confirmed by other aspects: two appear to be the most significant. The first is the obligation to follow personally all the stages of preparation of the deed, together with those formalities of Romanesque origin, such as the obligation to read the whole deed, often perceived as burdensome by the clients themselves, but still in force. In particular, the obligation to take personal care of the deeds constitutes an obvious obstacle to an entrepreneurial type of organisation of a notary's office: the notary cannot delegate to persons other than notaries the performance of the duties characteristic of his work. The fact that this obligation may in fact be evaded by certain notaries does not alter the fact that it is still in force and, therefore, the notary who wishes to comply fully with the law on notaries encounters an extremely significant limitation in terms of the efficiency of his structure. This confirms that the original plan did not envisage competition between notaries on the basis of their productivity, within a framework of very strong regulatory interference.

Lastly, the overall public-law framework was confirmed by the provision that the amount of the pension is the same for all notaries, being determined solely on the basis of years of service and not on the basis of the contributions paid, thus providing substantial compensation in arrears for notaries assigned to unprofitable offices who, merely because they have performed a public service function in those areas, are rewarded by the payment of a pension, with the same length of service, of the same amount as that granted to notaries who, in the course of their activities, have produced a turnover and therefore paid much higher contributions.

# 4. The public nature of the notariat to the test of competition

This dual nature of the notariat, with anti-competitive benefits that compensated for the public obligations, guaranteed for a long time considerable extra-profits. However, more recently, the asymmetry between the beneficiary of the service (both the client and the public administration) and the payer (only the client) has begun to reveal contradictions that risk being irremediable.

The notariat has, in fact, been the subject, like other economic categories and in particular the providers of other professional services, of European and national drives towards liberalisation and greater openness to competition. As regards Italy, the path, started in the late nineties with a series of measures promoted by the then Minister of Economic Development Pier Luigi Bersani, has led progressively to an intervention on all three profiles of advantage outlined in the previous paragraph.

On the one hand, the competition for access to the profession has remained unchanged, as has the professional quota, but the number of notaries' posts has beenincreased by 500. To date, the number of professionals is 5130, to which must be added 1091 vacant seats[[14]](#footnote-14), with inevitable erosion of the potential market share of each individual professional.

On the other hand, exclusivities have also been significantly reduced: for the purchase and sale of motor vehicles and for mortgage cancellations it is no longer necessary to go to the notary, as is the case for the transfer of shares in limited liability companies, which can now also be carried out with the intermediation of accountants. Other even more incisive proposals, such as the attribution also to lawyers of the power to stipulate real estate sales, at least up to a certain cadastral value, have been put forward by various bills, although they have not been approved, and in all probability they will be taken up sooner or later, either spontaneously or under pressure from the institutions of the European Union.

Finally, the rates have been completely liberalized, and this - together with the first two aspects and the economic context of crisis - has led to a significant downsizing of the turnover of notaries, passed on average from 440 thousand euros in 2008 to 296 thousand euros in 2018[[15]](#footnote-15), and the number of staff employed in notary offices, from 70 thousand in 2005 to 30 thousand in 2015[[16]](#footnote-16) . Even, in partial compensation for past benefits and to a large extent still existing, it has been provided, in some cases, the prohibition for the notary to receive compensation for certain services, as in the case of the establishment of simplified limited liability companies, for which it is prohibited for the notary to receive fees (a provision strongly desired by the same organs of leadership, perhaps in the belief, in this way, to obtain a compromise solution compared to other threats perceived as greater for the survival of the profession).

The problem of the notariat and the reason for its current crisis is that, in the face of these undoubtedly unfavourable figures, there has been no parallel reduction in the public functions and corporate-type provisions referred to above: the notary remains personally responsible both for the formal correctness of the acts he signs and for the collection of taxes on behalf of the public administration without a premium for the same, and for the compulsory bureaucratic formalities connected with the exercise of his functions.

