JUSTICE WITHOUT LITIGATION

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Table of Abbreviations

§	Paragraph
§§	Paragraphs
Art.	Article(s)
BMJ	Bundesministerium für Justiz (Austrian Ministry of Justice)
C	Case
cf.	*confere*, compare
CJEU	Court of Justice of the European Union
e.g.	*exempli gratia*, example
EC	European Commission
ECHR	European Convention on Human Rights
ECS	European Certificate of Succession
ECtHR	European Court of Human Rights
Ed.	Editor
Eds.	Editors
EJN	European Judicial Network
et al.	*et alia*, and others
et seq.	*et sequens*, and the following (page, recital, paragraph etc.)
et seqq.	and the following (pages, recitals, paragraphs etc.)
etc.	*et cetera*, and so on
EU	European Union
EUR	Euro
EU-CFR	The Charter of Fundamental Rights of the European Union
FamRZ	Zeitschrift für das gesamte Familienrecht (Journal for Family Law)
GPR	Zeitschrift für das Privatrecht der Europäischen Union (Journal for European Law)
i.e.	*id est*, that is

IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
JuWiLi	Justice Without Litigation
No./no.	number
ÖJT	Österreichische Juristentag (Austrian Jurists' Conference)
ÖJZ	Österreichische Juristen-Zeitung (Austrian Jurists' Journal)
para.	paragraph(s)
PIL	private international law
rec.	recital(s)
Sec.	Section
sp.	subparagraph
SR	Succession Regulation
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
Vol.	volume
vs.	versus

1 Overview of Country Reports

1.1 Part I: Private Law

1.1.1 Austria

1.1.1.1 Relationship notary – court

Austrian notaries exercise official functions as court commissioners (*Gerichtskommissär*) in accordance with special statutory provisions, such as the Non-Contentious Proceedings Act (*Außerstreitgesetz*) and the Court Commissioner Act (*Gerichtskommissärsgesetz*), thus they act as court commissioners in succession proceedings and when granting access to the land register and the company register.

The competences of Austrian notaries as court commissioners in succession proceedings do not depend on any court order but derive directly from the Court Commissioner Act, so their function is mandatory by law. They represent the courts as their delegates (court commissioners), are bound to apply the same rules as the courts, have to use their official seal when issuing certificates, but do not have any decision-making power.

Court commissioners are under supervision of the court: the court can give them orders, request reports from them, carry out investigations, and set a time limit for the handling of the files. The Court Commissioner Act also provides a 'request for redress' (*Abhilfeantrag*) to the court against any action or the behavior of the court commissioner. The court has to hear the court commissioner and, if necessary, provide remedy. The 'request for redress' applies to the proceedings of issuing an ECS.

1.1.1.2 Succession proceedings

In Austria, succession proceedings are carried out by notaries as court commissioners and by the courts.

The competences of Austrian notaries as court commissioners in succession proceedings are based directly on the law; cases are distributed among them in a certain district on the basis of a yearly provision of the president of the respective Regional Court for Civil Matters (*Verteilungsordnung*). The parties thus cannot choose the notary who is acting as court commissioner. To guarantee impartiality, a change in the person of the court commissioner may be ordered by the court in case of a conflict of interests.

Court commissioners in succession proceedings (§ 1 para. 1 sp. 1 Court Commissioner Act) have the following functions:

a. the record of the death (*Todesfallaufnahme*) and all related urgent measures
b. all other official action required in the course of succession proceedings
c. safeguarding of the estate situated in Austria, even if a foreign court should be competent according to Art. 3 No. 2 SR
d. issuing the European Certificate of Succession (ECS) according to Art. 62 SR

Court commissioners are explicitly not competent to make judicial decisions, to minute judicial settlements (unless stated otherwise), to arrange mandatory measures and to request legal assistance abroad (§ 1 para. 2 Court Commissioner Act).

During preliminary proceedings, centered on the record of the death, the court commissioner is the first point of contact, investigates and takes evidence to be able to determine the further procedural steps of the succession proceedings. Along with succession proceedings ending with the devolution of the estate (*Einantwortung*), the Non-contentious Proceedings Act recognizes two abbreviated proceedings: the absence of necessity of proceedings (e.g., if the value of the estate does not exceed a certain threshold, currently the amount of EUR 5.000,00, and no entries in public registers are necessary) and the surrender of property in place of payment if the estate is overindebted or insolvent.

Notaries as court commissioners investigate the assets and their value, take measures to secure and protect the estate, take over all documents relating to testamentary or succession related dispositions, are entitled to make inquiries throughout Austria, hear and collect all evidence on their own, effectuate deliveries by postal service or via court and make public notifications. Insofar as court commissioners are entrusted with ascertaining the truth and collecting evidence in succession proceedings, they have the same rights of access as the court, especially including the access to certain judicial registers. Any person whose statements or information constitute evidence has the same rights and obligations towards the court commissioner as towards the court; courts and other authorities are required to provide legal assistance to court commissioners.

If succession proceedings are not terminated as a result of abbreviated proceedings, the court commissioner has to provably request all persons who could possibly be heirs to declare whether and if so how (unconditionally or conditionally) they intend to accept the inheritance and to advise them about the possibilities for accepting the inheritance and the legal consequences of doing so. This is usually done during a hearing initiated and led by the competent notary as court commissioner; (positive or negative) declarations of inheritance (acceptance or disclaimer) are recorded in writing by the court commissioner, the minutes then signed by all parties. A (positive or negative) declaration may also be filed in written form to the court commissioner or the court.

The court commissioner is also authorized to minute agreements by the parties concerning the division of the estate or the adjustment and settlement of claims of parties entitled to a compulsory portion. Such an agreement has the effect of a court settlement and constitutes an enforceable title for execution.

In case of conflicting declarations of acceptance of inheritance, the court commissioner has to try to achieve an agreement on the right of succession between the parties; otherwise, it is up to the court to decide the matter in contentious proceedings on the right of succession.

Even if all necessary steps in succession proceedings are initiated and carried out by the court commissioner all relevant decisions in succession proceedings – often literally prepared by the court commissioners – are made by the court. The court does not only decide succession disputes arising from conflicting declarations of acceptance of inheritance, but also makes the decision on the devolution of the estate (*Einantwortungsbeschluss*), the decision for the handing over of property, the decision on granting authority to parties or creditors to take over assets of the estate in cases of absence of necessity of proceedings (*Unterbleiben der Abhandlung*) or on the surrender of property to creditors in place of payment (*Überlassung an Zahlungs statt*) as well as all intra-procedural decisions like appointing a curator as representative of the contingent inheritance or determining whether or not certain assets have to be included in the inventory.

The court commissioner has only the power of issuing a declarative certificate on the power of representation and the ECS under Art. 64 SR; as to the ECS the court has the final say in this matter if the court commissioner believes that the status and/or the rights to be certified do not exist.

If, due the court's decision on the devolution of the estate, an entry into the land register has to be made, the court commissioner is bound to monitor if the heirs have taken the appropriate steps within the statutory period (not considerably exceeding one year).

If assets of the estate emerge after the decision of the court, the court commissioner also has certain duties.

The fees of notaries as court commissioners in succession proceedings are determined by law and the court and are to be paid by the parties.

1.1.1.3 Public auctions

Notaries (not in their function as court commissioners) have also competence to carry out public auctions, which is especially relevant regarding real estate.

1.1.1.4 Recognition of paternity

If the parents of a newborn child are not married to each other or if the husband is not the father of the child, the biological father can acknowledge paternity at a notaries' office (alternatively, for example, also at the registry office or district court).

Such acknowledgment is possible by means of a declaration in form of a national public or publicly certified document. The father must appear in person at a competent authority e.g., before a notary, and sign the document. The acknowledgment becomes valid upon filing at the registry office. The mother and the child can file an objection with the court within a period of two years.

1.1.1.5 Registers

Land Register

According to § 2a Court Commissioner Act a notary who grants land register access acts (*ex lege*) as a court commissioner in this respect.

Company Register

The notary acts *ex lege* as court commissioner when granting access to the commercial register (§ 2b Court Commissioner Act). Notaries are also acting in their function as court commissioners when forwarding an application for an entry to the company register to the court.

Notaries participate in the electronic legal data interchange with courts, especially with the land and company register. For the time being, Austrian notaries are not able to make direct entries in public registers, although this topic is very up to date and has already been (directly or indirectly) addressed in government programs (e.g. in connection with the possibility of founding a company online).[1]

[1] Recent reflections on this topic: *Hempel-Hoheneck* in Saria, Die Direkteintragung in das Firmenbuch durch Notare und Rechtsanwälte (2022), 47 (47 *et seqq.*) and *Saria* in Saria, Die Direkteintragung in das Firmenbuch durch Notare und Rechtsanwälte (2022), 71 (71 *et seqq.*). *Saria* states that the advantages of the possibility of direct entries in particular with regard to the company register would outweigh the disadvantages and consequently argues for opening the possibility of direct entries in the company register by notaries.

1.1.1.6 EU law

EU Succession Regulation (No. 650/2012)

The court commissioner is competent authority to issue the ECS. He/she has to submit the application for the certificate to the court if he/she believes that the status and/or the rights to be certified do not exist. The 'request for redress' applies also in proceedings of issuing an ECS.

The Austrian government did not notify notaries as ‘other authorities or legal professionals’ acting as courts under Art. 3 No. 2 in conjunction with Art. 79 SR to the Commission. This is not, *per se*, decisive for the question of the classification of Austrian notaries as a 'court' according to the requirements set out in Art. 3 No. 2 SR (see chapter 2.1.2 *infra*).

Austrian notaries are independent, cannot be removed or transferred, and comply with the principle of impartiality. Succession proceedings offer guarantees with regard to impartiality. The right of all parties to be heard is also guaranteed by mandatory legal provisions. According to rec. 20 SR the notion 'court' should be given 'a broad meaning. Austrian notaries acting as court commissioners in succession proceedings do not make 'decisions' in the sense of Art. 3 No. 2 SR. It is, therefore, difficult to argue that they can be qualified as courts under the mentioned Regulation. Taking decision-making authority into consideration, Austrian notaries as court commissioners could still be 'courts', but only based on a broad meaning under rec. 20 SR: Austrian notaries acting as court commissioners in succession proceedings always act within the judicial framework and therefore – like the court – are bound by the rules of the SR on international jurisdiction.

Taking of Evidence Regulation (No. 1206/2001; No. 1783/2020)

Whether Austrian notaries acting as court commissioners in succession proceedings meet the requirements of the court definition of Art. 2 No. 1 in conjunction with Art. 31 No. 3 Taking of Evidence Regulation is not entirely clear. In conducting succession proceedings, they certainly perform court functions. However, they only prepare the final decision of the proceedings which is finally made by the court, not the court commissioner herself.

1.1.2 Croatia

1.1.2.1 Relationship notary – court

Croatian notaries act as court commissioners in succession proceedings and enforcement of payment proceedings. The president of the court assigns the cases to the notaries equally in alphabetical order of the notaries surnames taking into account their official area.

As court commissioners, notaries act fully independent and cannot be instructed by the court or other authorities. There is a full delegation of power and the notarial decision does not need confirmation by the court.

However, regarding succession proceedings, if a dispute arises between the heirs, the notary has to forward the file to the court. The court then decides if there is a dispute at all, that cannot be decided by the notary and – if there is such a dispute – instructs the parties to initiate contentious proceedings (see the next chapter).

Notarial fees are determined by statute and are not up to party negotiations. They are separate from court fees. The notaries are paid directly by the parties. There is no possibility for legal aid/exemption of notarial fees as such.

1.1.2.2 Succession proceedings

Succession proceedings are initiated *ex officio* after the competent municipal court receives the information of death of a person. After that, the municipal court entrusts a notary to conduct the proceedings. A notary acts in succession proceedings in the function of a court commissioner. He/she has to take all the necessary actions in the course of the proceedings and eventually also render the decision.

The succession proceedings have to be conducted only exceptionally in court. As stated in the previous chapter, the court commissioner has to forward the case file to the court, if a dispute arises among the potential heirs. The notary for example cannot decide on facts on which a right of inheritance depends, on disputes regarding the size of an inheritance share or on a dispute over the composition of the estate. If the court finds that there is such a dispute, it stays the proceedings and instructs the party whose right of inheritance appears to be the weakest to initiate contentious civil proceedings. Otherwise, the case will be sent back to the notary who can continue his/her proceedings. This will be the case if there is (only) a dispute about the facts that are assumed by law, generally known facts or facts which are contained in publicly certified documents. The decision of a court in contentious proceedings can be appealed. If a person instructed by the court to initiate contentious proceedings does not do so within the time limit set by the court, the case is returned to the notary for further proceedings, and the notary will make a decision in accordance with the data in the succession file and the law.

In succession proceedings the entrusted notary will set a hearing and invite all persons required by law. After the hearing the notary will decide on the right of inheritance and the amount of the respective shares of the heirs, in accordance with the law and the given declarations of inheritance. This decision has the same effect as a court decision.

The notary’s decision can be appealed. The court is competent to decide in case the heirs file an appeal. After the court decides about the appeal the court returns the succession file to the court commissioner who makes the final decision based on the court decision on the appeal.

The court commissioner makes the decision independently, the court has no influence on the notary's decision.

The court, however, supervises the work of notaries in succession proceedings. The court may remove the case from the notary as court commissioner, for example if he/she is unable to perform the work due to illness or if he/she neglects legal obligations. The court may also fine the court commissioner if he/she refuses court orders.

1.1.2.3 Registers

Croatian notaries (in their function as “notaries”) can submit applications for entries to the company register and to the land register electronically with an electronic signature. They are also entitled to produce authenticated excerpts from these public registers. Excerpts from the registers by the notary have the same effects as those issued by the court.

1.1.2.4 Enforcement proceedings

Croatian notaries are entitled to issue enforcement orders based on so-called "trustworthy documents" (issued by private entities e.g., invoices) on the request of the creditor.

