Policy Recommendations

1.1 EU Law

1.1.1 Definition of non-contentious judicial proceedings

Currently, non-contentious judicial proceedings are not defined at the EU level, even though the play an important role in most EU Regulations on conflicts of laws based on Art. 81 TFEU (international jurisdiction, applicable law, recognition and enforcement in the Member States). An EU definition of non-contentious proceedings would be useful for the following reasons: In the context of the different EU instruments referring to such non-contentious judicial proceedings a definition would contribute clarity and transparency. Defined non-contentious proceedings could be better taken into account in EU justice policy initiatives such as the EU Justice Scoreboard. This would contribute to obtaining the full picture of judicial activity and functions in the EU, taking account of all types of justice systems. Furthermore, a more closely defined notion of non-contentious proceedings would better reflect the trend which can actually be observed in more and more Member States towards outsourcing certain court tasks – in the area of non-contentious proceedings – to certain legal professionals (in particular notaries).

Against this background, we propose the following working definition. Non-contentious judicial proceedings are characterized by the following elements:

- The proceedings are initiated *ex officio* or by an "application" by a party (applicant), but NOT by an "action" filed by a plaintiff.[1]
- Absence of the classical situation of a litigation between two opponent parties. Smaller and larger issues in dispute between the parties are settled amicably during the non-contentious proceedings.
- The state wants to allocate important issues of family law, even though maybe under dispute among parties, to non-contentious forms of decision: as for instance decisions about parental responsibility, parenthood, adoption, protection of adults, distribution of matrimonial property after divorce, succession into rights and property after death.
- Proceedings normally involve less formalities and less costs than fully fledged court litigation.
- One-party proceedings are possible.

1.1.2 Interpretation of existing EU law

The Succession Regulation (SR) realizes a two-track model for non-contentious proceedings, which is identical in the Matrimonial/Partnership Property Regulations: The narrower notion of "court" in EU primary law (Art. 19 TEU, Art. 267 TFEU, Art. 47 EU-CFR) and in Art. 6 ECHR is used by the CJEU in the *W.B.* and *E.E.* cases to interpret the term "judicial function" in Art. 3 No. 2 SR (two parties, competence to decide a dispute). Non-contentious notarial proceedings are, however, included in the delegation and control alternatives of Art. 3 No. 2 SR. When notaries are acting on the basis of a delegation of powers by a traditional court or under the control of the court they qualify as "courts" under the mentioned regulations. This means that track 1 applies: Art. 4 *et seq*. SR, Art. 39 *et seq*. SR etc. Where there is no such institutional link to a traditional court, track 2 is applicable (Art. 59 *et seq*. SR). Under

[1] In German: "Antrag", not "Klage".

present law, track 2 applies in particular to notarial authentic instruments and to notaries who are entrusted with the conduct of non-contentious succession proceedings directly by the law of a Member State, but not by a court of that Member State (like in Poland [*W.B.*] and Lithuania [*E.E.*] for example). Therefore, the track-1-track-2 differentiation in the SR (and other regulations like Matrimonial Property) is based on a formal (organizational) criterion: authorization *directly* by the law of a Member State or – in addition – by intervention of a court of that Member State. An amended definition of court should rest more on substantive standards than on form and require only an entrustment by state law, not additionally by a traditional court. For more details, see chapters 2.1.5, 2.1.6 and 3.1.3 of the study.

Out-of-court divorce in Brussels II *ter* Regulation: Notarial out-of-court divorces in the form of a "court decision" and in the form of an authentic instrument trigger the same legal consequences (one-track model). The notion of court under Brussels II *ter* seems to be – probably[2] – broader and less restricted than in the SR. The same applies to the court definition in the European Payment Order Regulation. However, as the legal consequences of court decisions and authentic instruments under Brussels II *ter* (in terms of international jurisdiction, *lis pendens*, *res iudicata*, and recognition and enforcement) are almost identical, the relevance of the "court" definition is reduced. For more details, see chapters 2.1.5 and 2.1.6 of the study.

1.1.3 Amendments to EU Law

When it comes to the free cross-border circulation of public acts[3] produced by notaries in non-contentious proceedings (under national law) within the EU in the sense of Art. 81 TFEU, a regime of EU regulations is needed which ensures the recognition and enforcement in all other Member States. The now *incoherent* situation with different notions of court excluding or including notarial proceedings to different degrees basically works on two tracks: Where notaries are (incoherently) excluded by a certain EU regulation from track 1, they can work on track 2, where a certain restricted version of "recognition" (called "acceptance") is provided for their "authentic instruments".