In addition, these obligations, so to speak historical, have been gradually added to increasingly burdensome bureaucratic and fiscal burdens, in part common to all professionals (think of the rules on the processing of personal data or the anti-money laundering legislation), in part common to all VAT numbers, and in part specific to the notariat, which further reduce the effective working time and, therefore, the margins of profit, once very substantial, and today significantly reduced on average.

In addition, there is a significant problem at the operational level. In particular, with regard to mortgages, the distorted use of emergency decrees has forced notaries to take account of provisions whose entry into force was announced, but whose text was not yet available, except informally through press reports. In the context of a more general hypertrophy of legislation and of a progressive decay of the technique of drafting regulatory acts, legal professionals, including notaries, are forced to make improbable interpretative efforts in order to resolve questions, sometimes apparently entirely marginal, on which the validity or otherwise of an act may depend.

In this way, the knots, inherent in the basic ambiguity described above, seem to have come to the surface: the civil service is, in fact, characterized by rigidity of costs and procedures, moreover, ever increasing, which are ill-suited to the flexibility and competition in which notaries too inevitably find themselves today.

Moreover, paradoxically, this change in working conditions has been matched by a progressive deterioration in the social perception of the notary, who, from being a prestigious professional at the top of the social respectability ranking, has often been a paradigmatic polemical target, as a "lobby" symbol of a stratification of privileges to be removed as soon as possible. In this regard, not to be overlooked is the confusion that a large number of customers run into with regard to the fee paid to the notary: by virtue of his role as tax withholding agent, it is typically inclusive of the taxes that he must mandatorily collect and pay to the State, but it is not uncommon that this amount is received together with the professional fees, which are instead only one item of the total amount paid by the customer.

In this context, the Italian notariat appears to have made choices that are not very effective in the challenge of claiming its usefulness. For example, an initiative launched with considerable conviction by the leaders of the profession and presented as revolutionary in the social perception of the notary consisted, for example, a few years ago, in the decision to introduce the deontological obligation to draw up the acts on the basis of so-called "protocols", which imposed a significant procedural burden for the activity, through obligations not required by law, which would have to account to the client of all the work done and its usefulness. This initiative, however, was a colossal failure, and has now sunk into oblivion. The top management has also been responsible for counterproductive initiatives such as the attack, in the press, on accountants, at the time of extension to them of certain skills previously reserved for notaries: an advertisement was commissioned and distributed that offensively cast doubt on the abilities of the entire "rival" category, an initiative that cost a hefty fine against the order of notaries (or, ultimately, all members).

In my opinion, it would have been preferable to avoid entrenchment and closure in defence of the past, in order to adopt a more open approach in facing the new challenges for the profession, proposing to overcome the basic ambiguity mentioned above, understanding that the defence of one's own work cannot pass through an attempt to evade competitive openness.

To tell the truth, the notariat has also attempted - again with little success - to spread awareness in the media and public opinion of the centrality and irreplaceability of the figure of the notary in Latin law systems, often comparing the Italian system with the Anglo-Saxon ones.

In fact, the supporters of the uselessness, or at least of the supervening inadequacy, of the notarial functions often cite, in support of their thesis, the inexistence of notaries (if not in the limited sense of the notary *public of which we* have spoken) in the systems of *common law*. These are clearly systems which are more favourable to entrepreneurship [[17]](#footnote-17)and which typically precede the Italian system in the various international rankings on hospitality for entrepreneurial initiatives[[18]](#footnote-18), but they are, in fact, completely different legal "systems": a hypothetical abrogation of notarial exclusivity could not be achieved without at the same time putting in hand epochal reforms of our law[[19]](#footnote-19).

Since the various legal systems have evolved in different ways according to whether or not there is a notary, the de facto elimination of the notary would require tackling the many institutions that have evolved on the basis of the existence of the notary. This would necessarily entail freeing the law from a centuries-old apparatus of stratified procedures over which the notariat must preside. Since to a large extent these procedures can now be replaced on a technical level by more efficient and economical alternatives (just think, for example, of the potential offered by blockchain), it seems preferable, from a notarial perspective, to take this into account and, instead of trying to curb innovation with rearguard battles, to put "on the market" that undoubted heritage of high legal expertise of a specialized type that is their own.

