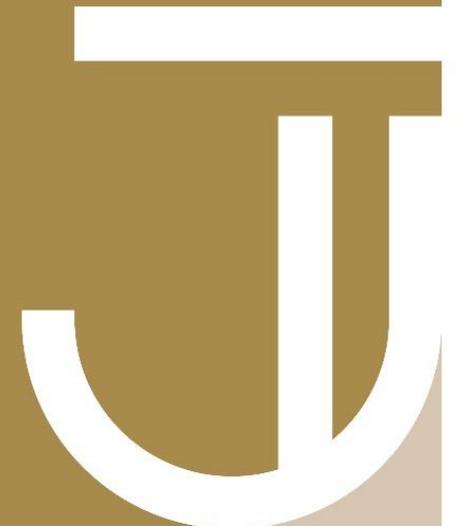


# Intermediate Result Presentation: Legal Part

Prof. Karl Stöger, MJur, University of Vienna  
(together with Prof. Brigitta Lurger, LL.M., and Mag.  
Romina Herz, University of Graz)



# Overview of the Legal Report

- Country reports: notaries acting as court commissioners or as courts in the Hexagonale countries (A, HR, CZ, H, SK, SLO) and Alsace-Moselle – private law and fundamental rights guarantees
- Analysis, Part I: Private Law
  - Systematic definition of non-contentious proceedings
  - Notions of „court“ and „decision“ in EU Secondary Legislation
  - A more systematic approach by EU Secondary Law on notaries acting as court commissioners or courts is proposed
- Analysis, Part II: Public Law
  - Primary law poses no obstacle to the transfer of non-contentious proceedings to notaries
  - No obstacles regarding transfer of judicial tasks to notaries in the national constitutional law of most Hexagonale states

# Policy Recommendations (I)

- Arguments in favour of the extension of notarial judicial functions
  - Alleviating the workload of courts
  - Better coverage of rural regions
  - Less formalities, quicker procedures, resulting in lower costs
  - Approachability: notary as personal contact as opposed to a court as state organ
  - Privacy, intimacy: in particular in family law
  - Smoothness, reduction of conflict: specific training by notaries (mediation, ADR)
  - Contentious proceedings, many of them also in mediation and ADR, are experts in settling party conflicts amicably and avoiding painful conflict and litigation
  - Independence, impartiality: The notary as a legal profession is neutral and non-partisan (so that his role is, compared with other legal professions, very much comparable to that of a judge)
  - Legal expertise, advice
  - Expertise in impartial drafting and future provision: The notary is a bi-partisan contract professional

# Policy Recommendations (II)

- (No convincing) arguments against the extension of notarial judicial functions
  - Legal training and expertise: judges vs notaries – however, note high qualification requirements for notaries
  - Only courts are part of a “purely” state-run system – however, notaries are in most states also supervised by the Ministry of Justice
  - Stronger procedural and institutional guarantees of courts: The impartiality and independence of courts and their realization of fair trial standards could be seen as higher than that of notaries
    - However, note strict statutory impartiality requirements for notaries
    - Notaries as courts or court commissioners are often partially covered by the professional law of judges
  - State liability for damages incurred by the parties: In most systems, the state is liable for damages incurred by parties of traditional court proceedings which were caused by a judge’s illegal actions. While this does not always apply to notaries acting as “courts”, notaries in Austria acting as court commissioners are covered by the State Liability Act (best practice model). Furthermore, mandatory malpractice insurance of notaries can also cover damages.

# Policy Recommendations (II)

- Based on a comparative analysis, the following best practice models were identified and can be recommended for establishment in other states:
  - Notaries acting as “court commissioners” in non-contentious succession proceedings, who conduct and decide these proceedings as a “one-stop-shop”, can be recommended as best practice.
  - Notaries are the ideal institutions for consensual divorces.
  - The legal systems of some of the participating Member States indicate that notaries can conduct execution proceedings for certain claims in a desirable manner.
  - Notaries should be competent 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 of division of the common property of spouses or registered partners.
  - Notaries should be 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.

Thank you very much for  
your attention!