In our study, we recommend **a more systematic approach** which can be summarized as follows:

Where, in non-contentious proceedings, notaries are entrusted with their respective judicial competences and tasks by a Member State, certain procedural standards are met by them (like impartiality, *audiatur et altera pars*, review by court) and what the notary does could interchangeably be done by a traditional court, the *notarial acts* should encounter the same legal consequences as the respective *court acts*.

With respect to *all types of non-contentious proceedings*, **EU Member States** should be the ones to decide *to whom to entrust* the proceeding: notary or judge. This should apply to all "judicial" tasks which could be **interchangeably** also carried out by a traditional court in which case the public act produced would be circulated under an EU regulation (Art. 81 TFEU) in the privileged way of a court judgement (**track 1**). This means, where a court issues a declaratory decision or the notary does the same, *both* should be on track 1. Where the court issues a certificate without the force of law (like the German *Erbschein*) or the notary does the same, *both* should be on track 1 (or *both* not). This should,

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[2] Court can be "any authority with jurisdiction" in the matters covered by the regulation. So, the scope finally rests on the interpretation of the word "jurisdiction" which is not yet clarified by CJEU decisions in these circumstances.

[3] The term "public act" – as used here – comprises court decisions (track 1) and authentic instruments (track 2).

by the virtue of a future legislative amendment, also be realized for decisions and public acts in matrimonial/partnership property law, as well as for non-contentious proceedings falling within the scope of other regulations, like Brussels I *bis* for instance.

In such a **one-track model**, provision should be made for the realization of the constitutional **guarantees** of a **fair trial** by notaries (having competence in the matter by national law) in a manner similar to that in **Art. 3 No. 2 SR**:

- *Basis*: The notary is entrusted by the national law of the respective Member State with the power to conduct and conclude certain non-contentious proceedings.
- The respective notaries offer the guarantee of independence and impartiality and
- comply with the principle of all parties to be heard.
- Their decisions are subject to review by a judicial authority in the national justice system and
- their public acts (decisions, certificates, etc.) have the same force and effect as the respective acts of judges would have in such matter.

We, therefore, propose an **amendment of the notion of court** (in the sense of track 1) for all EU Regulations (under Art. 81 TFEU) covering non-contentious judicial proceedings on a mere **functional** and **qualitative basis**. This proposed amended definition of court will eliminate *two* formal/organizational criteria for differentiation which are presently employed:

a) the distinction between a judicial authority, a traditional court, which has the power to decide in a pluri-party litigation and another public authority (e.g., a notary) which only has competences in non-contentious matters.
b) the distinction between notaries entrusted with their judicial functions in non-contentious proceedings directly by a state and notaries who are entrusted by a traditional court (like in alternatives 2 and 3 of Art. 3 No. 2 SR: delegation of power or control by a court).

This elimination of the two formal differentiations seems justified because **comprehensive substantive quality standards** will be included as mandatory requirements: Notaries acting as courts will have to fulfill the same institutional and procedural guarantees (impartiality, fair trial, etc.) as courts and their decisions will be subject to court review. Indeed, notaries already fulfil these standards in the national legal systems we analyzed.

Beyond these court competences in non-contentious proceedings as provided by national law, notaries will issue "authentic instruments" of all kinds, which will follow the well-known **track-2** regime of the EU regulations, as for instance laid down in Art. 59 *et seq.* SR.

We, therefore, recommend to adapt the texts of the respective regulations (SR, Matrimonial/Partnership Property, Taking of Evidence Regulation) accordingly.

We would like to suggest the following **amendments** to the SR, Matrimonial/Partnership Property Regulations, Brussels II *ter* Regulation, Taking of Evidence Regulation, and Brussels I *bis* Regulation:

Art. 3 No. 2 Succession Regulation (SR) NEW:

For the purposes of this Regulation the term 'court' means any authority with competence in matters of succession, 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.

Art. 3 No. 2 SR present text:

For the purposes of this Regulation the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions 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 a decision of a judicial authority on the same matter.

Art. 3 No. 2 Matrimonial Property Regulation and **Partnership Property Regulation NEW**:

For the purposes of this Regulation, the term 'court' means any authority with competence in matters of matrimonial property regimes, provided that such authority offers guarantees with regard to independence, 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.

Art. 3 No. 2 Matrimonial/Partnership Property Regulation present text:

For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of matrimonial property regimes which exercise judicial functions or act by delegation of power by a judicial authority or under its control, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard, and provided that their decisions 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 a decision of a judicial authority on the same matter.