On the other hand, in the difficulty of dealing with reforms of this magnitude, the tendency of the legislator so far seems to have been to proceed regardless of these considerations, without resolving the basic ambiguity, prefiguring an overcoming of the notariat, without, however, the simultaneous, necessary abolition of the compulsory procedures over which the notary presides.

On the other hand, it is certainly not without merit, in itself, the argument of the notariat, recognized, in fact, even in the same "*Doing Business*" rankings of the World Bank on competitiveness, whereby the presence in Italy of a system of public real estate and company registers and land registers in which the notarial acts are transcribed (and only the notarial acts, and now the acts of accountants where permitted), which, moreover, for some time now has been available electronically and in a very short time, allows, firstly, anyone to find out quickly, with certainty and at very limited cost, who the owners of the real estate are and, if necessary, whether they are burdened by formalities prejudicial to the free movement of the same, and, secondly, and as far as the register of companies is concerned, to obtain information on the shareholders, the balance sheets and the *governance of* a company.

What the presence of the Notary guarantees is, therefore, the certainty of the rights deriving from transactions between private individuals. This - always notes the notary - has a value that transcends the parties involved in the same, investing, with a typical positive externality, all potential parties who will find themselves, in the future, to deal with rights and duties that arise from that transaction. We need only think of the subsequent purchasers of a property, of the bank that will provide a loan guaranteed by the property itself, of those who must conclude any contract with a company and need to know who its partners and legal representatives are.

In fact, abstractly, on a *policy* level, one could consider the hyper-liberal option of leaving the parties free to renounce, in exchange for a saving, the advantage of certainty, but today, the legal system does not grant such freedom, on the basis of a recognised general interest of third parties and of the community as a whole. The latter is identified on a twofold basis: on the one hand, with regard to the interest of the legal system in a system which guarantees the certainty of the titles of ownership and, consequently, creates favourable conditions for an orderly circulation of goods; on the other hand, because of the anti-trial function which is guaranteed by the public faith attributed to the notarial deed, which reduces the rate of litigation in transactions in which a notary intervenes for the [[20]](#footnote-20)facts which are the subject of his assessment: according to a famous phrase of Carnelutti, "the more notary, the less judge" [[21]](#footnote-21).

Even if one acknowledges the existence of such externalities, it is still appropriate to ask about possible alternatives, in order to check whether there are not different systems that are more efficient overall.

Generally speaking, the role of the notary as an intermediary source of legal certainty is jeopardized, first of all, by the emergence of new technologies: one thinks in the first place of the possibilities of ascertaining the identity of the contracting parties and of signature guaranteed already today by digital tools (which had led to provide in the first draft of the competition bill the possibility of concluding some corporate acts through digital tools and without the obligation of notarial intermediation). More prospectively, the development of applications based on the *blockchain*, a sequence of computer "blocks" that can record and give certainty of what is written in it in a decentralized way, which challenges the public monopoly on both the production and application of the law[[22]](#footnote-22), could in the medium term lead to a technological overcoming of the traditional figure of the notary[[23]](#footnote-23), giving an alternative response to the needs that in the Latin world has always responded to the notary, but with an innovation of a spontaneous and bottom-up type[[24]](#footnote-24). Again thanks to new technologies, in the United States, it seems that huge private databases are emerging which record the history of millions of property purchases and sales, and which could constitute a sort of private property register, also potentially capable of supplanting what until now has been a public prerogative overseen by the notary.

But even leaving aside these future scenarios, which are still only potential, in some systems legal security is directly guaranteed by the State and the costs are internalised by it, being covered by public resources, and therefore by general taxation. To give just two examples, in Sweden, public registers are kept by magistrates[[25]](#footnote-25), while in Austria, where the notary is cheap because he only certifies the identity of the parties, the control of the acts is carried out by the Tavolare Judge[[26]](#footnote-26).