A creditor who wishes to enforce a claim has the possibility to initiate proceedings before the municipal court in the debtor's district by application. The enforcement cases are assigned to the notaries by the municipal court (alphabetical order). The notary instructs the debtor to comply with the demand, as in case of non-compliance within 15 days, a writ of execution (decision of enforcement) is issued by the notary, provided that there is a "trustworthy document". If the demand is not met within 15 days, the writ of execution is forwarded to the debtor, who is also informed of the possibility of a contest. If the writ is not contested (within 8 days or 3 days for bill of exchange or check) by the debtor, the notary can issue a valid and enforceable title for the execution (certificate of enforceability) on the basis of the writ. In cases in which the application for enforcement is withdrawn, the notary may terminate the proceedings with a decision. If the debtor contests the writ of execution within the deadline, the file has to be forwarded to the competent municipal court and contentious court proceedings have to be initiated.

1.1.2.5 EU law

EU Succession Regulation (No. 650/2012)

Notaries (court commissioners) in Croatia are acting as "courts" in the sense of Art. 3 No. 2 SR. They exercise judicial functions in succession proceedings by delegation of power of a court. They act under the control of that delegating court. Notaries fulfill the requirement of impartiality and the right of all parties to be heard. Lastly, decisions made by court commissioners may be subject of an appeal and are of the same force and effect as decisions of a court. However, the Croatian government did not notify notaries as 'other authorities or legal professionals' acting as courts under Art. 3 No. 2 SR but that is only of declaratory significance anyway.

Croatian notaries have the competence to issue the ECS.

1.1.3 Czech Republic

1.1.3.1 Relationship notary – court

In the Czech Republic, notaries act as court commissioners (only) in succession proceedings. Their tasks in succession proceedings include the power to issue the final decision, which has the same effects as a judicial decision.

Notaries also make direct entries into public registers e.g., the company register. Regarding the land registers, notaries have no exclusive competences. However, they are entitled to draw up authentic instruments and make applications for registrations in the land register.

The notarial tariff is determined by the Decree of the Ministry of Justice No. 196/2001. There is no room for price negotiation for the parties and the court commissioner. The notary's remuneration in succession proceedings is paid by the participating parties. In case the deceased did not leave any substantial assets, the succession proceedings will be suspended and the state has to pay the notarial fees. Notarial fees are different from court fees.

Legal aid is available for the representation in succession proceedings if a notary considers the representation for a party for the sake of protection necessary (usually in succession proceedings no representation is required and therefore no legal aid available). Of course, the parties can also be represented by an attorney at law (or as far as it goes also by a person that is not qualified as a lawyer) in case they wish to be represented, but the costs of representation may be handled differently.

Parties are not entitled to choose the notary if he/she has the role of a court commissioner (annual schedule).

The court has a certain supervisory function: It may issue instructions as regards the course and conduct of proceedings. However, it does not issue instructions on the merits. Theoretically, it can also relive a notary of a case (in case of extreme delays). This scenario is rare in practice.

The decision of a notary may be appealed. The appeal may be filed both with the district court or with the notary.

1.1.3.2 Succession proceedings

The competent district court initiates the succession proceedings *ex officio* as soon as it receives the information that a person has died. After that, the court assigns a notary to conduct the succession proceedings in his/her function as court commissioner. The court commissioner is assigned on the basis of a schedule issued by the regional courts upon proposal of the regional notarial chamber. The schedule is issued for the period of a calendar year and publicly available.

After the assignment the notary starts with the preliminary research in which the potential heirs, any wills, the assets, debts etc. of the deceased are determined. Court commissioners can, for example, also make inquiries with banks, the Land Registry and other institutions that are relevant for the examination. If the deceased has not left any assets, the notary suspends the proceedings.

Usually, a hearing follows the preliminary research. The hearing is held before the notary acting as court commissioner. In this case, an inventory is established with the main purpose of protecting the heirs from the debts of the deceased. In the hearing, creditors should also assert their claims. A liquidation of the estate is necessary in the case of insolvent estates. As regards to the liquidation, notaries do not carry out the function of a liquidator, but they decide on its initiation and carry out certain preliminary tasks.

If there is a dispute on the facts (e.g., whether a person is an heir), the notary issues a resolution and instructs the heir whose claim to the right of inheritance appears to be the weakest to initiate an action for the determination of a disputed fact before the court within a time limit (the minimum being two months). If the instructed heir does not file an action, the dispute is presumed by law to have been resolved to his or her disadvantage.

In contrast to disputes on the facts, the notary can issue a binding decision on the law, e.g., if there is a dispute which merely concerns the legal assessment of undisputed facts.

Decisions in succession proceedings are issued by the court commissioner in the name of the competent district court (decision-making power). The decision (= *Beschluss*) has to include the name of the competent civil court, the name of the notary who acted as court commissioner and his employees, the name of the decedent, the permissibility for an appeal at the district court and the deadline, etc. Partial decisions (on the undisputed parts of the estate) are not explicitly regulated but

accepted in practice (As for the disputed part of the estate, the parties have to initiate contentious proceedings before the court). The decision does not require confirmation by a judge/the court.

1.1.3.3 Registers

Czech notaries are entitled to make direct entries in public registers (e.g., company register). These entries are automatically displayed in the respective register and the notaries do not need any confirmation of the court or another authority for the registration. They can also upload attachments to the register. This competence does not fall within the activity of the court commissioner.

There must be three requirements fulfilled for a direct entry. At first the facts being registered must be authenticated in a notarial deed. Secondly, this deed has to confirm the legality of the content and compliance with formal requirements. Thirdly, all the documents necessary for registration must be present.

The notary is also competent to produce authenticated excerpts from public registers.

There are six public registers:

- Register of Associations (*spolkový rejstřík*)
- Register of Foundations (*nadační rejstřík*),
- Register of Institutes (*rejstřík ústavů*),
- Register of Associations of Unit Owners (*rejstřík společenství vlastníků jednotek*; associations of unit owners are legal persons gathering the owners of flats in the blocks of flats),
- Company Register (*obchodní rejstřík*),
- Register of Publicly Beneficial Associations (*rejstřík obecně prospěšných společností*).

The land register is not considered a public register according to the Czech Act on Public Registers in the same way as the before mentioned registers (another category of "register"). Regarding land registers, notaries are (however, not exclusively) entitled to draw up authentic instruments and make applications for registrations in the land register.

1.1.3.4 Insolvency Administration

Notaries in the Czech Republic are entitled to perform the activity of an insolvency administrator and are entitled to draw up declarations of insolvency. This is not a common activity for notaries in the Czech Republic. Notaries can perform the activity of an insolvency administrator (only) upon permission issued by the Ministry of Justice.

1.1.3.5 EU law

EU Succession Regulation (No. 650/2012)

Czech notaries as court commissioners do qualify as courts in the sense of Art. 3 No. 2 SR since all stipulated requirements are met. They conduct the succession proceedings, they issue the final decision in the name of the competent court, the impartiality and right to be heard are guaranteed by law, there is the possibility for an appeal against the decision of the court commissioner and their decisions have the same effect as court decisions.

Czech notaries also issue the ECS in cases the succession proceedings are not yet concluded (after their conclusion it is issued by the court).

The Czech government did explicitly notify notaries as 'other authorities or legal professionals' acting as courts under Art. 3 No. 2 SR in conjunction with Art. 79 SR According to § 100 para. 1 of Act No. 292/2013 on Special Judicial Proceedings, acts of the court of first instance in succession proceedings are performed by a notary, acting as a Court Commissioner, authorized by the Court, unless otherwise specified.

1.1.4 Hungary

1.1.4.1 Relationship notary – court

Notaries in Hungary generally have an auxiliary function for the court and should make it easier for the parties involved to settle certain non-contentious matters. In some cases, however, the function of notaries goes beyond that of an auxiliary function and they act as a "court", conducting the proceedings instead of a court = notarial non-contentious proceedings. The proceedings under the competence of Hungarian notaries which have the same effect as court proceedings are stated in particular in Act XLI. of 1991 on Civil Law Notaries, short KJTV, in Act XLV of 2008 on Certain Notarial Extrajudicial Proceedings Act, short KJNP, in Act L of 2009 on the Order for Payment Proceeding, short FMHTV, and these proceedings being of particular importance, in Act XXXVIII of 2010 on Succession Proceedings, short HETV. Non-contentious proceedings by notaries are by statute regarded as being legally equivalent to those of a court (§ 5 KJTV). Decisions of a court on the merits in Hungary are called judgements. In notarial non-contentious proceedings decisions are not called judgements, while they have *de facto* the same effect as judgements and have the character of *res iudicatae*.

A notary acts as a court and a decision of a notary has the same effect as that one of a judge

- when issuing undisputed payment orders
- when concluding settlement agreements in succession proceedings
- when concluding settlements to terminate a registered partnership
- when annulling a security or deed.
- When approving out-of-court settlement agreements made before them.
- On succession proceedings, see 1.1.4.2 *infra*.

In cases in which the notaries have competences to conduct the proceedings and decide on the non-contentious matter, they act fully independent and may not get instructed by the courts or any other authority. It is usually possible to file an appeal against a decision where a notary decides on the merits (exceptions e.g., in preliminary evidence or payment order proceedings).

The court, however, is specifically competent to decide on legal remedies against notaries decisions and proceedings regarding the exclusion of a notary.

If a notary acts as a "court", the assignment i.e., jurisdiction is regulated by law, in other cases the parties can choose the notary freely.

Notarial fees, are like court fees in Hungary, regulated by law and not up to party negotiation. The notary cannot waive the charging of the fee. There are just a few exceptions in which a notary may reduce the fees but in general everybody should be entitled to the same service for the same price. The fees for notarial proceedings must be paid by the party or parties (joint liability) initiating the proceedings (cost note may be enforced by the notary).

1.1.4.2 Succession proceedings

Conducting succession proceedings falls within the competence of Hungarian notaries. This competence also covers succession proceedings in which there is a dispute between the parties. These notarial non-contentious proceedings are of the same effect as proceedings in court and end with a formal decision (HETV. 2. § (1)-(2) ph. Act XXXVIII of 2010 on Succession Proceedings). Therefore, the notary decides on the transfer of the estate (= the entitled heirs → "grant of probate"). This decision is binding on the parties but can be appealed with a court which then issues a final, binding decision (see also 1.2.4 *infra*).

Settlement agreements are possible within succession proceedings in front of a notary and also of same effect as an agreement which has been approved by a court (HETV. 12. § (1) ph.).

In case the parties of succession proceedings have contradictory interests, the notary may carry out a legal assessment of the facts that have emerged during the proceedings. On that basis he or she will make the final decision on the release of the estate. The notary is also required by the law to clarify the essential facts. However, only the court has the power to make a final assessment of the facts, which cannot be disputed (challenged) anymore. The notary's decision on the release of the estate binds the parties (heirs, debtor) in the same way as if it had been taken by a court, but a party (heirs, debtors) who disagrees with the notary's findings of fact may take the case to the court (within 30 days of the notary's decision becoming final and binding). Insofar, in case of a dispute, the notary only releases the estate with a so-called temporary effect, which may lead to the dispute to be finally decided by the court.

1.1.4.3 Family matters

Regarding registered partnerships, it is possible to agree on a settlement and to terminate a registered partnership before a notary (= non-contentious notarial proceeding).

A decision approving the settlement of the parties shall have the same effect as a court-approved settlement, and a decision terminating a registered partnership shall have the same effect as a court judgement. There is no right to review the decision of a notary in this case as far as the law is concerned (Act XLV of 2008, KJNP. 36/D. § (3) ph.). In case of factual errors, an extraordinary remedy (renovation of the case) is possible.

1.1.4.4 Payment Orders

The order for payment proceedings fall within the competence of notaries. The person claiming payment submits her claim electronically to the Hungarian Chamber of Civil Law Notaries. The Chamber in turn forwards the request for payment order to a notary. The notary is responsible for issuing an order for payment (within 72 hours). The notary forwards the order for payment to the debtor, who can respond to it within 15 days. In the event of a challenge, the case is referred to the competent court which then continues the proceedings. If the order for payment has not been challenged within the prescribed time limit, it shall have the same effect as a final court judgement (Act L of 2009 on the Order for Payment proceedings, FMHTV. 36. § (1) ph.).

In case of a rejecting decision of the notary regarding the order for payment, the claimant may appeal which leads to non-contentious proceedings at the regional court (*törvényszék*) with jurisdiction at the seat of the deciding notary.

1.1.4.5 Annulment of securities and deeds

Any notary is competent for the proceedings regarding the annulment of securities and deeds (KJNP. 29. § ph.). The last holder of a lost, stolen or destroyed security may apply at the notary's office for a declaration of annulment, as may the person who has a right or is subject to an obligation under the security. A notary's decision declaring a security annulled has the same effect as a judgement in court (KJNP. 34. § (5) ph.).

1.1.4.6 EU law

EU Succession Regulation (No. 650/2012)

In Hungary, notaries have to comply with the provisions of the SR and assess the applicable law and jurisdiction. The notary has the exclusive power to issue the ECS. Regarding the SR, Hungary has notified to the Commission (Art. 79 No. 1 in conjunction with Art. 3 No. 2 SR) that Hungarian notaries are to be considered as authorities acting as courts in accordance with Art. 3 No. 2 SR.

EU Enforcement Order Regulation (No. 805/2004)

A document (notarial deed) issued by a notary constitutes a European Enforcement Order for the purposes of this regulation and the notary has the competence to issue such an order in accordance with this regulation.

EU Taking of Evidence Regulation (No. 1206/2001; No. 1783/2020)

Hungarian notaries may apply directly to the courts of the Member States for the purpose of taking evidence. This is common for succession proceedings but may also occur in other proceedings.

EU Service of Documents Regulation (No. 1393/2007)

It allows service of judicial documents from one Member State directly to Hungarian notaries which speeds up the proceedings.