Art. 2 No. 2 Brussels II *ter* Regulation NEW:

For the purposes of this Regulation the following definitions apply: (1) 'court' means any authority in any Member State with competence in the matters falling within the scope of this Regulation, provided that such authority offers guarantees with regard to independence, 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.

Art. 2 No. 2 Brussels II ter Regulation present text:

For the purposes of this Regulation the following definitions apply: (1) 'court' means any authority in any Member State with jurisdiction in the matters falling within the scope of this Regulation.

Art. 64 Brussels II *ter* Regulation NEW:

Scope

This Section applies in matters of divorce, legal separation and parental responsibility to authentic instruments which have been formally drawn up or registered in a Member State assuming jurisdiction under Chapter II.

Art. 65 Brussels II *ter* Regulation NEW:

Recognition and enforcement of authentic instruments

Authentic instruments on legal separation and divorce and in matters of parental responsibility which have binding legal effect in the Member State of origin shall be recognized in other Member States without any special procedure being required. Sections 1 and 3 of this Chapter shall apply accordingly, unless otherwise provided for in this Section.

Art. 64 Brussels II ter Regulation present text:

Scope

This Section applies in matters of divorce, legal separation and parental responsibility to authentic instruments which have been formally drawn up or registered, and to agreements which have been registered, in a Member State assuming

Art. 65 Brussels II ter Regulation present text:

Recognition and enforcement of authentic instruments and agreements

1. Authentic instruments and agreements on legal separation and divorce which have binding legal effect in the Member State of origin shall be recognized in other Member States without any special procedure being required. Section 1 of this Chapter shall apply accordingly, unless otherwise provided for in this Section.

2. Authentic instruments and agreements in matters of parental responsibility which have binding legal effect and are enforceable in the Member State of origin shall be recognized and enforced in other Member States without any declaration of enforceability being required. Sections 1 and 3 of this Chapter shall apply accordingly, unless otherwise provided for in this Section.

Comment: The legal definition of the notion of court in the mentioned regulations should be coherently extended to notaries exercising the **same functions** as courts with the **same quality** (procedural and institutional guarantees of independence and fair trial, review by court). Succession, matrimonial property and out-of-court divorce are areas where notarial activities in non-contentious proceedings – at least in a large group of Member States including the Hexagonale countries – are very common. Notarial and real court activities should be treated in an **institution-neutral manner** in the regulations provided that notaries comply with procedural and institutional guarantees and their acts are open to review in a court. Whether the SR and Matrimonial/Partnership Property Regulations should be – in

addition – equipped with provisions similar to Art. 64 and 65 Brussels II *ter,* can be left to further debate and without recommendation here. If such an additional provision for authentic instruments was adopted, notaries issuing authentic instruments in matters of succession or matrimonial property who do not meet all of the requirements of Art. 3 No. 2 SR (procedural guarantees, review) would be in track 1 as well (international jurisdiction, recognition and enforcement just as for court acts), as is already the case for out-of-court divorces under Brussels II *ter*.

Notification: To achieve more general transparency with respect to notaries acting as courts (track 1) in non-contentious proceedings covered by EU regulations, the Member States should be obliged to notify those judicial functions of notaries to the Commission: see, for instance, Art. 3 No. 2 and Art. 79 SR or Art. 2 No. 1 and Art. 31 No. 3 Taking of Evidence Regulation. This notification should only have **declaratory** force and effect like in Art. 3 No. 2 and Art. 79 SR[4] for the following reasons: As past experience showed, some Member States do not notify the Commission even though they should have done so. If the Member State's notification is a constitutive requirement for the application of track-1 rules of the respective EU Regulation, there will be no rules of international jurisdiction and no recognition and enforcement for the notarial proceedings and decisions originating from that Member State until an effective notification. This will harm all EU citizens concerned by such instruments. These citizens will not have the power to change this, because their situation is caused by the failure of the respective Member State to notify the Commission. For these reasons, we recommend to lay down a **duty of notification** by the respective Member State in the EU Regulations (for the goal of transparency) which has declaratory effect only (in the interest of the parties concerned).[5]

We therefore propose the following wording for the above-mentioned Regulations (SR, Matrimonial/-Partnership Property, Brussels II *ter*):

The Member States shall notify the Commission of the other authorities referred to in the preceding paragraph in accordance with Art. XX. The notification has a declaratory effect.