In others, and we come to the Anglo-Saxon legal systems, based on a legal system and registers completely different from that of the Latin model, in order to obtain the above-mentioned information regarding real estate and companies, it is necessary to hire professionals. In addition, to ensure the security of an important purchase, which in our system comes from the notary's intermediation, lawyers and insurance institutions are involved, stipulating - as for example happens in the United States - a *title* insurance, a policy on the legal risks of the sale, which guarantees against the loss of the real right on the property caused by undeclared liens, third party rights or other defects (a remedy, however, that allows at most to obtain monetary relief, but not a real protection, as instead happens in our system).

Existing US estimates of the total cost of insurance, securities investigation and legal advice range from 1.5% to 3%[[27]](#footnote-27) of the transaction value. It is difficult to find updated data, comparable, on the Italian situation, because they often include the cost including taxes, or the mediator's fee, or calculate the costs of the notary as including his fees for the loan taken out for the purchase (a fact only possible, which does not appear, for example, in the data for the U.S.). A 2010 study by the *European Mortgage Foundation* estimated for Italy a 1.9% of the value of the transaction[[28]](#footnote-28), then substantially in line, if not below, with the U.S. data, while a 2012 survey of the magazine l'Espresso on the sale of first homes reported a figure much lower, 0.3%[[29]](#footnote-29).

Moreover, it seems correct to take into account the fact that in the remuneration of the notary is included, as mentioned, the remuneration of functions carried out by way of *outsourcing on* behalf of the public administration, which otherwise should be charged to general taxation. And also the figure of litigation, estimated at about 0.003% of the acts in Italy, and instead many times higher in the U.S.[[30]](#footnote-30), is certainly a figure to be taken into account. Moreover, it is worth remembering here the thesis, albeit much debated, of the Nobel Prize winner for economics Robert J. Shiller, according to which the presence of the Latin notariat in the United States would have helped to prevent the *subprime*[[31]](#footnote-31) mortgage crisis; again in this regard, it has been written that "in the United States, the events related to subprime mortgages in 2011/2012 alone forced 23 states to suspend procedures due to uncertainty about the identity of the owners. The transactions related to false real estate deeds (and the consequent loss of possession by the owners) for this period amount to at least $ 35 billion"[[32]](#footnote-32); finally, again in the United States the problem of identity theft is also a major scourge of real estate transactions, absent in Italy by virtue of the control carried out by the notariat[[33]](#footnote-33).

# 5. Conclusion: future perspectives and some possible coordinates for reform

Ultimately, it is possible to ask ourselves, from the perspective of legal policy, how it would be appropriate to proceed and what principles of reform should the legislator adhere to in order to guarantee the desirable opening up to competition in a sector in which, for too long, it has been excluded, taking into account, however, the considerations made above on the externalities currently guaranteed by the notariat.

First of all, it is necessary to start from the observation that the two poles indicated, i.e. private and public functions, no longer appear to be compatible; It must therefore be considered that a choice can no longer be postponed, whether to safeguard the "historical" aspect of the notariat - as the exercise of a public function, sacrificing that freedom of initiative, of carrying out the activity, of free determination of fees that characterize the other liberal professions - or, on the contrary, to enhance these latter aspects and consider that the public function has exhausted its raison d'être, or that it can no longer be exercised as it has been until now, with competences entrusted exclusively to the notaries, limited numbers and tariffs.

The second path seems to be the one most in line with the evolution of this market and of the economic system as a whole: the evolution, technological in the *first place,* but also social and economic, does not seem to be able to allow for a long time the notaries to remain to some extent outside the services market, without full freedom of competition and determination of business costs, bound by the binding link with the assigned seat, by the limited number and by the public competition, by the personality of the service, etc..