EU Payment Order Regulation (No. 1896/2006)

In Hungary, European Orders for Payment are issued by notaries. The notary who issued the European Order for Payment is also competent for conducting the enforcement.

1.1.5 Slovak Republic

1.1.5.1 Relationship notary – court

In the Slovak Republic, notaries act as court commissioners in succession proceedings and in proceedings for the redemption of deeds. The competences of notaries as court commissioners in both tasks derive from a court order (court of first instance). This court order is a procedural measure, which itself is not a contestable court decision.

Upon the court order the notary is entitled to conduct the succession proceedings, to decide and to issue the final decision, including the decisions regarding the approval of legal acts of minors and person with deprived legal capacity (appointing a person who acts on behalf of them).

The court commissioner's decision is considered to be a decision of the court of first instance, which means that Slovak notaries do have decision-making power (ruling in the name of the district court).

Appointed court commissioners are acting independently from instructions of a court, however, the notary is still under certain control of a court (can be withdrawn or excluded from the case). The court of first instance may by order withdraw a case from the respective court commissioner if he/she causes unnecessary delays. The notary can be excluded, if the objections regarding the partiality of a notary are raised by the parties during the proceedings, or the notary declares himself/herself to be partial (not common in practice).

It is possible to file an appeal against the decision of a court commissioner. The appeal must be filed at the office of the court commissioner who issued the decision, at the district court which appointed the court commissioner or at the competent court of appeal.

The court is bound by an annual working schedule issued by the president of the respective district court on the proposal of the Chamber of Notaries of the Slovak Republic when choosing a court commissioner for succession proceedings or proceedings for the redemption of deeds. Therefore, the parties cannot choose the notary of their proceedings.

The fees for notaries/court commissioners are separate from court fees. The fees must be determined in accordance with the law[2]. Notarial fees are paid directly to the notary by the parties of the proceedings (in succession proceedings the heirs pay the fees in amount to the relative proportion of the price of the estate required). If the succession proceedings were terminated due to insolvency or by other reason, notarial fees are paid by the court of first instance. There is no legal aid for notarial fees.

1.1.5.2 Succession proceedings

The competent district court initiates the succession proceedings *ex officio* as soon as it receives the information that a person had died or has been declared dead. After that, the court authorizes a notary (evenly) on the basis of the annual working schedule to conduct the succession proceedings in his/her function of a court commissioner.

Receiving the court order, the court commissioner is entitled to conduct the succession proceedings (starting with the preliminary hearing, making records and taking evidence, creating the inventory, securing the estate, etc.) and to make the final decision (decision-making power). Decisions and acts of the notary issued in succession proceedings are emitted, signed and stamped by the notary under the name of the district court of first instance by which the notary was appointed. The notary moreover makes a remark upon enforceability and effects for an execution regarding his/her the decision.

If upon preliminary hearing the respective notary concludes the insolvency of the deceased or the fact that the value of his assets is low or if neither reaches the value of funeral costs, he decides on the termination of the succession proceedings. Otherwise, the notary concludes the succession proceedings by emitting the judicial decisions on devolution of the estate to the heirs.

In case it is disputed if a person has a right to inherit, the person concerned is referred to the court after a conciliation attempt. Thus, the notary cannot decide on that specific disputed fact. Instead, he or she instructs the heir whose right of inheritance appears less probable to initiate an action for the determination of a disputed fact before the court within a time limit set by the notary. If the instructed

[2] Court fees Act. No. 71/1992 Zb. Act on Court Fees and Fee for Criminal Record Extract and the notary fees upon Executive Act. No. 31/1993 of the Ministry of Justice of the Slovak Republic on fees of notaries.

heir does not initiate contentious court proceedings, the matter is considered to be decided against this person.

The court must also decide if a dispute arises among the heirs regarding the amount of the deceased's estate or debts unless the dispute concerns the legal assessment of undisputed facts (which the notary can decide). In case of dispute over facts, the notary does not make any binding decision over these disputed facts and does not take the disputed property or debt into account in the proceedings. As for the disputed part of the estate, the parties have to initiate contentious proceedings before the court.

The notary can have the function of a liquidator in case the value of debts exceeds the value of the estate. Then the succession proceedings are prolonged and the liquidation of the inheritance is carried out by the notary in the function of a liquidator of the property of the deceased upon the initial court order.

1.1.5.3 Proceedings for the redemption of deeds

The court authorizes a notary to conduct the proceedings for the redemption of deeds and decide on the matter. Notaries in proceedings for the redemption of deeds act as court commissioners.

Such notarial proceedings are not very relevant in practice.

1.1.5.4 Registers

Land Register

If, after succession proceedings, entries have to be made in the land register, it is the task of the notary to file the necessary proposals (this applies only to the land register).

1.1.5.5 EU law

EU Succession Regulation (No. 650/2012)

The notary who was appointed by the court in the respective case is the competent authority to issue the ECS in cases the succession proceedings are not yet concluded. After the final conclusion of the succession proceedings, the court is the competent authority. In practice, however, the court to issue the ECS usually appoints a notary to issue the certificate on the basis of an annual working schedule. Therefore, in any case, it is usually the notary who issues the ECS. The notary, acting as court commissioner, can be considered as “court” under national law and constitutes an authority in the sense of Art. 3 No. 2 SR Therefore, the notary as court commissioner is also bound by the provisions on the jurisdiction of the SR.

The government of the Slovak Republic did not explicitly notify notaries as professionals competent to act under Art. 3 No. 2 SR, neither other profession.

1.1.6 Slovenia

1.1.6.1 Relationship notary – court

Notaries do not have any other special functions in non-contentious proceedings in Slovenia than the functions described below. They do not have judicial powers and all tasks, especially the decision-making powers, are reserved to the courts. According to Art. 12 Notary Act it is, however, possible that courts order the performance of some tasks in non-contentious proceedings within the meaning of the

Notary Act (e.g., appraisal of assets or securing the estate) by notaries that have their registered office in the territorial jurisdiction of the competent court. If there are several such notaries, they are selected according to the time of the order of the court, considering the list in alphabetical order of notaries' surnames.

The fees of notaries are separate from court fees and directly paid by the parties. Both, the notaries fees and the court fees are determined by law. It is not possible to apply for legal aid for notary fees. There is, however, the possibility that notaries lower their fee because of a party's poor financial situation. That is up to the notary's discretion.

1.1.6.2 Succession proceedings

According to Art. 132 Inheritance Act, the estate of a deceased person passes by the law itself, *ipso iure*, to the heirs at the time of his/her death. Therefore, the decision of the court on the estate and its heirs concluding the succession proceedings is of a declaratory effect. According to Art. 214 Inheritance Act, the court (alone) declares the respective legitimate persons to heirs.

Whereas, for example in Austria, a notary as court commissioner has official functions in non-contentious proceedings (some of them obtained *ipso iure*, some of them by delegation order of a judge) and plays an important role in conducting the succession proceedings and in other countries, such as the Czech Republic, can even issue judicial decisions, Slovenian law does not provide for notaries as court commissioners. However, the court can delegate some competences in succession proceedings to the notaries by decision. The tasks the court may hand over to notaries in succession proceedings include the inventory, appraisal of assets and securing the estate. A notary may be appointed to act as an administrator of the estate by court decision. Furthermore, a notary may make a land register/company register proposal (based on a ECS for example), which means he/she converts the documents delivered into an electronic form, signs them with an electronic signature and files the proposal. Therefore, the tasks of notaries in Slovenia are not too different from those which are performed by notaries as court commissioners in some other States.

The law provides only for the delegation of certain tasks, but not for the delegation of decision-making powers. The notaries follow the instructions of the court regarding the tasks to be performed and perform these tasks according to their professional standards (Art. 12 para. 2 Notary Act).

1.1.6.3 Family matters

Proceedings for recognition of paternity/maternity

Notaries have the competence to draw up the official document according to which a man recognizes his paternity or a woman her maternity for a child.

Agreements on division of joint property, maintenance and consensual private divorce

A notary has the competence to draw up (before or during the marriage, or in the event of divorce) an enforceable notarial deed for the division of the joint property of the spouses. Furthermore, the spouses may conclude a maintenance agreement in form of an enforceable notarial deed (Art. 101 Family Code) and the notary can also draw up a notarial deed covering the maintenance between parents and their child (Art. 182 Family Code – maintenance to be paid by parents to a child who has reached the age of majority; Art. 193 Family Code – maintenance to be paid by a child at the age of majority to its parents).

As far as private divorces are concerned, notaries have quite extensive competences in Slovenia. Regarding Art. 96 and 97 of the Slovenian Family Code a divorce can be carried out by a notary if there are no parental duties for joint children of the spouses and if they have reached an agreement regarding the division of their joint property, an agreement about who of the spouses shall remain or become the tenant of the apartment in which they live and on the maintenance for the entitled spouse.

The parties do not have to be presented by a lawyer.

The marriage is terminated from the signing of the notarial record. This record constitutes the basis for the entry of the divorce in the civil register. Within eight days of the signing of the record, the notary has to send the record to the administrative unit, where the divorce will be registered in the civil register. In Slovenia when spouses cannot reach mutual consent or have minor children the divorce must take place in court.

1.1.6.4 Registers

Land Register

Notaries have the competence for filing land register proposals, which means on request by the parties he/she converts the documents delivered into an electronic form, signs them (confirming the receipt of the original document for the safekeeping) with an electronic signature and then the proposal is automatically distributed to the competent land registry court (local court, *okrajno sodišče*). Notaries file most of the proposals regarding land register entries (more than 70 %). In addition to the notaries, also lawyers, municipalities and some companies can file such proposals. In exceptional cases parties can also personally file a proposal at the local court. The decision about the proposal is made by the court.

Notaries may also apply for the amortization of a document. Notaries keep the documents received for the register proposal until the final decision of the land register proceedings is made and then return them to the applicant.

On request, notaries can issue authenticated certificates from the land register (authenticated land register excerpts in the form of a printout).

The land register is available via an online e-court portal (portal e-*sodstvo*) and the information published there is accessible to everyone free of charge. The only requirement is the prior registration with a valid email address.

Company Register

Notaries may – like it is the case in land register proposals – file an electronic company register proposal. Notaries can only file the register proposals in electronic form. In case an electronic application has been filed by a notary, all future submissions in company register proceedings must also be made electronically. The notary is the one who receives the decision from the court (district courts, *okrožno sodišče*, manage the company register). Parties can also personally file an application at the district court. All further applications that become necessary in the course of the proceedings (e.g., applications for any other potential party) are also made by the notary (authorized person by the applicant).

On request, notaries can issue authenticated certificates from the company register (authenticated company register excerpts in the form of a printout). It is possible to find registered companies online

on the website AJPES (*Agencija Republike Slovenije za javnopravne evidence in storitve*). The information published on this website may be accessed by anyone free of charge.

1.1.6.5 EU law

EU Succession Regulation (No. 650/2012)

Notaries in Slovenia do not qualify as courts in the sense of Art. 3 No. 2 SR Slovenian notaries do not have the power to issue a ECS (exclusive competence of the court).

1.1.7 Alsace-Moselle

1.1.7.1 Relationship notary – court

The main non-contentious proceedings in Alsace Moselle for notaries are:

- real estate execution proceedings,
- judicial partition proceedings (division of the estate in succession proceedings),
- proceedings for the distribution of money by order

In these proceedings, the notary is appointed by the competent court and has from this moment the full power to conduct the respective proceedings. The notary no longer acts as a notary but as a delegate of the court ("*delegué du tribunal*") and is obliged under Art. 6 ECHR to be neutral, impartial and to ensure the right of all parties to be heard. Notaries in non-contentious proceedings exercise a mission of conciliation and mediation, with the aim to reach a settlement between the parties and thereby relieve the courts.

In the event that a dispute arises which the notary is unable to resolve, within the scope of his non-contentious duties, he/she is obliged to draw up a "report of the dispute" and to record the dispute. The party concerned must then refer the matter to the court, which will then decide on the dispute (contentious proceeding). If necessary, the court confirms already issued notarial deeds or other acts of the competent notary. If no dispute arises, the court will not intervene in the notarial proceedings and the function of the court is reduced to the appointment of the notary at the beginning of the proceedings. The appointing court retains a role of controlling the proper conduct of the delegated proceedings and may appoint another notary if the appointed notary does not do his/her job properly (which is very rare). In the judicial partition proceedings under local law (Alsace Moselle), the possibility of referring to the competent court to settle a potentially arising substantive dispute, is only open if the notary draws up the before mentioned "report of the dispute".

The court appoints the notary of its choice. Its choice is discretionary. The applicant may propose the appointment of a notary, the other party/parties may also propose the appointment of a notary, but the judge is not bound by these proposals.

The fees for the proceedings of notaries are governed by a local decree determining the legal tariff. The notary's remuneration in these matters is not subject to negotiation between the parties and the notary.

1.1.7.2 Succession proceedings

The Alsatian-Moselle notary plays an important role in the succession proceedings regarding the issuance of the certificate of inheritance. The notary issues the "act of sacramental affirmation", a

notarial act which enables the heirs to prove their status as heirs and thus to assert their rights against third parties.

The "act of sacramental affirmation" establishes the inheritance status of the parties, and the court issues a certificate of inheritance confirming this status. The court is thus requested by the notary to issue the certificate of inheritance on the basis of a notarial deed.

Although the notary does not exercise any judicial competence as such, he contributes significantly to the succession proceedings.

1.1.7.3 Real estate execution proceedings

In matters of forced execution of real property, the notary is exclusively competent to conduct the proceedings. The notary is appointed by the competent execution court. In the course of the proceedings, the notary must first of all summon the debtor, the creditor and the third-party holder to discuss the initial price, the conditions, the time, the method and the place of the auction. The notary has to organize and publicly announce the public auction.