The notion of "court" in the **Brussels I *bis* Regulation** was determined by the CJEU decisions *Pula Parking* (CJEU March 9, 2017, C-551/15) and *Parking and Interplastics* (CJEU May 7, 2020, joined cases C-267/19 and C-323/19) – see chapter 2.1.3.1 of the study. The court decided that a writ of execution issued by a Croatian notary under Croatian law was not a court decision which had to be recognized and enforced as such by another Member State under the regime of Art. 56 *et seq.* Brussels I *bis*, due to a lack of constitutional/primary law guarantees of independence, impartiality and *audiatur et altera pars* and of an *inter partes* basis to be realized by an authority qualifying as "court" under the regulation. Croatian notaries – unlike Hungarian notaries – are not mentioned as "courts" in the short list of Art. 3 Brussels I *bis*, and could, thus, not qualify as courts under this article.

The same narrow notion of court applies in the **European Enforcement Order Regulation.** In the case *Zulfikarpašić* (CJEU March 9, 2017, C-484/15), the CJEU held that the Croatian notary issuing the writ of execution was not acting as a "court" under the European Enforcement Order Regulation. However, the European Enforcement Order Regulation, comprises not only "judgements" (court decisions) on uncontested claims, but also "court settlements" and "authentic instruments" on uncontested claims. The conditions for an "uncontested claim" incorporated in an authentic instrument (Art. 3 No. 1 [d]) are met if the instrument contains an express agreement to the claim by the debtor.

In the SR and the Matrimonial/Partnership Property Regulations, notaries can act as "courts" in the sense of Art. 3 No. 2 SR or Matrimonial/Partnership Property Regulations *or* as non-courts issuing

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4 CJEU May 23, 2019, C-658/17 *W.B.*, para. 39 *et seq*.

5 CJEU May 23, 2019, C-658/17 *W.B.*, para. 39 *et seq*.

authentic instruments. Therefore, in the areas of succession and matrimonial/partnership property, non-judicial actors (in particular notaries) can operate on both of the two *different* tracks: the court-decision track 1 (as "courts") and the authentic instrument track 2 (*not* as "courts"). By contrast, Brussels I *bis* Regulation is for notaries (except Hungarian notaries under Art. 3) a one-track regulation: Notaries can produce an enforceable instrument only by issuing an authentic instrument, governed by Art. 58 Brussels I *bis*. The European Enforcement Order Regulation is, at least for notaries *not* conducting *inter partes* proceedings like in Croatia, a one-track regulation, as well: Such notaries can issue a European Enforcement Order, but only on the basis of a bilateral authentic instrument (Art. 3 No. 1 [d] of the Regulation) on an uncontested claim as defined by the regulation. However, court judgements and authentic instruments which qualify as enforcement orders under the regulation trigger the same legal consequences and are enforced in the same way. Art. 5 No. 3 **European Payment Order Regulation** expressly speaks of "any authority", which without any doubt includes also notaries which have the respective competences under national law, as is the case in Hungary.

Notaries acting in enforcement proceedings of claims under national law (like in Croatia or Hungary) can profit from the cross-border enforcement regimes set up under the **European Enforcement Order Regulation** as well as under the **European Payment Order Regulation**. Therefore, we do not see any immediate need for legislative amendment on the EU level with respect to these two regulations. Even though, notaries do not qualify as "courts" under an old narrow notion of court in the European Enforcement Order Regulation, they are given the possibility to operate in a similar manner by enforcing an "uncontested claim" incorporated in an authentic instrument containing the agreement of the debtor.

It is, however, debatable whether the narrow notion of court in the **Brussels I *bis* Regulation** has not become problematic over time. A more modern approach would be to adopt the model incorporated in Art. 3 No. 2 SR or the Matrimonial/Partnership Property, and Taking of Evidence Regulations in its *present* – or, as suggested above, its *amended* – version. Where procedural guarantees are realized and the review to a court is open, notarial decisions in enforcement proceedings should have the same cross-border effects as court enforcement would have under the same conditions.

Art. 3 Brussels I *bis* Regulation NEW:

1. For the purposes of this Regulation 'court' means any authority in any Member State with competence in the matters falling within the scope of this Regulation, provided that such authority offers guarantees with regard to independence, 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.

2. The Member States shall notify the Commission of the other authorities referred to in the preceding paragraph in accordance with Art. XX. The notification has a declaratory effect.

Art. 3 Brussels I bis Regulation present text:

For the purposes of this Regulation, 'court' includes the following authorities to the extent that they have jurisdiction in matters falling within the scope of this Regulation:

(a) in Hungary, in summary proceedings concerning orders to pay (fizetési meghagyásos eljárás), the notary (közjegyző);

(b) in Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the Enforcement Authority (Kronofogdemyndigheten).