A similar path must be accompanied by the elimination of the constraints to which notaries are bound by virtue of their public function, now linked to compliance with often redundant and anachronistic requirements, which the legislator could easily and hopefully do without.

The alternative to this opening consists, for the notariat, in continuing to carry out the public function in the traditional way, but in this case a definitive (re)internalisation in the state organisation seems inevitable, with the renunciation of the free profession. Apart from reasons of opportunity and merit, this is a choice which is difficult to make, since it would make a series of services which are currently outsourced weigh on the public accounts.

This last perspective, therefore, seems unrealistic, as well as, in the opinion of the writer, not particularly appreciable in merit. It would therefore be preferable, or at least more consistent, if freedom were given on all fronts. On the one hand, therefore, a genuine opening to the market and to competition should provide for the radical elimination of all exclusions, with the acceptance of a basic principle of freedom to turn to the notary or not to do so, assuming the risks. On the other hand, it would be correct to radically eliminate the public nature of the notarial function, with all the obligations, fulfilments and responsibilities connected with it, and the provisions of a corporate nature mentioned above (guarantee fund, minimum income, etc.), leaving the character of public faith to tend (as would be inevitable) towards the Anglo-Saxon model. At the same time, with the abolition of exclusivity, any form of restriction of the profession should be eliminated, which is highly suspected of being illegitimate according to the principles of European law[[34]](#footnote-34), leaving, as has been said, a free choice as to whether or not to go to the notary, and at the same time allowing all those who demonstrate a minimum of competence to be able to work as notaries.

Both models could also be kept alive, but alternatively, so that notaries can choose whether to become agents of the public administration or freelancers, for distinct tasks and competences, even if hybridisation under the same subject no longer seems sustainable for a long time.

On the other hand, the position of the notary, as it has come down to us by tradition, is threatened not only by all that has been said so far, but also by the appearance of new players in the real estate negotiation market: for example, some large banking groups, with their unrivalled economic and organisational capacity, have for some years now started to propose themselves as exclusive managers of all the phases of such negotiations, from the offer of the property to the stipulation of the purchase, passing through the granting of the financing and perhaps the sale of the policies connected with the operation, offering services which today are typically provided by estate agents, consultants of the parties (possible accountants, lawyers, surveyors) and perhaps in the future potentially also the notaries, at the end of the chain, perhaps proposing themselves as subjects qualified to put hands in the land registers (as already happens today in the matter of cancellation of mortgages), or, alternatively, entrusting to "contracted" notaries of their choice the last act of the real estate affair.

What is certain is that it will be very difficult to sustain for a long time the traditional model, still widely present, of a professional with a personal or small-medium studio, with transversal and not particularly specialized skills; In the same way, it will be very difficult to sustain for a long time the discrepancy whereby the transfer of ownership of a garage, or a ruin with a commercial value of a few thousand euros, requires bureaucratic and fiscal steps that are sometimes extremely complex, which only a person like the notary is able to carry out, while contracts with an economic value many times higher, typically with regard to dematerialized wealth but not only, can be validly entered into exclusively between private parties, without even the assistance of professionals.

In the opinion of the writer, the notariat should accept the challenge of modernity and open itself entirely to competition, while at the same time demanding the lightening of all the bureaucratic burdens with which notaries are burdened by virtue of their public function. This would perhaps be their last positive externality: if many of these steps, being removed from their compulsory contract, were to be eliminated altogether, in the absence of other subjects deputed to ensure their *enforcement*, the entire economic system would probably benefit, given the unsatisfactory cost/benefit ratio of many of these fulfilments.