The court is solely involved at the beginning of the proceedings, to order the execution and to appoint the notary who will be in charge of it.

Afterwards, the court has of course the competence for appeals. In non-contentious proceedings do exist appeals, called "immediate appeals" (*"pourvoi immédiat"*).

1.1.7.4 Distribution proceedings

In case a sale through execution has become final, the creditors may reach an amicable agreement on the distribution before the notary in charge of the auction. The notary who was also competent for the auction shall forward a copy of the specifications and the record of the auction to the registrar in charge of the land register and request the registration of the property rights of the successful bidder(s).

Where no amicable agreement is reached, the notary shall initiate the distribution proceedings and draw up a record thereof. The creditors are given a deadline by the notary to submit their position and the notary makes a "declaration of collocation" in this regard. The declaration of collocation contains, in particular, a list of the assets to be distributed, a list of liabilities and the rank of admitted debts.

In the event of a dispute, each party shall immediately submit its objection regarding the declaration of collocation. If an objection is recognized by the parties as well-founded, or if another agreement is reached between the parties, the declaration of collocation shall be corrected accordingly. If the points in dispute are not clarified, the execution court is competent to decide. The decision of the enforcement court may be appealed.

If there are no objections or if the objections raised are resolved at the appointed time, the declaration of collocation shall be closed.

Upon completion of the distribution process, the successful bidder who has deposited the price (incl. interest) may request removal of the existing entries.

1.1.7.5 EU law

The French and Alsatian-Moselle notary does not have the status of a court within the meaning of EU law.

EU Succession Regulation (No. 650/2012)

In France, the notary is the competent authority to issue the ECS according to Art. 3 No. 2 SR.

European Enforcement Order Regulation (No. 805/2004)

French notaries (and not only the notaries of Alsace-Moselle) are the authority that is able to issue a European Enforcement Order established by Regulation (EC) No. 805/2004, concerning uncontested claims.

Apart from the tasks on the bases of the SR and the issuing of European Enforcement Orders, it seems that French notaries, including those of Alsace-Moselle, do not exercise any court or quasi-court functions within the framework of any other EU regulation.

1.2 Part II: Constitutional Law

Preliminary remark: In this section of the study, which is based on the national reports, the main focus lies on the question whether the notary's role as a court or court commissioner is in conformity with the requirements of fair trial as laid out in Art. 6 ECHR, Art. 47 EU-CFR and equivalent constitutional provisions in national law. The objective is to find out whether there are, from a (national) constitutional law perspective, any objections against notaries in the role of "courts". The question whether such objections exist under EU primary law (beyond Art. 47 EU-CFR) will be addressed in chapter 2.2 of this study.

This question must be distinguished from the question whether a notary in a certain role meets the requirements which define a "court" not only in a fundamental rights' understanding, but in EU secondary legislation (for details, see chapter 2.1 *infra*). There are two set of CJEU cases which are of importance in this context: First, the "Croatian" cases[3] in which the CJEU held that a Croatian notary issuing a writ of execution without hearing the debtor beforehand cannot be regarded as a court as he or she did not hear both sides beforehand (for details, see 1.2.2.2 *infra*). Second, the "succession" cases[4] deal with the role of Polish and Lithuanian notaries in succession proceedings (these countries are not covered by the project). In both cases the Court held that a notary who only acts on joint instruction of the parties cannot be regarded as a court in the understanding of EU secondary legislation as he or she does not have the power to unilaterally decide between the parties. However, a court must settle a dispute between the parties involved. These decisions by the CJEU are also in line with the ECtHR case-law in which this court also held that a notary who can only act upon consent of the parties involved is for itself not a "tribunal" in the sense of Art. 6 ECHR as this cannot be regarded as "settling a dispute"[5] (see 2.2.1.2.d *infra*).

However, these cases do not rule out that a notary can act as a "tribunal" / "court" if he or she can decide unilaterally between the parties and the other criteria of "fair trial" are met, in particular that all parties are heard by the notary. This situation will be analysed in more detail in chapter 2.2.

1.2.1 Austria

1.2.1.1 Guarantee of fair trial

The guarantee of fair trial before a "court" under Art. 6 ECHR is a directly applicable fundamental right in Austria as the ECHR, since the 1960s, has the rank of a constitutional statute. Accordingly, any violation of Art. 6 ECHR can be invoked before national courts (and not only before the European Court of Human Rights). Furthermore, any statute which contradicts Art. 6 ECHR can be declared void by the Constitutional Court. The same also applies to Art. 47 EU-CFR as the Constitutional Court has explicitly

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3 CJEU March 9, 2017, C-551/15 *Pula Parking*; CJEU March 9, 2017, C-484/15 *Zulfikarpašić*; CJEU May 7, 2020, C-267/19 and C-323/19 *Parking and Interplastics.*

4 CJEU May 23, 2019, C-658/17 *W.B.*; CJEU July 16, 2020, C-80/19 *E.E.*; CJEU September 1, 2021, C-387/20 *OKR*.

5 See ECtHR November 28, 2000, 36.350/97 *Siegel vs. France*, in particular § 33. However, the ECtHR held the guarantees of Art. 6 applicable insofar as the notary was acting within a proceedings ordered by a Court.

declared that this provision may be invoked before national courts and the Constitutional Court itself like a "domestic" fundamental right enshrined in the Federal Constitution.[6]

Furthermore, the Austrian constitution provides for a fundamental right to the lawful judge (Art. 83 of the Federal Constitution) which states that decisions which are taken by courts or administrative authorities which do not have jurisdiction in the matter are illegal/unconstitutional.

1.2.1.2 Fundamental guarantees and notaries in the service of the judiciary

In principle, notaries are not bound by instructions (neither by courts nor other state authorities) and cannot be removed from their function or transferred to another notary's office against their will, except for reasons of incompatibility, incapacity to work or grave misconduct. Finally, notaries are obliged to act impartially and must balance the interest the parties involved. In other words, their independence is comparable to those of judges. This also applies in principle when notaries act as court commissioners. In this function, they do not make – as described in chapter 1.1.1 *supra* – formal decisions but assist in preparing a final decision by a judge. In this context, the judge (which him- or herself meets the requirements of Art. 6 ECHR / Art. 47 EU-CFR) – but not any other state authorities or parties to the proceedings – can issue instructions to the notary or demand information. Succession proceedings fall within the scope of Art. 6 ECHR / Art. 47 EU-CFR ("civil rights"). Due to the guarantees described above, notaries also in principle meet the requirement of a "tribunal" in the understanding of Art. 6 ECHR / Art. 47 EU-CFR. As court commissioners, notaries act under the supervision of a court, however, the court itself has the power to issue the final decision and is itself bound by the guarantees of Art. 6 ECHR / Art. 47 EU-CFR.

1.2.1.3 Potential future developments

Austria is the only country among those analysed in this survey where the transfer of additional tasks in the service of the judiciary poses an immediate challenge from a constitutional law perspective (in Hungary, while the transfer is *per se* possible, there are some limits as to the proceedings concerned, see below). This can be explained by historical reasons: The role of notaries as court commissioners was already existent for decades when the Federal Constitutional Law entered into force in 1920. Under the Non-Contentious Proceedings Act of 1854 (which was still in force in 1920), court commissioners could be transferred any tasks in non-contentious proceedings except those which required a judicial decision. The Constitution does not mention any specific duty of notaries in the service of the judiciary.

When legislative proposals for strengthening the role of notaries in non-contentious proceedings were discussed in the late 1980s and early 1990s, a dispute arose on whether such a stronger role was possible from the national constitutional perspective. This discussion was partially influenced by a fear of the judiciary of losing competences to non-judicial actors. In this dispute, part of the doctrine argued that the Federal Constitution does not permit for any decision-making function to be transferred to notaries, in other words: Notaries as court commissioners will always be limited to activities without decision-making powers ("auxiliary activities").[7]

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[6] VfGH (Austrian Constitutional Court) 14.03.2012, U 466/11, VfSlg 19632/2012 = iFamZ 2012/120, 164 (*Cede/Pesendorfer*).

[7] *Hochegger* in BMJ (Ed.), Das neue Außerstreitverfahren (1989), 103 (114); *Walter/Kucsko-Stadlmayer*, Verfassungsrechtliche Grenzen notarieller Befugnisse, ÖJZ 1997, 281 (282 *et seqq.*); *Fasching*, Verfassungsmäßige Gerichtsorganisation, 10. ÖJT I/3 (1988) 48.

This view was rightly challenged by *Stelzer* who, while discussing the role of the notary in succession proceedings, points out that this understanding misreads the constitutional framework.[8] While it is clear that there must be some "core tasks" of judicial adjudication, these are not found in the area of non-contentious proceedings. Apart from these tasks, a transfer of tasks formerly reserved for judges is possible as long as it is in conformity with Art. 6 ECHR / Art. 47 EU-CFR. In this context, it is also important to note that the guarantees of Art. 6 ECHR are also fulfilled if a decision by a "non-tribunal" is later reviewed by a tribunal in the second instance. Furthermore, as shown above, notaries under Austrian law meet the requirements of "fair trial" themselves. As long as these conditions are met, it would be possible to transfer tasks from judges to notaries, including decision-making powers.

In the end, the role of notaries as court commissioners was not strengthened despite the convincing arguments presented by *Stelzer;* until this date, court commissioners do not have the power to issue final decisions. However, in the following years, two important elements changed. On the one hand, EU secondary legislation passed under Art. 81 TFEU became quite "friendly" towards national provisions which allow non-judicial actors to take over judicial tasks (see 2.1.3. *infra*). On the other hand, as in many other Member States, the high caseload is a challenge for state courts which makes the perspective of "assistance" gained from non-judicial actors in non-judicial proceedings less threatening. Consequently, we will discuss the Austrian perspective for a re-evaluation of the status quo in the recommendations in chapter 3 of this study.

1.2.2 Croatia

1.2.2.1 Guarantee of fair trial

In Croatia, guarantees equivalent to Art. 6 ECHR can be found in Art. 29 of the Constitution.

1.2.2.2 Fundamental guarantees and notaries in the service of the judiciary

Under Croatian law, notaries are independent and free from instructions. In succession proceedings in particular, they are bound to treat all parties equally. This means that succession proceedings by notaries as court commissioners meet the requirements of Art. 6 ECHR. Hearings in succession proceedings are not public, but this can be presumed to be in conformity with Art. 6 which allows non-public proceedings in the interest of the "protection of the private life of the parties".

In this context, it is important that Croatian notaries also act in a very different role in the context of enforcement proceedings as a court commissioner, a role which was also discussed by the European Court of Justice. It is important to note that the notaries' tasks in this context were recast by the new enforcement law from 2020. Under this statute, notaries are entitled to enforce uncontested claims on the basis of "trustworthy documents" (on these, see chapter 1.1.2.4 *supra*). The enforcement cases are assigned to them by the municipal court at the place of residence or establishment of the (Croatian) debtor. Accordingly, the creditor has to address the Municipal Court which then contacts the competent notary. On the basis of such documents, the notary first delivers a proposal for enforcement together with a notice to the debtor informing him that he can fulfil the obligation within 15 days, and if he does not do so then the notary will issue and deliver a writ of execution to the debtor. If the debtor does not object to the writ of execution, the notary will issue a certificate of

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[8] *Stelzer* in Rechberger (Ed.), Verfassungsrechtliche Fragen der Übertragung richterlicher Entscheidungsbefugnisse auf Notare im Verlassenschaftsverfahren, Außerstreitreform – in der Zielgeraden (1999) 57 (60).

enforceability. If the debtor objects to the writ of execution or if the notary has any doubts about the permissibility of the proposed enforcement, the notary has to deliver the enforcement file and the debtor's objection to the municipal court of the debtor's residence which will then start contentious proceedings. Furthermore, such proceedings are only applicable if the debtor is a resident of Croatia. If the debtor resides or is established in another country than Croatia, the case has to be handled by a court as payment order.

Before 2020, the role of the notary in enforcement proceedings was very similar, including his or her obligation to transfer the enforcement file to the competent court if the debtor objected to the writ of execution. This role was discussed by the CJEU in his Pula Parking case. In this judgement, the Court held that a Croatian notary did not qualify as a court in the understanding of Regulation (EU) No. 1215/2012.[9] This judgement was confirmed, in the context of Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims, in the *Zulfikarpašić* judgement[10] of the CJEU, and again for Regulation (EU) No. 1215/2012 by the *Parking and Interplastics* case.[11] It should be pointed out that this does not mean that the Court denied the possibility that a notary can act as a court in the meaning of Art. 6 ECHR / Art. 47 EU-CFR. However, when issuing a writ of execution, the Croatian notary does not hear both sides, but issues the writ first and only afterwards sends it to the debtor. Insofar, the notary does neither act as a "tribunal" in the understanding of Art. 6 ECHR / Art. 47 EU-CFR (see also 2.2.1.2.b and c *infra*) nor as a court in the meaning of Regulation (EU) No. 1215/2012 as it does not hear both sides before issuing a decision. However, these judgements do not indicate that a notary cannot meet the requirements of a "tribunal".

The new enforcement law has reacted to these CJEU judgements by excluding the admissibility of notarial enforcement proceedings against a debtor who is not resident of or established in Croatia. The new enforcement law also responded to CJEU judgements by appointing notaries as court commissioners in enforcement proceedings and the *audi aleteram partem* principle was met by introducing notification of debtor before issuing enforcement decisions.

1.2.2.3 Potential future developments

As court commissioners, notaries in the Croatia already have decision-making power instead of a court in succession proceedings. There are no constitutional provisions that would preclude the transfer of additional tasks, including other decision-making powers, to notaries.

1.2.3 Czech Republic

1.2.3.1 Guarantee of fair trial

In the Czech Republic, guarantees equivalent to Art. 6 ECHR can be found in Art. 36 -40 of the Charter of Fundamental Rights and Basic Freedoms, especially in Art. 36. In this context, particular attention should be paid to the first para. of Art. 36 which states: "Everyone may assert, through the prescribed proceedings, her rights before an independent and impartial court or, in specified cases, before another body."