Finally, we propose to adapt the Taking of Evidence Regulation to the new definition of court in the SR, the Matrimonial/Partnership Property Regulation, the Brussels II *ter* Regulation, and the Brussels I *bis* Regulation:

Art. 2 Taking of Evidence Regulation NEW:

For the purposes of this Regulation, the following definitions apply:

(1) 'court' means any authority in any Member State as communicated to the Commission under Article 31 (3), which is competent under national law to take evidence for the purposes of judicial proceedings in civil or commercial matters, [provided that such authority, in its main proceeding, offers guarantees with regard to independence, 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.]

The text in the square brackets is not necessary because the taking of evidence in itself does not require the same procedural guarantees and standards as the main proceedings.

Art. 2 Taking of Evidence Regulation present text:

For the purposes of this Regulation, the following definitions apply:

(1) 'court' means courts and other authorities in Member States as communicated under Art. 31 (3), that exercise judicial functions, that act pursuant to a delegation of power by a judicial authority or that act under the control of a judicial authority, and which are competent under national law to take evidence for the purposes of judicial proceedings in civil or commercial matters.

1.2 National Law

1.2.1 General admissibility of notarial proceedings under EU primary law, ECHR and national constitutional law

It is up to the national legislators of the Member States to endow notaries, who offer the respective fair trial and justice guarantees under national constitutional law – and, where applicable, under EU primary law – with tasks and functions in the national justice system which would otherwise be fulfilled by traditional courts.

From the point of view of EU law, a far-reaching transfer of tasks of non-contentious proceedings to notaries is unproblematic: 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 as long as sufficient judicial remedies are available. This is

particularly true as notaries, not only in the Hexagonale states (Austria, Czech Republic, Croatia, Hungary, Slovak Republic and Slovenia) and in Alsace-Moselle, meet strict criteria of independence and offer fair trail and justice guarantees under the respective national legal systems, in particular through an obligation to hear all parties before them.

EU secondary law, in particular Art. 81 TFEU regulations, also already provides to a large extent the possibility to recognize decisions by non-judicial actors, like notaries, as equivalent to those of courts. This solution should further be promoted as a valuable contribution to national and EU justice systems which relieve the courts.

As our comparative study showed, this transfer of court tasks to other authorities, in particular notaries, normally takes place in areas of non-contentious proceedings like:

succession proceedings, access and entries to public registers, execution proceedings for uncontested claims or issuance of European payment orders; declarations of recognition of paternity or maternity to a child, dissolution of registered partnerships and marriages, or division of matrimonial/partnership property; the taking of evidence and service of documents with respect to those proceedings.

These proceedings may be based on or concluded by an agreement of the parties (on the division of property, or the divorce for example), but this is not necessarily the case. Where parties apply, for instance, for an execution or an entry into a register, there may be one-party proceedings only, with the power of the notary to grant or deny the application in accordance with the law. Where parties do not agree on factual or legal issues in proceedings which are not of core importance (like who is the heir?) the notary will often have the power to decide the issue. All kinds of disputes between the parties are usually settled within the proceedings by intervention of the notary with the parties.

There are, however, some differences in the national (constitutional) legal frameworks as regards the transfer of judicial tasks to notaries. In Austria, the Constitution is – without convincing arguments and based on a very historicized interpretation of the Federal Constitution – interpreted by some authors as being very restrictive concerning the transfer of judicial tasks to notaries. In Hungary, the Constitution prescribes some moderate limitations, allowing the transfer of judicial tasks to legal professions if these are “non-substantive adjudicating activities” (which is the case for non-contentious proceedings). In all other states included in this study, there are no strict constitutional limitations to the transfer of non-contentious proceedings to notaries. This constitutional framework has some implications for statutory legislation: In Croatia, the Czech Republic, the Slovak Republic, and Hungary, notaries in non-contentious proceedings have, at least if there is no dispute between the parties, been accorded a decision-making competence, especially in succession law matters. In Austria, they are – following the strict and debatable interpretation of the Federal Constitution – restricted to a preparatory role without a decision-making competence (a similar situation exists in Alsace-Moselle). In Slovenia, the law does currently not provide for any activity of notaries as court commissioners, even though there are no constitutional obstacles.

Accordingly, we recommend to harmonize national statutory legislation in the Hexagonale states (Austria, Czech Republic, Croatia, Hungary, Slovak Republic and Slovenia). Precisely because notaries can fulfil the main requirements of Art. 6 ECHR / Art. 47 EU-CFR, namely impartiality and the hearing of all parties, by acting as courts (notaries-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 (for organizational reasons) proved to be unfounded or irrelevant and, therefore, should be amended.