1. Cf. Candido, *I servizi professionali tra esigenze di liberalizzazione ed effetti distorsivi del mercato*, in Buzzacchi, (ed.), *Il mercato dei servizi in Europa. Tra misure pro-competitive e vincoli interni*, Milano 2014, 61 ff. [↑](#footnote-ref-1)
2. Cf. Sestini, *Libere professioni: la riforma incompiuta*, in *Consumatori, Diritti e Mercato*, 2009, 28 ff. [↑](#footnote-ref-2)
3. Cf. Ricca, *I notai, don Chisciotte e la sincronica inattualità degli altri: il notariato latino come medium intergenerazionale e interculturale*, in *Sociologia del diritto*, 2014, 7 ff. [↑](#footnote-ref-3)
4. Cf. Poggi, *La riforma delle professioni in Italia: sollecitazioni europei e resistenza interne*, in *Le Regioni*, 2009, 359 ff. [↑](#footnote-ref-4)
5. Cf. Martinez, Mora and Vila, *Entrepreneurs, the Self-employed and Employees among Young European Higher Education Graduates*, in *European Journal of Education*, 2007, 99 ff. [↑](#footnote-ref-5)
6. Cf. Genovese, *Regolazione e concorrenza nell'offerta di servizi notarili*, in *Osservatorio del diritto civile e commerciale*, 2015, 69 ff. [↑](#footnote-ref-6)
7. See, to that effect, <https://www.notariato.it/it/i-notai-nel-mondo>. [↑](#footnote-ref-7)
8. Cf. Smithers, *History of the French Notarial System*, in *Annual Bulletin*, 1912, 15 ff. [↑](#footnote-ref-8)
9. Cf. Parente, *Il procedimento disciplinare notarile e la sua evoluzione storica, in Zeszyty Naukowe KUL*, 2017, 169 ff. [↑](#footnote-ref-9)
10. Cf. Santoro, *Notai. Storia sociale di una professione in Italia (1861-1940)*, Bologna 1998. [↑](#footnote-ref-10)
11. The Notariat itself points out that every year it collects on behalf of the State the indirect taxes and capital gains relating to such deeds without any charge to the State, even if not collected by the client. See <https://www.notariato.it/it/casa/i-controlli-classici>. [↑](#footnote-ref-11)
12. Cf. Casu and Sicchiero, *La legge notarile commentata*, Torino 2011. [↑](#footnote-ref-12)
13. Notaries are not the only private individuals who perform services on behalf of the public administration. From a fiscal point of view, it is enough to think of all the withholding agents; from a broader point of view, think also of the health professions for tasks that are not only fiscal but also of certification, or of the Italian Authors and Publishers Society, also invested with public functions and exposed to a liberalisation that creates tensions where those public functions are maintained. [↑](#footnote-ref-13)
14. Data from the Notariat, updated November 2020. See <https://www.notariato.it/it/statistiche-di-categoria>. [↑](#footnote-ref-14)
15. This data is provided by the Ministry of Finance, based on the Synthetic Reliability Indices - formerly Sector Studies. See <https://www1.finanze.gov.it/finanze3/pagina_dichiarazioni/studisettore.php>. [↑](#footnote-ref-15)
16. Associazione nazionale dipendenti studi notarili Italiani: osservazioni e proposte sul disegno di legge C3012, depositato nel corso delle audizioni informali nell'ambito dell'esame del disegno di legge C. 3012 e abbinate, recante Legge annuale per il mercato e la concorrenza. See https://www.camera.it/temiap/allegati/2015/06/24/OCD177-1414.pdf. [↑](#footnote-ref-16)
17. Cf. Nguyen, Canh and Thanh, *Institutions, Human Capital and Entrepreneurship Density*, in *Journal of the Knowledge Economy*, 2020, <https://doi.org/10.1007/s13132-020-00666-w>. [↑](#footnote-ref-17)