[9] CJEU March 9, 2017, C-551/15 *Pula Parking*.

[10] CJEU March 9, 2017, C-484/15 *Zulfikarpašić*.

[11] CJEU May 7, 2020, C-267/19 and C-323/19 *Parking and Interplastics*.

1.2.3.2 *Fundamental guarantees and notaries in the service of the judiciary*

The principle of impartiality of the courts is enshrined in the above-mentioned Art. 36 para. 1 and Art. 38 para. 1 of the Charter of Fundamental Rights and Basic Freedoms. This guarantee applies in all type of court proceedings[12] and also extends to notaries as court commissioners, as they are assigned succession cases by the competent district court. If the impartiality of the notary would seem questionable in a specific case, they can be excluded by a court decision.

All guarantees of fair trial are met in succession proceedings (before a court as well as before a court commissioner) with the exception of a public hearing: Due to the nature of succession proceedings, the hearings are not public (Sec. 182 para. 1 of the Act on Special Judicial Proceedings), which seems compatible with Art. 6 ECHR (non-public hearing in the interest of the "protection of the private life of the parties"). Furthermore, in all their functions, notaries are obliged to act impartially and independently. However, when acting as a court commissioner, the notary may receive instructions on the course and conduct of proceedings by the supervising court for which it acts as a commissioner. However, the court does not issue instructions on the merits. Furthermore, the court itself meets all requirements of Art. 6 ECHR / Art. 47 EU-CFR.

1.2.3.3 *Potential future developments*

As court commissioners, notaries in the Czech Republic already have decision-making power instead of a court in succession proceedings (They are also competent for direct entries in registers, but this is not regarded as a judicial function *stricto sensu* in the Czech Republic). There are no constitutional provisions that would preclude the transfer of additional tasks to notaries. Currently, a bill is proposed which would allow uncontested divorces to be executed before notaries.

1.2.4 Hungary

1.2.4.1 *Guarantee of fair trial*

In its Art. XXIV and Art. XXVIII, the Fundamental Law of Hungary ("the Constitution") contains guarantees equivalent to Art. 6 ECHR and Art. 47 EU-CFR which partially extend beyond courts to all state "authorities". In this context, it is important to point out again that in Hungary, notaries not only exercise auxiliary functions for courts, but in some cases, are – under national legislation – classified as courts (notaries-as-courts; see for more details 1.1.4.1 *supra* and for the relevant national constitutional provision immediately 1.2.4.3).

1.2.4.2 *Fundamental guarantees and notaries in the service of the judiciary*

Notaries are not only obliged to act free from instructions and without any bias under the Act XLI of 1991 on Civil Law Notaries; when acting as a court, they also have to respect all obligations of a judge under the Code of Civil Procedure. This includes a strict obligation of impartiality and the obligation to hear all parties ("briefing obligation").

1.2.4.3 *Potential future developments*

Art. 25 para. 7 of the Fundamental Law of Hungary provides for the possibility that not only courts, but "other bodies may also be authorized to hear certain disputes under an act of Parliament". The

12 *Pekařová* in *Husseini/Bartoň(Kokeš/Kopa a kol* (Eds.), Listina základních práv a svobod. Komentář[1] (2021), 1181–1218; *Klička/Svoboda*, Dědické právo v praxi[1] (2014), 195–198.

Constitutional Court interprets this provision as permitting the transfer of tasks from courts to other authorities if these are "non-substantive adjudicating activities".[13] It is common agreement that in particular payment proceedings, the keeping of registers, questions of enforcement and undisputed succession proceedings count among these "non-substantive adjudicating activities". The Hungarian legislator could therefore extend the role of notaries to comparable tasks, including family law. The constitutional limits are therefore less rigid than those which, according to some authors, exist under Austrian law.

1.2.5 Slovak Republic

1.2.5.1 Guarantee of fair trial

The Slovak Republic acceded to the ECHR in 1992. According to the Slovak Constitution of 1992, international treaties are part of the national legal order and take precedence over national law if they are more generous in the attribution of rights and freedoms. This means that the guarantees of Art. 6 ECHR are directly invocable in the Slovak Republic. The same applies to Art. 47 EU-CFR which is directly applicable and takes precedence over national legislation.

Furthermore, the right to a fair trial and the right to the lawful judge are also enshrined in Art. 46 and Art. 48 of the Slovak Constitution. Notaries acting as court commissioners are bound by these provisions.

1.2.5.2 Fundamental guarantees and notaries in the service of the judiciary

Notarial activities as court commissioners in the service of the judiciary are regulated by § 4 of the Slovak Notary Code. In general, notaries are independent and can only be removed from their office if certain conditions, which are specified by the law, are met (loss of EU citizenship, of legal capacity, conviction of a criminal offence and disciplinary measures). When acting as a court commissioner, the notary has to act in an impartial and independent manner and is bound by the Constitution, constitutional laws and other laws of the Slovak Republic. This means that the constitutional guarantees of fair trial are directly applicable in this case. If a notary is allegedly acting in a partial manner, the court can verify this and withdraw the case from the notary.

The activity of notaries as court commissioners are, according to the Slovak Constitutional Court,[14] to be considered a direct exercise of judicial power, though the notary is not regarded as a court in the meaning of Art. 142 of the Slovak Constitution (which defines the courts' tasks and responsibilities). However, as mentioned above, the notary is bound by the guarantees of fair trial, his or her decision may be appealed against with a court in the meaning of Art. 142 of the Slovak Constitution. In this respect, it should again be pointed out that Art. 6 ECHR and Art. 47 EU-CFR at least require that a decision can be challenged before a "tribunal".

1.2.5.3 Potential future developments

There are no provisions in the Slovak Constitution which would prevent the transfer of additional tasks to notaries as court commissioners. Again, it has to be stressed that notaries as court commissioners are not courts in the understanding of the Slovak Constitution but are directly bound by the constitutional provisions applicable to courts, including the right to a fair trial.

[13] Hungarian Constitutional Court, 1/2008 (I.11.) AB decision.

[14] Resolution No. PL. ÚS 12/2019-17 of 06.2019.

1.2.6 Slovenia

1.2.6.1 Guarantee of fair trial

Art. 23 of the Slovenian Constitution contains the same guarantees as Art. 6 ECHR and Art. 47 EU-CFR and should accordingly be interpreted in conformity with the provisions. Art. 23 only covers the operation of (civil and criminal) courts as such, which does currently not pose any problems as Slovenian notaries currently do not act as court commissioners under Slovenian law. However, it would seem possible to interpret Art. 23 in a teleological manner if the Slovenian legislator decided to transfer judicial tasks to notaries.

1.2.6.2 Fundamental guarantees and notaries in the service of the judiciary

Slovenian notaries are independent and have to follow strict rules on impartiality. In particular, they must make sure that all parties are present and heard before them and that these are duly informed. Notaries may only be removed from office under exceptional circumstances as prescribed by statute (Art. 19 of the Notarial Act).

1.2.6.3 Potential future developments

Currently, notaries do not act as court commissioners under Slovenian law, however, since 2019, the notarial divorce has been established. There are no constitutional provisions which would prevent the transfer of tasks to notaries as court commissioners. Currently, Slovenia is the only Hexagonale country where notaries do not act as court commissioners.

In this context, it is worth mentioning that a draft act amending the Act on Succession was proposed in December 2017. This Act would have provided for uncontested successions to be handled by notaries, including the issuing of European Certificates of Succession. However, this proposal has not yet been voted into legislation so far.

1.2.7 Alsace-Moselle

1.2.7.1 Guarantee of fair trial

According to Art. 55 of the French Constitution, international treaties take precedence over national legislation. Accordingly, Art. 6 ECHR – which does not have an equivalent provision in the text of the French Constitution – ranks higher than French statutory law which has to be interpreted in accordance with it. Furthermore, French courts have recognized that the right of access to a court counts among the unwritten fundamental principles in the French legal order.

1.2.7.2 Fundamental guarantees and notaries in the service of the judiciary

The notary acting as "*delegué du tribunal*" under the particular legislation of Alsace-Moselle has to act independently and impartially and has to respect all guarantees prescribed by Art. 6 ECHR, including the obligation to hear the parties. This also holds true for the obligation to decide the matter in a reasonable time, an obligation on which case-law by the CJEU exists.[15] These obligations of the notary are controlled by the delegating court (which itself meets the requirements of Art. 6 ECHR / Art. 47

[15] ECtHR November 28, 2000, No. 36.350/97 *Siegel vs. France*.

EU-CFR) and may, as a matter of last resort, appoint another notary if the notary violates his or her obligations.

While the parties cannot choose a notary, they can waive their participation in notarial proceedings altogether and have the matter decided between them or by a court.

1.2.7.3 Potential future developments

There are no constitutional provisions which prevent the transfer of further tasks to notaries in France, whether in Alsace-Moselle or other parts of the country. Rather, there have been new tasks for notaries recently in the context of mutually agreed divorces (loi n°2016-1547).

2 Analysis

2.1 Part I: Private Law

2.1.1 Introduction

This project focusses on the court or court-like activities of notaries in non-contentious proceedings in relation to EU law which also refers to and regulates such activities. However, the basis for EU law to apply is always the national legislation that endows notaries with such court or court-like powers and functions in the national justice system. Therefore, the research project started with information gathering and analysis of these national rules in the participating Member States.

2.1.1.1 Member States Law

Our analysis wants to take into account the whole **spectrum** of **non-contentious** civil proceedings in which the state offers its power to determine or change the legal situation of private parties. *Examples* are succession proceedings, the entry to state registers, the issuance of titles for execution, the enforcement of uncontested claims, divorce based on the spouses' agreement, division of matrimonial property, recognition of paternity and maternity, and the taking of evidence and service of documents abroad. Whereas contentious proceedings, i.e., litigation between parties, are usually reserved to traditional state courts to conduct and decide in all Member States, non-contentious proceedings often involve other state actors, like court officials (public servants employed by the court, not being judges), administrative authorities or liberal legal professionals like notaries endowed with state powers.

A quick review of the law of the Member States reveals two facts: (1) the "other" state officials (other than judges) and liberal professionals (most often notaries) are involved to a stronger degree in the administration of justice in some areas of the law than in others; and (2) if, to what extent and how these persons are involved in the administration of justice and in which areas of the law differs strongly from one European country to the other.

The **notion** of **"non-contentious proceeding"** is not defined by EU law. In a first step, it is up to the Member States to draw their own lines between litigation and non-contentious proceedings within their national justice systems.

Rec. 59 SR expressly refers to "non-contentious proceedings" by saying: "In the light of its general objective, which is the mutual recognition of decisions given in the Member States in matters of succession, irrespective of whether such decisions were given in contentious or non-contentious proceedings, this Regulation should lay down rules relating to the recognition, enforceability and enforcement of decisions similar to those of other Union instruments in the area of judicial cooperation in civil matters."

For purposes of this project, we define "non-contentious proceedings" as proceedings that are characterized by the following points:

- The proceedings are initiated *ex officio* or by an “application” by a party (applicant), but NOT by an “action” filed by a plaintiff.[16]
- 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.

As will be explained in chapter 2.2 (Public Law) below, constitutional or primary law rules providing for procedural and institutional guarantees (fair trial, independence etc.) and the rule of law often employ a narrower notion of court proceedings which does not extend to one-party proceedings, for instance, or to public acts[17] which do not decide a dispute between opposing parties, like Art. 19 TEU, Art. 47 EU-CFR, Art. 6 ECHR, and Art. 267 TFEU.

2.1.1.2 EU Law

Some of the fields of non-contentious judicial activity are heavily regulated by **EU law** in so far as they involve **cross-border aspects**: *Examples* are the SR, the Brussels II *bis* and II *ter* Regulations and the Rome III Regulation for divorces, the Matrimonial Property Regulation, the Property Regulation for Registered Partnerships, the Taking of Evidence Regulation, the Service of Documents Regulation, the Enforcement Order Regulation, the Order for Payment Regulation. The goal of these regulations, which were passed under **Art. 81 TFEU**, is the establishment of **free circulation of judicial and extra-judicial decisions and public documents** in private law areas among the Member States. Art. 81 TFEU speaks of the “mutual recognition of judgements and of decisions in extrajudicial cases” and of the “cross-border service of judicial and extra-judicial documents”. As we see from secondary law based on Art. 81 TFEU (see, for instance, Art. 58 Brussels I *bis* and Regulation (EU) No. 2016/1191 on public documents) the mutual recognition and free circulation reaches beyond “decisions” as it is extended to certain public documents, like for instance authentic instruments.

However, the **regulations** based on Art. 81 TFEU exhibit ***different*** **approaches** to the inclusion of other public authorities (other than judicial authorities) and liberal legal professionals. Some of them take their court-like activities into account and define a dividing line between such activities of other authorities and legal professionals in which they are acting as “courts” in rendering “decisions” and other activities in which they are acting in the service of civil justice, but not as “courts”. Yet, the line dividing court and non-court activities seems not the same in the EU regulations involved, but rather differs from one instrument to the other, as is confirmed by CJEU judgements.[18] In addition, the legal consequences of the non-court (but close-to-court) activities of these other authorities and legal professionals are not uniform as well: Sometimes they are unclear and highly problematic (like in the SR, see 2.1.5 *infra*), sometimes they are so close to the legal consequences of court decisions that it

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[16] In German: “Antrag”, not “Klage“.

[17] The term “public act” – as used here – comprises court decisions and authentic instruments.

[18] CJEU March 9, 2017, C-484/15 *Zulfikarpašić*, para. 23-37; CJEU March 9, 2017, C-551/15 *Pula Parking*, para. 42 and 49; *Wilderspin*, The Notion of “Court” under the Succession Regulation, Problemy Prawa Prywatnego Miedzynarodowego T. 26 (2020), 48 and 49: https://orcid.org/0000-0002-9372-2613.

seems superfluous to draw the line any more (see Brussels II *ter* Regulation, Art. 65; see chapters 2.1.3.2).