1.2.2 Arguments for and against the exercise of judicial functions by notaries

If constitutional or EU law limitations do not stand in the way of the exercise of judicial functions by notaries in non-contentious proceedings, but rather to the contrary as shown above, what are the advantages and disadvantages of a delegation of judicial tasks and powers to notaries in general? Some of the arguments listed below have been **verified** by empirical data gathered and analyzed by the Economic Working Group of our Project "Justice Without Litigation". For this verification and additional arguments see the **Economic Study** of the publication.

In the following, we will summarize some arguments which we distilled from our examination of the legal systems of the participating and some other Member States (see parts 1 and 2 of the Legal Study in the publication).

Arguments in favor of entrusting notaries with judicial tasks:

- *Alleviating the workload of courts*: The workload of traditional courts could be alleviated. They could concentrate on core judicial tasks like litigation (contentious proceedings).
- *Better coverage of rural regions*: Notaries, rather than courts, are likely to be available also in not so densely populated rural regions of a country. This means that notaries' offices are often geographically nearer than courts, ensuring better access to justice for the population.
- *Form, time*: The proceedings at a notary's office will be less formal and, consequently, will take less time than proceedings in a court.
- *Costs*: There can be lower costs corresponding to the shorter and simpler proceedings.
- *Approachability*: From a psychological point of view, it is for some people more convenient or easier to turn to a notary than to an anonymous state institution (like a court) as such.
- *Privacy, intimacy*: Proceedings in family law and succession often require protection of privacy and intimacy of the parties involved. A legal professional can better satisfy the need for protection of privacy and intimacy of the parties than a court as a widely publicly accessible state institution.
- *Smoothness, reduction of conflict*: Family and succession law issues are often sensitive and prone to painful conflict. Notaries who are exclusively and extensively trained in non-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 is neutral and non-partisan. She will, therefore, seek a fair balance of the interests of all parties involved. In this characteristic she is very much comparable to a judge, in contrast to other legal professions. For example, an attorney is obliged to be partisan and work in the best interest of only one of the parties.
- *Legal expertise, advice*: The notary is a legal expert. She can give the parties all relevant legal information and the practical advice they need. She can ensure that the provisions of the law are complied with.
- *Expertise in impartial drafting and future provision*: The notary is a bi-partisan contract professional. She can draft fair and balanced agreements and decisions which are comprehensive and will last: e.g., on the division of property involved in a divorce or succession proceedings, on maintenance or even the duties regarding the children after divorce. Many of the decisions in non-contentious proceedings have to purpose to secure a peaceful and prosperous future of the parties involved. The tackling of the legal side of personal future provision is one of the key competences of notaries rather than of courts.

Arguments against entrusting notaries with judicial tasks:

- *Legal training and expertise*: In some systems, one could argue that the levels of legal qualification and continuous legal training for judges are higher than those for notaries.
- *Control by the state*: Courts are certainly under a stricter control by the state. Judges are employed by the state, working in the hierarchy of the court system, under the responsibility of the Ministry of Justice.
- *Stronger procedural and institutional guarantees*: The impartiality and independence of courts and their realization of fair trial standards could be seen as higher than that of notaries, because notaries usually also work as representatives of parties and providers of legal services on the respective market. Hence, their broader field of activities also includes tasks in which notaries are not neutral. However, 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. However, this does not always apply to notaries acting as "courts". They are themselves personally liable under the rules of national malpractice law. Parties are, additionally, protected by a mandatory malpractice insurance of every notary. Thus, parties seem to be relatively well protected under both systems. However, this aspect can easily be addressed by national legislation: In Austria, for example, notaries as court commissioners are covered by the rules on state liability.

If you compare the arguments in favor and against entrusting notaries with judicial tasks, it is fair to conclude that the arguments in favor of entrusting notaries are not only more numerous, but also, at least in part, of considerable weight. The arguments listed in favor of entrusting judges and courts are also partially of considerable weight. The judges' higher standards in legal training and expertise seem to be confirmed by data, at least, from some participating Member States (see the **Economic Study** in the publication). State control systems as well as procedural and institutional fair trial and impartiality standards are also in place for notaries in all Member States examined. The respective claim could, therefore, only be that state control of notaries acting in judicial function is probably not as tight and strict as the comparable state control of courts. State liability and private professional liability backed up by mandatory insurance are both very protective of the interests of the aggrieved party.