18. The reference is to the *Doing Business* project of the World Bank [(https://www.doingbusiness.org](https://www.doingbusiness.org)), but see also the GEI index of the Global Entrepreneurship and Development Institute [(https://thegedi.org](https://thegedi.org)) as well as, possibly, the ranking drawn up by Forbes [(https://www.forbes.com/best-countries-for-business/list/](https://www.forbes.com/best-countries-for-business/list/)). [↑](#footnote-ref-18)
19. Cf. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, in *The Journal of Legal Studies*, 2001, 503 ff. [↑](#footnote-ref-19)
20. Cf. Arruñada, *The economics of notaries*, in *European Journal of Law and Economics*, 1996, 5 ff. , and Lavecchia and Stagnaro, *There ain't no such thing as a free deed: the case of Italian notaries*, in *European Journal of Law and Economics*, 2019, 277 ff. [↑](#footnote-ref-20)
21. Cf. Carosi, *Presentazione: Il seme – I frutti*, in Piergiovanni (ed.), *Hinc publica fides: Il notaio e l’amministrazione della giustizia*, Milano 2006, 1 ff. [↑](#footnote-ref-21)
22. Cf. de Caria, *Blockchain and sovereignty*, in Pollicino and De Gregorio (eds.), *Blockchain and Public Law: Global Challenges in the Era of Decentralisation*, Cheltenham 2021, 40 ff. [↑](#footnote-ref-22)
23. Cf. Nastri, *Blockchain, Smart Contracts and New Certainties: What Future for Notaries*, in Cappiello and Carullo, *Blockchain, Law and Governance*, Chem 2021, 221 ff. [↑](#footnote-ref-23)
24. Cf. Fairfield, *Bitproperty*, in *Southern California Law Review*, 2015, 805 ff. [↑](#footnote-ref-24)
25. Cf. Johansson, *Land Register in Sweden - Present and Future*, 2002, available at <https://www.fig.net/resources/proceedings/fig_proceedings/fig_2002/Ts7-12/TS7_12_johansson.pdf>. [↑](#footnote-ref-25)
26. Cf. Cuccaro, *Lineamenti di diritto tavolare*, Milano 2010. [↑](#footnote-ref-26)
27. Cf. Global Property Guide, [*U.S. buying costs range from low to moderate*](http://www.globalpropertyguide.com/North-America/United-States/Buying-Guide#Title-search-and-insurance), January 5, 2020; according to Caudle, [*How Much You Should Spend on a Home*](http://guides.wsj.com/personal-finance/buying-a-home/how-much-you-should-spend-on-a-home/), *The Wall Street Journal*, December 17, 2008, between 2% and 3%. [↑](#footnote-ref-27)
28. Cf. 2010 *EMF Study on the Cost of Housing in Europe*. [↑](#footnote-ref-28)
29. Cf. Cerami, *Notai, il silenzio è d’oro*, in *l’Espresso*, 7 February 2012. [↑](#footnote-ref-29)
30. Data od the Notariat: see Consiglio Nazionale del Notariato, *Notaio sicurezza giuridica sviluppo economico*, 2007, 15 ff. [↑](#footnote-ref-30)
31. Cf. Shiller, *The Subprime Solution: How Today's Global Financial Crisis Happened, and What to Do about It*, Princeton 2008; but see also Mattei, *Regole sicure. Analisi economico-giuridica comparata per il notariato*, Milano 2006. [↑](#footnote-ref-31)
32. Gargiulo, *Il contributo del Notaio per la crescita economica dell'Italia*, available at <https://www.notaiogargiulo.it/da-sapere/il-contributo-del-notaio-per-la-crescita-economica-dell-italia/55>. [↑](#footnote-ref-32)
33. Cf. Gargiulo, *op. cit*. The possible role of notaries as a bulwark against organized crime has been recognized, for example, by the National Anti-Mafia Directorate in expressing an opinion against an amendment to the Growth Decree which would have extended to lawyers and accountants the power to officially stipulate acts of lease of busineff. However, there are also those who have expressed a less optimistic perspective, in general on the professions (see D'Alfonso, *Professions in Italy: a Grey Area*, in *Italian Journal of Public Law*, 2016, 164 ff.). [↑](#footnote-ref-33)
34. Cf. Delsignore, *Il contingentamento dell’iniziativa economica privata. Il caso non unico delle farmacie aperte al pubblico*, Milan 2011. [↑](#footnote-ref-34)