2.1.1.3 Problems and Research Questions

Thus, the EU faces different national legislation in their Member States in which non-judicial authorities and legal professionals are involved in the conduct of non-contentious private law proceedings *in very different ways* in *many different areas*. The EU legislator clearly expanded her concept of free circulation of "judgements" or "decisions", developed for "real" courts under the judicial cooperation regime of Art. 81 TFEU, to this universe of non-contentious legal activities of other authorities and legal professionals. Therefore, we are confronted with a "**free circulation of public legal acts**", thus comprising "court decisions" as well as other public documents, in particular authentic instruments, in some cases (Brussels I *ter* Regulation) also registrations. This concept of the free circulation is also sketched in rec. 14 of the Brussels II *ter* Regulation.

The "**authentic instrument**" has been included in the free circulation regime of the EU (EC) for a long time already (Art. 50 Convention Brussels I of 1968). It is also defined by EU law. In its **Unibank** judgement (C-260/97; June 17, 1999) the CJEU stated in its 15th recital:

> "*Since the instruments covered by Art. 50 of the Brussels Convention are enforced under exactly the same conditions as judgements, the authentic nature of such instruments must be established beyond dispute so that the court in the State in which enforcement is sought is in a position to rely on their authenticity. Since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the state of origin is needed in order to endow them with the character of authentic instruments.*"

Citing the *Jenard-Möller* Report, the CJEU states that the authenticity of the instrument must have been established by a public authority. This authenticity has to relate to the content of the instrument and not only, for example, the signature. This Unibank definition is repeated by many regulations adopted thereafter: see, for instance, Art. 3 No. 1 (i) SR, Art. 4 No. 3 European Enforcement Order Regulation, Art. 2 (c) Brussels II *bis* Regulation).

However, the EU has not yet found or even looked for a **more systematic approach** to this endeavor, but rather takes a different path in every regulation. This raises several questions for EU law: Should there be different definitions of "decision-making courts" also embracing non-judicial actors under certain conditions in every regulation (see for instance Art. 3 No. 2 SR, Art. 2 No. 1 and 2 No. 1 Brussels II *ter*) or should a uniform expanded category of "court" be established that applies in all EU Regulations (under Art. 81 TFEU)? Besides these "court" activities of non-judicial actors, is there a separate category of similar-to-court activities conducted by non-judicial actors? And if so, what should be its legal consequences: as for instance, what should be the legal consequences of authentic instruments (national certificates of succession) concluding succession proceedings, of public registrations of party agreements? And should this similar-to-court category also assume a uniform shape, thus, overcoming the differences in present EU regulations? If complete uniformization of both categories (court and similar-to court activities) does not seem appropriate: what are the appropriate criteria for differentiation inside these categories?

This project attempts to pave the way to a more systematic and principled approach to court and court-like activities of non-judicial national actors (like non-judicial authorities and liberal legal

professionals) in non-contentious legal matters. It uses as a starting point the comparative overview of the national systems of six EU Member States with respect to notarial, court or court-like activities.

(1) On the one hand, such an approach may have the following **advantages for EU law**: A systematic and principled approach will appear more transparent and easier to understand, will be more practicable and easier to handle for authorities, legal professionals and citizens. It could also be considered more just and legitimate because it treats equal cases equally. It eliminates disruptive elements from the system and may contribute to the consequent realization of procedural guarantees and the rule of law in non-contentious proceedings.

(2) On the other hand, such an approach may offer **guidelines for the national legislators** of the Member States: The project will highlight those *characteristics* of court and court-like activities of non-judicial legal actors which are relevant for their overall evaluation in the (EU and national) civil justice system, in the system of constitutional procedural guarantees and in the light of the rule of law principle. This makes it possible for national legislators to evaluate their own institutional settings against the bigger framework we are trying to set up, based on national comparisons and EU law. Where and how could the national rules for the actions of judicial and non-judicial legal actors be improved to reach their full potential with respect to the EU legal framework of free circulation of public legal acts and with respect to the optimal functioning of the national legal system?

2.1.2 Comparing National Systems

The national reports of the participating Member States of the JuWiLi Project (Austria, Croatia, Czech Republic, Hungary, Slovenia, Slovakia, and Alsace-Moselle not being a Member State of its own, but a region of France) reveal that notaries already play an important role in non-contentious **succession** proceedings in these countries, with the exception of Slovenia. In the remaining five countries and the region, notaries acting as “court commissioners” (in Hungary as “courts”) conduct non-contentious succession proceedings. They are thereby acting in court functions (judicial functions otherwise pursued by courts) on the basis of a statutory provision (statutory delegation) or a delegation by court ordinance. The succession proceedings are terminated by decisions or acts of the notary which are enforceable. Only in Austria and Alsace-Moselle, the final decision is taken by a court, not the notary herself. In Slovenia, however, a draft statute (of December 2017) exists which would decisively expand the notaries’ role in succession proceedings in the direction of the competences of the other five mentioned countries: notaries would conduct non-contentious succession proceedings and terminate them by issuing a notarial deed of the inheritance agreement. Under present Slovenian law, notaries assist courts in succession proceedings by, for instance, setting up the inventory or securing the estate, but they do *not* act as “court commissioners” or even “courts” in succession proceedings like the notaries of the other six examined countries.

From the perspective of the **EU Succession Regulation (No. 650/2012)**, the notaries of five participating countries and a region (Austria, Croatia, Czech Republic, Hungary, Slovakia, and Alsace-Moselle) excluding Slovenia have the competence to issue the European Certificate of Succession (ECS) according to Art. 62 *et seq.* SR. According to Art. 3 No. 2 SR, the term “court” in the sense of the SR does not only include “judicial authorities”, but also “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” provided “their decisions” are subject of an appeal or review by a judicial authority and “have similar force and effect as a decision of a judicial authority on the same matter”. These other authorities and legal professionals must also offer guarantees of independence

and impartiality and of the right of all parties to be heard. Even though the notaries of at least four participating countries (Croatia, Czech Republic, Hungary, Slovakia) conduct complete succession proceedings and terminate these proceedings by a final "decision", only the Czech Republic officially notified the EU Commission under Art. 3 No. 2 (last sentence) and Art. 79 No. 1 SR that their notaries are acting as "courts" under Art. 3 No. 2 SR. However, such notification operates as mere information and does not have legal effects, in particular, it is not a requirement for the qualification of non-judicial actors as "courts" in the sense of Art. 3 No. 2 SR.[19]

In most participating countries, notaries grant access to the land (and company) **registers**, as "court commissioners". In the Czech Republic, notaries can themselves make entries into company and association registers without any intervention by court officials. Under Croatian law, notaries are entitled to **enforce** uncontested claims based on a "trustworthy document" (see chapter 1.1.2.4 *supra*): Upon request of the creditor, they issue a writ of execution, which is consequently served upon the debtor. In such cases, the whole execution proceedings are conducted solely by the notary. In Alsace-Moselle, notaries are exclusively competent to conduct real estate execution proceedings. Under the law of all participating countries, notaries can issue nationally enforceable authentic instruments that are enforceable in all other Member States, pursuant to Art. 58 Brussels I *bis* Regulation and other regulations (like the SR, Brussels II *ter* etc.). The same applies to "authentic instruments" drawn up on uncontested claims (in which agreement is expressed by the debtor) under Art. 3 European Enforcement Order Regulation: These can be enforced in other Member States under the regime of this regulation.

In Hungary, the effect of some notarial acts goes even further: Hungarian notaries issue European **orders for payment** under the EU Payment Order Regulation (No. 1896/2006) as "courts" (under Art. 5 No. 3). Hungarian notaries are also explicitly mentioned as "courts" in summary proceedings concerning orders to pay under Art. 3 (a) Brussels I *bis* Regulation. In Hungary, the competences of notaries in the conduct of succession and other judicial proceedings are accompanied by the respective powers of direct application for **taking of evidence** in other Member States' courts under the EU Taking of Evidence Regulation (No. 1763/2020). Under the EU Service of Documents Regulation (No. 1393/2007) the **service of** judicial and other **documents** from abroad is speeded up by direct involvement of notaries in court function (circumventing official authorities according to Art. 2, 3 of the Regulation).

In family law matters, Hungarian notaries have the power to issue a decree approving the settlement and dissolving the relationship between **registered partners**, which has the same effect as a court judgement. Under Slovenian law, fathers and mothers can **recognize paternity** and maternity to a child in front of a notary. Slovenian notaries also draw up enforceable authentic instruments for the division of joint property of spouses and for maintenance rights between parents and children. Under certain conditions, Slovenian notaries have the power to pronounce the **dissolution of marriages** on the basis of a consensus of the spouses: when spouses do not have common children (or they no longer exercise parental authority over the children), and when they have reached an agreement on the division of co-owned property, on which of them remains or becomes tenant of the home in which they live, and on the maintenance claim of the spouse who does not have the means of subsistence and is unemployed without fault.

To sum up, the legal systems of the participating Member States and in Alsace-Moselle already exhibit a relatively wide range of activities in which notaries, as the classical non-judicial actors in non-

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

contentious proceedings, conduct activities which are otherwise – in the same system or in other jurisdictions – conducted by traditional courts: they conduct and decide non-contentious succession proceedings, they grant access to and decide in matters of public registration (company, land or similar registers), they conduct execution proceedings or issue European enforcement orders and European orders for payment under EU Regulations No. 805/2004 and No. 1896/2006. In family law matters, notaries receive declarations of recognition of paternity or maternity to a child or dissolve registered partnerships and marriages, in particular, when the spouses agree on the dissolution itself and (sometimes also on) important legal consequences of the dissolution (like division of property and maintenance). In some countries, the respective competences of notaries to conduct non-contentious proceedings are accompanied by their direct applications rights under the Taking of Evidence Regulation, if evidence located in other Member States is needed.

With respect to the classification of these notarial acts and activities in the framework of the national and EU legal systems, the following **questions** arise:

(1) Do these court or court-like activities fall within the diverse **definitions of "court"** in the national and the EU legal systems? Where is the dividing line to non-court activities (quasi-court activities) and which legal consequences does this classification (court and non-court) have? Is there a separate system of legal rules (A) dealing with the legal consequences of court decisions (in non-contentious matters) and a separate **system** (B) dealing with the **legal consequences of non-court** (but similar-to-court) **acts**? Or is system (B) not yet sufficiently developed, at least not on the EU level? Parts 2.1.3.2, 2.1.4 and 2.1.5 below will deal with these questions, mainly focusing on the EU legal system in its relation to national jurisdictions.

(2) **What characterizes the different fields** of non-contentious proceedings in which traditional courts and non-judicial actors, like in particular notaries, seem to operate interchangeably? In some national systems a certain function or power – like divorce, succession proceedings, execution of claims, issuance of titles for execution, public registration, recognition of paternity/maternity – is exercised by a traditional court, in others by a notary acting in public function.

    (a) First, in a **comparative analysis**, what seem to be the prerequisites for national jurisdictions to entrust notaries with such tasks and functions? Certainly, a situation of non-litigation (non-contentiousness), but not necessarily an agreement or contract by the parties is required. In the national jurisdictions examined, the acts (decisions) of non-judicial actors may have different effects (declaratory, constitutive and other): the effect of declaring or registering rights or other legal consequences, or of creating or terminating rights or other legal consequences, the authentication of an agreement or a document, the use of force in the execution of a title. Do these differences in effects inter-relate with the qualification of the acts as "court decisions", or with the determination of their legal consequences (like recognition abroad, international jurisdiction, *lis pendens*)? Like for instance: Only constitutive (notarial) acts can be treated as "court decisions" and recognized as such?

    (b) Second, in a **legal policy perspective**, what are the advantages and disadvantages of entrusting notaries with a judicial or quasi-judicial task instead of entrusting traditional courts? And what are the legal (constitutional, procedural) limits for using traditional courts or non-judicial actors (notaries) interchangeably on a

certain task? These questions will be dealt with in chapter 2.1.6, and continued in the public law analysis of the following in chapter 2.2.

(3) *Policy recommendations EU*: How could the **EU legal system** best **respond** to the results of the analysis and systematization of non-contentious legal activity in this study? The second to last chapter of this study (see chapter 3) will deal with this question.
(4) *Policy recommendations Member States*: How could the national jurisdictions of the Member States (participating) best respond to the results? The last chapter of this study (see chapter 3.2) will deal with this question.

2.1.3 The Notions of "Court" and "Decision" in Relevant EU Regulations

2.1.3.1 The texts of the definitions and their preliminary interpretation

Art. 3 No. 2 EU Succession Regulation (No. 650/2012) provides: 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 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 (No. 1103/2016) and **Partnership Property Regulation (No. 1104/2016)** provide: 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 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 (No. 1111/2019) provides: 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. 2 (a) Brussels I *bis* Regulation (No. 1215/2012) does not define the term "court", but "judgement": "'judgement' means any judgement given by a court or tribunal of a Member State, whatever the judgement may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court." **Art. 3 Brussels I *bis*** provides: "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). The proposal of this

regulation still included a definition of “court”, which was later removed from the final text. This definition included “any authorities designated by a Member State as having jurisdiction in the matters falling within the scope of the Regulation.”

Art. 4 European Enforcement Order Regulation (No. 805/2004) provides: For the purposes of this Regulation, the following definitions shall apply: (1) ‘judgement': any judgement given by a court or tribunal of a Member State, whatever the judgement may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. Art. 4 No. 6 defines the “court of origin” also as a “court or tribunal”. Art. 4 (7) provides that “in Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande), the expression ‘court' includes the Swedish enforcement service (kronofogdemyndighet).”