This leads us to the general conclusion that the contemporary trend of "out-sourcing" non-contentious justice provision to notaries, in the national systems of the Member States, should definitely be supported. But how should this support look like in concrete areas of the law? In the following chapter, we will formulate some best practices which we discovered in our study of the participating Member States.

1.3 Best practice models

1.3.1 Succession

In the area of non-contentious succession proceedings, the model of court commissioners as established in Croatia, the Czech and the Slovak Republic can serve as best practice model for the following reasons: In these countries, the establishment of a close link to a court (in the sense of Art. 3 No. 2 SR in the form of delegation of power or court control) ensures the full application of Art. 3 No. 2 SR (track 1) in its present version already (no modification of Art. 3 No. 2 SR as recommended is needed). The notary is treated like a court under the SR in every respect. Under this best practice model the Czech,

Slovak or Croatian notaries conduct the succession proceedings and end it by a final decision. Proceeding and final decision are in the same hands, those of the notary.

This close link between court and notary also exists in Austrian law and in the system of Alsace-Moselle. There, however, not the whole Art. 3 No. 2 SR is fulfilled: Austrian courts, even though conducting the vast majority of succession proceedings in the country, do not terminate these proceedings by a final decision. This decision is taken by the respective court itself. This seems a problematic fragmentation of proceedings involving disadvantages for all sides: Courts do not get rid of the workload, they still have to make decisions in proceedings they are not familiar with, because they were conducted by the competent notary, not by themselves. Notaries cannot terminate the proceedings they are familiar with and they would be ready to decide. The shifting of the same case, in Austria, from court to notary and from notary back to court requires additional administrative steps that cost additional time and prolong the proceedings for the parties involved. Parties are drawn forth and back between court and notary, both of whom are competent for their case. They would certainly prefer a one-stop-shop situation in which the whole matter is handled by the competent notary alone.

In Slovenia, notaries do not yet act as court commissioners, in particular not in succession proceedings. Even though the Slovenian system works well at the moment, allowing notaries to handle judicial tasks would well correspond to a contemporary trend observed in many EU Member States (and EU secondary law), whose obvious advantages are listed in the preceding chapter. Furthermore, the role of notaries in neighbouring Croatia (which has a similar legal tradition) could serve as an example here. Croatia and the other Hexagonale States also deliver proof that notaries as court commissioners can help to make proceedings quicker by relieving the court systems (which has already happened in Slovenia in the context of family law reform where notaries took over new tasks in divorce matters), while notaries are as accessible as courts for the population. Furthermore, a stronger role of notaries as court commissioners could also lead to the establishment of new notarial offices in rural areas, which would lead to the creation of high-quality jobs and high-quality judicial services in rural regions.

1.3.2 Out-of-court divorces

For the reasons stated in the preceding chapter 1.2.2 on arguments for and against the exercise of judicial functions by notaries and in chapter 2.1.4 of the study, notaries are the ideal institutions for consensual out-of-court divorces. We, therefore, highly recommend notarial out-of-court divorces as best practice models. This task could also be administrated by notaries acting as court commissioners.

The excellent experiences made in Slovenia and in other countries support this recommendation. The involvement of courts does satisfy all the needs of the parties in a divorce setting. The involvement of attorneys as the major actors in out-of-court divorces is problematic as well, as they are obliged to support only the interests of one of the spouses and will, thus, contribute to conflicts instead of settling them as a bi-partisan intermediary. The Brussels II *ter* Regulation even includes “agreements” of the divorcing spouses which are afterwards merely “registered” by a public authority. This form of out-of-court divorce cannot be recommended because it invokes the danger of complete lack of legal expertise and guidance by a legal professional or a court.

1.3.3 Execution of claims

We consider the examples of Hungary and Croatia which employ notaries in the conduct of certain execution proceedings of claims as forerunners in this area. The European Enforcement Order Regulation and the European Order for Payment Regulation give notaries – having the respective competences under their national law – the possibility to participate in an EU cross-border enfor-

cement regime with their enforcement decisions. Other Member States are free to make use of this possibility as well. The present narrow notion of court under Brussels I *bis* Regulation gives the Member States the opportunity to register their national notarial enforcement proceedings under Art. 3 (which has been done only by Hungary and Sweden) or to prescribe notarial proceedings that satisfy the requirements of the *Pula Parking* judgement of the CJEU. An amended definition of court that could be adopted in Art. 3 Brussels I *bis* is formulated and recommended in chapter 1.3.

