



Executive Summary Legal Study

In a series of country reports (Austria, Croatia, Hungary, Czech Republic, Slovak Republic, Slovenia; French region: Alsace-Moselle), we provided comprehensive information on the different national legal frameworks under which notaries currently exercise judicial functions in non-contentious proceedings. We, subsequently, analysed these rules on a comparative basis, in the light of national constitutional law and primary EU law, and as elements of the EU regime of judicial co-operation and free cross-border circulation of public acts under Art. 81 TFEU (comprising decisions, certificates, authentic instruments, among others).

On the national level, we found that notaries of the examined Member States conduct non-contentious proceedings, in particular, in the following areas (see chapter 1.1): succession, access and entries to public registers, execution proceedings for uncontested claims or issuance of European payment orders; receipt of declarations of recognition of paternity or maternity to a child, dissolution/divorce of registered partnerships and marriages, division of matrimonial/partnership property; they are included in taking of evidence and service of documents with respect to those proceedings. Five Member States (Austria, Croatia, Hungary, Czech Republic, Slovak Republic) and Alsace-Moselle place the main burden of succession proceedings on notaries acting as “courts” (Hungary) or “court commissioners” under a delegation of powers or under control by the court system. Only Slovenia does not do so. Surprisingly, in Austria and Alsace-Moselle the notarial succession proceedings are concluded by the decision of a court, not by a decision of the notary. In all other countries, notaries deliver the final decision. Taking all Member States into account, we observed a historic trend to shift more and more judicial tasks away from traditional courts to other public authorities, in particular to notaries. This trend has recently gained additional strength in the area of out-of-court divorces.

Notaries of the participating Member States acting in the service of the judiciary – as “courts” or “court commissioners” – meet the guarantees of independence (including protection against removal from office) and are under an obligation to hear all parties in cases before them (see chapter 1.2). Accordingly, they meet the institutional requirements of a fair trial (Art. 6 ECHR, Art. 47 EU-CFR) even in cases which fall outside the scope of these provisions as they do not concern the settlement of a “dispute”. Furthermore, national constitutional law in most Member States does not prescribe any strict limits as to the transfer of judicial tasks to notaries, with the exception of Austria (due to a very narrow and debatable interpretation of the Federal Constitution) and Hungary (which is more generous as it allows for the transfer of “non-substantive adjudicating activities”; which is the case for non-contentious proceedings).

A number of EU conflicts regulations based on Art. 81 TFEU ensure that public acts from one Member State, like court decisions and authentic instruments, can freely move across borders to another Member State, where they are recognised and enforced without further checks or even formalities (see chapter 2.1). Mutual trust between Member States is nourished by a uniform system of

international jurisdiction and a uniform designation of the applicable private law. In the oldest prototype text of these regulations, Brussels I bis Regulation, non-contentious proceedings were practically ignored in a narrow notion of the court (see chapter 2.1.3.2). Later regulations, starting with the Succession Regulation (2012), expressly take account of non-contentious proceedings and of other authorities, like notaries, acting as “courts” under the regulation. This development culminated in the recently amended version of Brussels II ter Regulation, where authentic instruments in family matters (in particular, divorce) issued by notaries have the same legal consequences as court decisions. However, the solutions offered by the EU conflicts regulations for the inclusion of judicial competences of notaries in non-contentious proceedings reveal frictions, incoherencies, and unequal treatments.

In our study, we develop a working definition of non-contentious proceedings to be applied on the EU level (see chapters 2.1.1 and 3.1.1). Based on that definition, we formulate a more systematic approach to the inclusion of non-contentious proceedings conducted by notaries (and other non-judicial authorities) in the free circulation system of Art. 81 TFEU (see chapters 2.1.6 and 3.1.3). At its centre, we place an amended uniform version of the definition of court for all EU regulations dealing with non-contentious proceedings. We recommend the following wording of the uniform court definition:

For the purposes of this Regulation the term ‘court’ means any authority with competence in matters falling within the scope of this Regulation, provided that such authority offers guarantees with regard to independence and impartiality and the right of all parties to be heard and provided that their acts under the law of the Member State in which they operate:

- (a) may be made the subject of an appeal or review by a judicial authority; and*
- (b) have a similar force and effect as an act of a judicial authority on the same matter would have.*

This new definition focuses on substantive criteria and eliminates two formal/organizational criteria of differentiation presently in force. The criteria suggested for elimination are the narrow court definition (based on deciding disputes) and the distinction between notaries entrusted (with judicial competencies) directly by state law and those entrusted by courts. This elimination can be justified by the consequent incorporation of mandatory quality standards, like the institutional and procedural guarantees of impartiality, fair trial, etc., and a review by a court.

This new uniform definition will ensure that traditional courts as well as notaries – directly or indirectly (by the intervention of a court) authorised by the Member State – who are fulfilling the same judicial function under the same quality standards will render decisions (certificates etc.) that can freely circulate in the same manner and trigger the same legal consequences throughout the EU: same function + same quality = same legal consequences. The proposed change will simplify EU law and will ensure easier access to it. It will extend the free circulation privileges also to citizens who are presently not included because their notaries are directly entrusted by state law (and not by a court) and do not satisfy the narrow definition of the court (deciding disputes). As a result of our analysis, we formulate the amended texts of the respective court definitions in the EU regulations (see chapter 3.1.3).

On the level of EU primary law, our study showed that Art. 19 TEU and Art. 47 EU-CFR do not form an obstacle for the national legislator to endow notaries with tasks and functions in the national justice system which would otherwise be fulfilled by traditional courts (see chapter 2.2). Notaries can fulfil the main requirements of Art. 6 ECHR and Art. 47 EU-CFR, namely impartiality and the hearing of all parties, by acting as “courts” or “court commissioners” if national law is designed accordingly. National provisions in constitutional law which prevent a further transfer of tasks in non-contentious proceedings to notaries can no longer be justified on substantive grounds and should be amended.

We distilled a list of arguments in favour of and against the conduct of judicial activities by notaries (see chapter 3.2.2): The balancing of these arguments also speaks for an extension of notarial judicial functions in the interest of courts, citizens and notaries. From a comparative analysis of the national legal systems examined, we identified a number of best practice models which we recommend to the Member States (see chapter 3.3). In the area of non-contentious succession proceedings, the model of “court commissioners” conducting and deciding these proceedings as “one-stop-shops” has proved a success and can be recommended as best practice. Austria, Alsace-Moselle and, in particular, Slovenia will benefit from amending their legal rules in that respect. Notaries are the ideal institutions for consensual out-of-court divorces. The legal systems of many countries, inside and outside the EU, provide ample evidence thereof. The legal systems of some of the participating Member States indicate that notaries can conduct execution proceedings for certain claims in a desirable manner. The same applies to the competence of notaries to make direct entries in public (state) registers, like the land or the company registers. Notaries are well equipped to conduct and decide in proceedings concerning the division of common property belonging to spouses or registered partners. This competence could also form part of the notarial competence to effect out-of-court divorces. We also recommend that notaries are given the competence to receive declarations of recognition of paternity or maternity to a child in accordance with the applicable family law. All Member States entrusting notaries with non-contentious judicial proceedings should formally notify them as entitled institutions under the Taking of Evidence Regulation and the Service of Documents Regulation.