Art. 5 No. 3 European Order for Payment Regulation (No. 1896/2006) provides: ‘court’ means any authority in a Member State with competence regarding European orders for payment or any other related matters.

Art. 2 Taking of Evidence Regulation (No. 1783/2020) provides: For the purposes of this Regulation, the following definitions apply: (1) ‘court’ means courts and other authorities in Member States as communicated to the Commission under Art. 31 No. 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.

The **European Small Claims Procedure Regulation (No. 861/2007)** applies to small claims before a “court” or “tribunal” (Art. 2). It belongs, however, not to the realm of non-contentious proceedings.

The **European Judicial Network** (EJN) in civil and commercial Matters (established by Decision 2001/470/EC) embraces the associations of the legal professions directly involved in judicial cooperation in civil and commercial matters, in particular the associations of notaries, as “a key element of the modernized legal framework of the Network” (introduced by Decision No. 568/2009/EC):[20] “The amended Decision also makes membership available to legal professionals when they exercise judicial functions under specific Union instruments. This has become particularly relevant in the context of the SR. Legal professionals which participate in the Network in this capacity can make use of all the functionalities of the Network.” Thus, the overall goal of the EJN “to facilitate cooperation between judicial and other relevant authorities in civil and commercial matters”.[21] This can be understood as an official recognition by EU secondary law of the important role of notaries exercising judicial functions or acting as “courts” in the sense of EU secondary law.

It is evident that the definitions of Art. 3 SR and Art. 3 Matrimonial Property and Partnership Property Regulations are identical, both opening up the definition of decision making “**courts**” to

- “other authorities” and “legal professionals” = non-judicial actors,

provided certain conditions are met. These conditions include the following:

- the non-judicial actors have competence in matters of succession (or matrimonial/partnership property) under national law;

[20] Commission Report on the activities of the European Judicial Network in civil and commercial matters, March 10, 2016, COM (2016) 129 final, chapter 2.1.2.

[21] Council conclusions 15349/16 December 8, 2016, JUSTCIV 318.

- the non-judicial actors have judicial function[22]
- or judicial powers are delegated to them by the judicial authority or they act under the control of the judicial authority;[23]
- they offer guarantees of their impartiality and of the rights of all parties to be heard;[24]
- they make "decisions";
- those decisions are subject to an appeal or review by a judicial authority;
- those decisions have similar force and effect as decisions of a judicial authority in the same matter.

In the examined group of six Member States, the notaries of five Member States and Alsace-Moselle act as "court commissioners" (or as "court" in Hungary) in **succession** proceedings where they perform "judicial functions in the wider sense" (pursuant to a delegation of power or under the control of the court) according to national law (no matter how they are endowed – by statute, court ordinance or other). However, only in Croatia, the Czech Republic, Hungary and Slovakia, notaries also take the final decision terminating the non-contentious succession proceedings. They all meet the court-criteria of Art. 3 No. 2 SR. Considering the lack of such decision-making power under Austrian law and the law of Alsace-Moselle, Austrian and Alsace-Moselle notaries do not meet the requirement of producing a decision "with similar force and effect" as decisions by formal courts. Slovenian courts do not act as court commissioners in succession proceedings under present law.

With respect to the distribution of **matrimonial** or **partnership property** as a consequence of dissolution of the respective marriage or partnership, the notaries of the participating Member States seem to draw up enforceable authentic instruments (Art. 58 *et seq*.) of agreements between spouses, but do not act as "courts" under the definitions of Art. 3 No. 2. The EU Regulations on Matrimonial Property and Partnership Property, however, open the field of judicial activity up to non-judicial actors whichever may be competent under national law to conduct matrimonial/partnership property proceedings and conclude them with a real "decision" in the sense of Art. 3. No. 2. Therefore, theoretically, the "court commissioner" model – currently in place in five examined Member States in succession matters – could also work properly in matrimonial/partnership property matters on the cross-border level. In this theoretical case (notaries in court function in the wider sense), international jurisdiction in matrimonial/partnership property matters and recognition and enforcement of their

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[22] This may be interpreted narrowly if one considers EU primary law as relevant: see the decisions interpreting Art. 6 ECHR, Art. 47 EU-CFR and Art. 267 TFEU mentioned in chapter 2.2 *infra* (Public Law). This narrow definition even resonates in the interpretation of the Regulations Brussels I bis (CJEU March 9, 2017, C-551/15 Pula Parking) and on EU Enforcement Order Regulation (CJEU March 9, 2017, C-484/15 *Zulfikarpašić*). In the *W.B.* judgement (CJEU May 23, 2019, C-658/17, para. 56) and the *E.E.* judgement (CJEU July 16, 2020, C-80/19, para. 51) the CJEU defines an "authority exercising judicial functions" in the sense of Art. 3 No. 2 SR with reference to the *Oberle* judgement (CJEU June 21, 2018, C-20/17 *Oberle*, para. 44) *in abstracto* as an institution "having jurisdiction to hear and determine disputes in matters of succession", even though this authority is *in concreto* issuing only a deed of certification of succession in non-contentious proceedings (as in the *Oberle* case).

[23] As most notaries will *not* "exercise judicial functions" in the narrow sense explained in the preceding footnote, their activities as court commissioners in non-contentious succession proceedings will qualify under this alternative requirement. However, where the national law of the respective Member State does not provide for such a link to the institutional court system (like in Slovenia, or in Poland – see the *W.B.* case – and in Lithuania – see the *E.E.* case), the notary conducting non-contentious succession proceedings and finally issuing a national certificate of succession will not qualify as a "court" under Art. 3 No. 2 SR.

[24] This is the essence of the procedural constitutional guarantees of a fair trial as explained in chapter 2.2 *infra* (Public Law).

decisions in other Member States would be secured by the two Regulations in the same manner as for traditional courts' decisions (Art. 4 *et seq*., Art. 36 *et seq*.).

Art. 2 of the **Taking of Evidence Regulation** has a similar basis and wording as Art. 3 No. 2 SR and Art. 3 No. 2 Matrimonial/Partnership Property Regulation. Art. 2, however, does not require a decision-making power under national law, but the power "to take evidence for the purposes of judicial proceedings in civil or commercial matters". This power must be present under national law. Art. 2 – unlike Art. 3 No. 2 SR and Matrimonial/Partnership Property Regulations – does not mention "legal professionals", as notaries, expressly and only speaks of "other authorities". Whether notaries, having taking of evidence powers under national law, will qualify as "other authorities" as well, is a question of interpretation of Art. 2 Taking of Evidence Regulation, which certainly has to be answered in the affirmative. In such case, notaries can be notified as "courts" in the sense of Art. 2 and Art. 31 No. 3 Taking of Evidence Regulation to the EU commission (as in the case of Hungary, other Member States are assumed and recommended to follow).

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): The court had to decide on the question whether a writ of execution issued by a Croatian notary under Croatian law was 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*. The court in *Pula Parking* (para. 34 *et seq.*) explained that the core principle of mutual trust of the regulation required not only the constitutional/primary law guarantees of independence, impartiality and *audiatur et altera pars* to be realized by an authority qualifying as "court" under the regulation, but that the proceedings had to be conducted "on an *inter partes* basis" (para. 58). The Croatian writ, however, was issued on application of the creditor and served upon the debtor, without prior hearing of the debtor, and did, thus, not conclude *inter partes* proceedings. The *Pula Parking* court also mentioned that Croatian notaries – unlike Hungarian notaries – were not mentioned as "courts" in the short list of Art. 3 Brussels I *bis*, and could, thus, not qualify as courts under this article (para. 46). And the CJEU expressly distinguished between the notions of court under Art. 3 No. 2 SR and under Brussels I *bis*. The court states that, unlike the SR and unlike the text of its proposal, Brussels I *bis* does not expressly open up the notion of "court" to non-judicial authorities in general under certain conditions (para. 48). The court also reaffirms that the notion of "court" has to interpreted in light of circumstances and goals of a particular regulation (para. 49). Under current EU law, the notions of "court" may, therefore, differ from one regulation to the other.

Art. 4 **European Enforcement Order Regulation** only mentions judgements of courts and tribunals and does not seem to open this notion up to non-judicial actors, at least not expressly. Art. 2 of this regulation on the scope provides: "This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal." One provision (Art. 4 No. 7) expressly includes the Swedish enforcement service in the notion of "court". Therefore, the legal background very much resembled that of the Brussels I *bis* Regulation. In the case *Zulfikarpašić* (CJEU March 9, 2017, C-484/15) a Croatian notary had issued a writ of execution based on an "authentic instrument" which latter was only an invoice issued by the creditor. With similar argumentation as in the *Pula Parking* decision, which was adopted on the same day by the court, the CJEU held that the Croatian notary issuing the writ of execution was not acting as a "court" under the European Enforcement Order Regulation, as well: the main argument being that the Croatian notary did not conduct *inter partes* proceedings. 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. In the *Zulfikarpašić* case, the conditions for an "uncontested claim" under the regulation were not met (Art. 3 No. 1 [d]): This invoice did not contain an express agreement to the claim by the debtor.

This marks a sharp difference between the Brussels I *bis* Regulation and the European Enforcement Order Regulation, on the one side, and the **SR** and the **Matrimonial/Partnership Property Regulations**, on the other: In the latter 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 authentic instruments. Both options follow completely different rules with respect to international jurisdiction, *lis pendens*, and recognition and enforcement abroad. 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").

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) of 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. In the Taking of Evidence Regulation, the taking of evidence has an auxiliary function to several judicial tasks, like in particular the conduct of proceedings. These main judicial tasks are defined in a broad sense, opening them up to the "court" activities of "other" – non-judicial – "authorities" (including also notaries by a correct broad interpretation).

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.

2.1.3.2 Brussels II ter Regulation as a case of particular interest

Art. 2. No. 2 **Brussels II *ter*** Regulation uses a similar wording as the European Payment Order Regulation in its court definition: It speaks of "any authority" with "jurisdiction" in the respective matters under national law. In the European Payment Order Regulation this is called a "competence". At this point, one could conclude that "any authority" certainly must be read to include notaries as well, provided they have "jurisdiction" in the matter of dissolution of marriages (or parental responsibility) under national law. Thus, if notaries are – under national law – involved in the dissolution of a marriage, as for instance in Slovenia, where they have the power to pronounce the dissolution of the marriage under certain circumstances, they will be considered "courts" in the sense of Art. 2. No. 2 Brussels II *ter* Regulation.

However, Brussels II *ter* Regulation appears to be the most puzzling Regulation with respect to judicial and non-judicial actors and the acts they produce. In its court definition, Art. 2 No. 2 Brussels II *ter* gives no further guidance, unlike Art. 3 No. 2 SR or Matrimonial/Partnership Property Regulation, as what characterizes a non-judicial actor acting in court function or power. Thus, Art. 2 No. 2 Brussels II *ter* gives rise to a number of **questions**:

- Do non-judicial actors (like notaries) have to offer institutional and procedural guarantees as to impartiality and the right to be heard?
- Do they have to make decisions with the similar force and effect as the decisions of formal courts?
- What does it mean that they have to have "jurisdiction"?
- Where do they have to derive their jurisdiction from: a statute, a delegation by court or court control – like in Art. 3 No. 2 SR and others?

And: Can we assume that the additional criteria mentioned in Art. 3 No. 2 SR or Matrimonial-/Partnership Property Regulation, but not mentioned in Art. 2 No. 2 Brussels II *ter*, can be added to Art. 2 No. 2 Brussels II *ter* for purposes of interpretation and clarification?

There is certainly one decisive difference between the legal regimes in the SR and Matrimonial/Partnership Property Regulations on the one hand, and in Brussels II *ter*, on the other hand: **Brussels II *ter*** also has **two separate tracks** for court decisions (international jurisdiction: Art. 3 *et seq*; recognition and enforcement: Art. 30 *et seq*.) and authentic instruments [and registered agreements] (recognition and enforcement: Art. 64 *et seq*). But unlike in the SR and Matrimonial/Partnership Property Regulations, the **legal consequences** of these two tracks are almost the **same**:

- **Art. 65 No. 1** Brussels II *ter* (on the recognition and enforcement of authentic instruments and registered agreements) provides that "Section 1 of this Chapter shall apply accordingly, unless otherwise provided for in this Section." This means that Art. 30-41 Brussels II *ter* apply, the general provisions on recognition and enforcement referring to "court decisions": Thus, **recognition** may only be refused on the grounds enumerated in Art. 38 Brussels II *ter* (mainly manifest violations of public policy, violations of the right to be heard, irreconcilable contradiction with own prior or recognized foreign prior decision). The prohibition of review of jurisdiction of the court of origin (Art. 69 Brussels II *ter*), the prohibition of review of applicable law (Art. 70 Brussels II *ter*) and, in particular, the prohibition of a review as to substance (= *revision au fond,* Art. 71 Brussels II *ter*) also apply to authentic instruments and registered agreements (Art. 40 Brussels II *ter*).
- In addition, according to **Art. 64** Brussels II *ter,* the rules of **international jurisdiction** of Chapter II do not only apply to courts, but also to non-judicial actors issuing authentic instruments and effecting registrations involved in a divorce. This also includes the ***lis pendens* rule** of Art. 20 Brussels II *ter* (being also part of Chapter II). This means that non-judicial actors issuing non-judicial instruments (like authentic instruments and registrations) will only become part of the special recognition regime of Art. 64 *et seq*. Brussels II *ter* = Art. 30-41 Brussels II *ter* if they have international jurisdiction in the particular case (Art. 3 *et seq*. Brussels II *ter*). But if they have, courts of other Member States will have to respect this jurisdiction under the *lis pendens* rule of Art. 20 Brussels II *ter.* A clash of different regimes of international jurisdiction applying to "courts" on the one hand, and notaries issuing authentic instruments, on the other hand, never occurs. Notaries or other (non-judicial) authorities assuming or claiming jurisdiction beyond the rules of Art. 3 *et seq*. will produce legal instruments which may be enforceable in their own jurisdictions only (according to national rules), but not in other Member States (see Art. 64 Brussels II *ter*).