1.3.4 Entry into public registers

Following the example of the Czech Republic (for the company register), we recommend the competence of notaries to make direct entries in public (state) registers, like the land or the company register. The decision of entry could be part of non-contentious proceedings equipped with the respective procedural guarantees (independence, fair trial etc.). This competence of entry should be accompanied by the competence to issue authenticated excerpts from the register.

1.3.5 Division of matrimonial/partnership property

As already sketched for respective competences in Slovenia and Hungary, notaries are well equipped to conduct and decide in non-contentious proceedings for the purpose of division of the common property of spouses or registered partners upon termination of the common property status. This competence could also form part of the notarial competence to effect out-of-court divorces.

1.3.6 Recognition of maternity or paternity to a child

Following the examples of Slovenia and Austria, we 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.

1.3.7 Taking of evidence and service of documents

We definitely recommend that all Member States entrusting notaries with non-contentious judicial proceedings – like, for instance, all Hexagonale countries except Slovenia in the area of succession – formally notify them as entitled institutions under the Taking of Evidence Regulation (Art. 2 No. 1 and Art. 31 No. 3) and the Service of Documents Regulation ("transmitting and receiving agency" Art. 2 No. 1 and 2). These two EU regulations deal with activities, taking of evidence and service of documents, which are ancillary to the exercise of judicial functions by courts or notaries under national law. The notary's competence for the ancillary activity should, therefore, follow her main competence to conduct judicial proceedings (like succession proceedings). The notification or designation by the respective Member State is of particular importance because it has a constitutive – not merely a declaratory – effect. And such a notification is of enormous help for notaries in carrying out their judicial tasks.

The notion of "court" in Art. 2 No. 1 Taking of Evidence Regulation is similar to Art. 3 No. 2 SR in that it requires that notaries act pursuant to a delegation of power by a judicial authority or under the control of a judicial authority (see chapter 2.1.3.1 of the study). As we have shown, this is the case for court commissioners in Austria, the Czech Republic, Croatia and the Slovak Republic, as well as for notaries acting-as-courts in Hungary. In Hungary, notaries are already competent to apply directly to the courts of other Member States for the purpose of taking evidence, in particular in succession

proceedings (see chapter 1.1.4.6 of the study). Notaries would be particularly suitable for this task as they are bound and protected by very strict requirements of independence and impartiality, in particular when acting as court commissioners or courts. Insofar, their professional status is different from that of other legal professions.

In this context, the question arises whether the taking of evidence by a notary acting as court commissioner or court could be regarded as "exercise of official authority" under Art. 51 (in conjunction with Art. 62) TFEU. In principle, the CJEU has been very hesitant to qualify court commissioners as exercising official authority,[6] this also applies to Hungary.[7] With respect to the taking of evidence *prior* to a proceeding, the CJEU in para. 130 of its *Commission vs. Hungary* judgement[8] expressed the following opinion:

> "*As regards notaries' powers in relation to the prior gathering of evidence, it should be noted that the objective of that procedure is to ensure that evidence in the acquisition of which an applicant has a legal interest is collected with a view to the possible subsequent introduction of contentious proceedings, which, however, do not fall within the notary's powers. Thus, the Law on non-contentious notarial procedures provides that it is not possible to resort to the prior gathering of evidence if civil or criminal proceedings are pending in the case. Notaries' powers with respect to the prior gathering of evidence therefore constitute ancillary or preparatory activities with respect to the exercise of official authority*."

It is clear from this statement that taking of evidence by a notary *before* contentious proceedings are initiated in front of a traditional court (not the notary) does *not* constitute the exercise of official authority under Art. 51 TFEU. However, it can be asked whether the opposite, namely Art. 51 TFEU, applies if the notary (who takes evidence) is acting as a court commissioner or court during pending non-contentious proceedings conducted by the notary herself. Even if Art. 51 TFEU was not applicable in this latter case, a specific role of notaries in the taking of evidence as compared to other legal professions, under national and EU law, seems well justified by the specific requirements of their impartiality and independence. The specific contribution of notaries to the functioning of the national justice system has also been recognized by the CJEU, e.g., concerning Austrian notaries in the *Piringer* case.[9]

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6 E.g., concerning Austrian notaries as court commissioners CJEU May 24, 2011, C-53/08 *European Commission vs. Republic of Austria*, para 108.

7 CJEU 1 February 1, 2017, C-392/15, *European Commission vs. Hungary*, para. 107 *et seq.*

8 CJEU 1 February 1, 2017, C 392/15, *European Commission vs. Hungary*, para. 130.

9 CJEU March 9, 2017, C-342/15, *Piringer*, para. 57 *et seq.* (in the context of the land register system).