In the **SR** and **Matrimonial/Partnership Property Regulations**, by contrast, the **two-track regime** implies that very **different** rules for recognition and enforcement for court decisions and for authentic instruments apply; and that the rules of international jurisdiction (Art. 4 *et seq.* SR) only

apply to courts, but not to notaries issuing authentic instruments.[25] This major difference between a fully fledged two-track regime in the SR and Matrimonial/Partnership Property Regulations and an almost one-track model in Brussels II *ter*, makes it difficult to affirm or conclude that the court definition criteria described in the first (Art. 3 No. 2) can be used to render the court definition in Art. 2 No. 2 Brussels II *ter* more precise. With regard to his major difference, one could as well conclude that the notion of "court" under Art. 2 No. 2 Brussels II *ter* can assume a different shape than the notion of "court" under Art. 3 No. 2 SR and Matrimonial/Partnership Property Regulations. Both notions are not necessarily similar or the same.

Art. 2 No. 1 Brussels II *ter* provides a definition of a "decision", which is issued by a "court" of a Member State, "including a decree, order or judgement, granting divorce, legal separation, or annulment of a marriage". This wording (in particular the words "granting divorce") conveys the impression of a constitutive decision which brings the divorce of a marriage into effect. But the list of decision types is only exemplary (it says "including"): However, also decrees, orders, judgements and the like, which are declaratory or have registration function, but are nevertheless (formal) requirements for the validity of the divorce could form part of this category ("decisions"). As long as they are requirements for the valid divorce they could also, in the sense of the word, be considered to "grant" divorce.

This puzzling situation of a one-track regime for dissolution of marriages by court decisions as well as by authentic instruments or registered agreements in a regulation having just entered in application (August 1, 2022) has already given rise a number of different interpretations of the notion of "courts" and "decisions" under Brussels II *ter* Regulation.[26]

The confusion about its interpretation has also been fueled by the CJEU judgement in the ***Sahyouni*** **case**.[27] In this case, it was disputed whether a so-called *talaq* divorce before a religious court in Syria could be recognized in Germany. The Brussels II *bis* Regulation was not applicable. German courts would recognize the divorce if it was valid under the applicable law. The CJEU was asked whether the Rome III Regulation on Divorces also applied to so-called private divorces, like the *talaq* divorce, in which no state court or state authority was involved. The court decided that the Rome III Regulation only applied to divorces which are "pronounced" by "a state court or by a public authority or under its supervision." The requirement of "pronouncing" a divorce in the *Sahyouni* judgement seems similar to the "granting" of a divorce which is mentioned in Art. 2 No. 1 Brussels II *ter* in the definition of a "decision".

Under the old regime of Brussels II *bis* Regulation, the recognition of a divorce under the provisions for **authentic instruments** (Art. 46 Brussels II *bis*) was disputed:[28] The main reason for dispute was the fact that Art. 46 Brussels II *bis* obviously refers only to "enforceable" instruments. Out-of-court divorces, however, are legal acts whose main purpose it is to be "recognized" rather than to be enforced. "Authentic instruments which are enforceable" and "enforceable agreements between the parties" formally drawn up before August 1, 2022 generally fall within the scope of the Brussels II *bis* Regulation (pursuant to Art. 100 No. 2 Brussels II *ter*). Art. 46 Brussels II *bis* provides that the evidentiary (formal) effects such enforceable instruments have in the Member State of origin are extended to all other

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[25] CJEU July 16, 2020, C-80/19 *E.E*.

[26] See the following authors, all providing further references: *Sonnentag/Haselbeck*, Scheidungen ohne Gericht in EU-Mitgliedstaaten und ihr Verhältnis zur EuEheVO und Rom III-VO, IPRax 2022, 23; *Dutta*, Privatscheidungen und Brüssel IIb: drei Fragen an den neuen Art. 65 Abs. 1, FamRZ 2020, 1428; *Kramme*, Private Divorce in Light of the Recast of the Brussels II *bis* Regulation, GPR 2021, 101.

[27] CJEU December 20, 2017, C-372/16 *Sahyouni*.

[28] *Sonnentag/Haselbeck*, IPRax 2022, 23 (27).

Member States and that the instruments are enforceable there as well. A similar provision for enforceable authentic instruments also exists in the older Brussels I and younger Brussels I *bis* Regulation (Art. 58). All these provisions cause an "expansion of the (formal evidentiary) effects" an enforceable authentic instrument has in its Member State of origin to the other Member States.

They do, however, not prevent that the authentic instrument will not be respected in the Member State of receipt on substantive grounds: for instance, because the underlying agreement of the parties is materially invalid (substance ground) or the law applied to the case in the country of origin contradicts the law applied in the country of receipt (PIL ground). These grounds can be taken up by courts in the Member State of receipt which correct the content of the original instrument. It is only in the absence of such grounds for review, that the expansion of the evidentiary and authentication effects of the authentic instrument takes effect in the Member State of receipt. This means that **effect expansion provisions** like the **Art. 46 Brussels II *bis*** and **Art. 58 Brussels I *bis*** are of a completely different type and character than the provisions of "recognition and enforcement of judgements", which are at the same time in place in these regulations (see Art. 21 *et seq*. Brussels II *bis*, Art. 36 *et seq.* Brussels I *bis*). This latter regime of recognition and enforcement of judgements is similar to the one in place in Art. 30 *et seq*. Brussels II *ter* Regulation (see already above). And it was only in this Brussels II *ter* Regulation that the whole regime for judgements was extended also to authentic instruments and registrations of divorces (Art. 64, 65 Brussels II *ter*).

In **Art. 59 *et seq*. SR** a new approach was introduced to authentic instruments: A distinction between "**acceptance**" (= a low-level form of 'recognition') and "enforcement" was made. "Acceptance" is a newly invented term. It is very close to the old "**extension of evidentiary effects**" approach of Brussels I (*bis*) and Brussels II (*bis*) Regulations. "Acceptance" has to be clearly distinguished from the latest approach of full "recognition" of out-of-court divorces under Art. 64 and 65 Brussels II *ter* Regulation (one track approach for court decisions and authentic instruments).

- Similar to the older approach of expansion of effects, "acceptance" does not prevent the subject of an authentic instrument under Art. 59 *et seq*. SR (for instance an agreement between parties) from being **challenged on substantive grounds** (review as to substance = *revision au fond*): This challenge has to take place before courts having jurisdiction under matters of succession under the SR (Art. 59 No. 3 SR). Taking into account that the provisions on international jurisdiction in Art. 4 *et seq*. SR do not apply to notaries issuing authentic instruments under Chapter V SR,[29] the notary issuing a particular authentic instrument may be located in one Member State, whereas the courts having international jurisdiction to challenge its content may be located in another.
- Any challenge relating to the formal qualities of the authentic instrument – like its evidentiary function and authenticity – can only be brought in courts of the Member State of origin of the authentic instrument.

This approach of Art. 59 SR was taken up and replicated in the Matrimonial and Partnership Property Regulations (Art. 58). It is the first model which expressly distinguishes between the "acceptance" function and the enforceability function of an authentic instrument. And it explains for the first time what the "expansion of the evidentiary effects" to the other Member States really means. The *formal* qualities subject to the effect expansion have to be "accepted" (or recognized) by all other Member States and cannot be challenged in the courts of other Member States, but only in the courts of the Member State of origin of the instrument. This does however not apply to *substance*: With respect to

[29] CJEU July 16, 2020, C-80/19 *E.E.*

the substantive validity of the instrument and of the underlying legal relationship no "expansion" as a basis of acceptance or recognition takes effect at all. Such a challenge is always possible and will take place in the courts having jurisdiction in matters of succession under Art. 4 *et seq*. SR.

Returning to out-of-court divorces (for instance those involving notaries) taking effect before August 1, 2022, one can summarize that these acts were – under one interpretation – not comprised by Art. 46 Brussels II *bis* altogether, because they were not "enforceable" acts as such. Under yet another interpretation, they were covered by Art. 46 Brussels II *bis,* but, as mere authentic instruments, could not be recognized in a similar way as court decisions under the traditional regime of Art. 21 *et seq.* Brussels II *bis*. Thus, a recognition similar to that of court judgements, as the one provided in Art. 54 and 65 Brussels II *ter*, did not exist for out-of-court divorces prior to August 1, 2022,[30] unless these divorce acts could be classified as "court decisions" in the sense of Brussels II *bis* Regulation. This put a lot of pressure on the question of classification of earlier out-of-court divorces as "court decisions" under Art. 2 No. 1, 2 and 4 Brussels II *bis*.

Art. 2 Brussels II *bis* provides: For the purposes of this Regulation:

1. the term 'court' shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Art. 1;

2. the term 'judge' shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;

4. the term 'judgement' shall mean a divorce, legal separation or marriage annulment, as well as a judgement relating to parental responsibility, pronounced by a court of a Member State, whatever the judgement may be called, including a decree, order or decision.

These provisions are quite similar to those in Art. 2 No. 1 and 2 Brussels II *ter*. The notion of "court" is opened up to all other (non-judicial) "authorities" having "jurisdiction" in matters of divorce under national law. The definition of judgement requires (without an exemplary character this time) the "court" to "pronounce" a divorce. Thus, we are confronted with the question of what "pronouncing" (see the *Sahyouni* case)[31] or "granting" (Art. 2 No. 1 Brussels II ter) means once again: Does there have to be a constitutive decision, or can it also be declaratory? Is every formal requirement executed by a public authority (including notaries) that renders a consensual divorce effective (valid) sufficient for "granting" or "pronouncing" a divorce?

There is a proceeding pending at the CJEU about exactly this question (**case C-646/20, *T.B.***): The parties seek recognition of an out-of-court divorce effected in Italy by a certificate issued by the "*Ufficio di Stato Civile*" (a public non-judicial authority) in Germany. The German Supreme Court (*BGH*) requested the preliminary ruling on December 1, 2020. The *BGH* is of the opinion that the out-of-court divorce in Italy does neither constitute a judgement in the sense of Art. 21 Brussels II *bis* Regulation nor an authentic instrument or agreement in the sense of Art. 46 Brussels II bis.[32] The *BGH* argues that the Brussels II *bis* Regulation only applies to divorces in which the state intervention or state act (by the

[30] *Nademleinsky* in Fischer-Czermak/Tschugguel (Eds.) Liber Amicorum Erwin Gitschthaler (2020) 173 *et seq*.

[31] CJEU December 20, 2017, C-372/16 *Sahyouni*.

[32] The two questions are: "1) Is the dissolution of a marriage on the basis of Art. 12 of Decreto Legge (Italian Decree-Law) No. 132 of September 12, 2014 ('DL No. 132/2014') a divorce within the meaning of the Brussels IIa Regulation? 2) If Question 1 is answered in the negative: Is the dissolution of a marriage on the basis of Art. 12 of DL No. 132/2014 to be treated in accordance with the rule in Art. 46 of the Brussels IIa Regulation on authentic instruments and agreements?"; see also *Kramme*, GPR 2021, 101 (102).

public authority) amounts to more than the fulfilment of evidentiary, warning or advisory functions. This argument seems in line with the *Sahyouni* requirement of "pronouncing" a divorce. The *Berliner Kammergericht*, as the second instance of the case *T.B.*, was of the contrary opinion: It qualified the Italian divorce as a court decision in the sense of Art. 2 No. 1 Brussels II *bis*. [33] The CJEU judgement in this case is expected with excitement because it might also offer insight to the construction of the notions of "court" and "decision" under the new Brussels II *ter* Regulation.

The *Sahyouni* decision was made against a background of a huge majority of Member States in which divorces were always carried out by traditional courts. This situation has changed over the years, due to a strong trend towards **out-of-court divorces** (also called "**private divorces**", even though they are not entirely private). This trend will be described in more detail below (see 2.1.4). Today, it is highly uncertain whether the great number of out-of-court divorces, which are now possible in the Member States, will fit wholly, partly or not at all into the rigid formula of *Sahyouni*. At the same time, it is highly desirable that a uniform private international law regime applies to divorces in the EU, to court models as well as to their out-of-court cousins. In other words, the Rome III Regulation should be applicable to all of them, guaranteeing a uniform regime of determination of the applicable law in cross-border cases. We should, therefore, be hopeful that the CJEU will soon find the opportunity to revise its *Sahyouni* judgement for Rome III in this sense, *and* that the CJEU in the C-464/20 case will not extend the *Sahyouni* formula to Brussels II *bis* (and *ter*).

But still, the Brussels II *ter* puzzle remains unresolved: How shall we interpret its notion of "court" and "decision" under Art. 2? What does it mean that the respective authority must have "jurisdiction" to "grant" a divorce in its decision? Answers in literature to these questions go in all directions:

Some authors argue that the requirement for a constitutive decision by a court or other authority having jurisdiction does not exist.[34] This construction is plausible for several reasons:

- **Grammatical argument**: As mentioned above, the description of a "decision" in Art. 2 No. 1 Brussel I *ter* can be read as being exemplary (not exclusive). The word "granting" could also encompass declaratory decisions and others.
- **Practical argument**: And it is, indeed, very hard to draw a line between different types of "court" intervention, ranging from declaratory to constitutive decisions to a mere registration of an authenticated document of the agreement.
- **Function argument**: Most divorces are based on the *agreement of the spouses* to divorce. This agreement or consensus leaves no discretion for judges or other authorities *not* to grant or register the divorce or to make any decision as to substance. Their involvement in the divorce has two main functions: The main *substantive* function of the authority "granting" divorce is often its duty to offer guidance and legal advice to the spouses. The other function is the establishment of a *form* on which the formal validity of the divorce is conditioned. In other words, courts, notaries or other authorities are, according to the national law of the Member States, not really deciding to whom to grant a divorce and to whom not. They only provide certain legal guidance and advice coupled with a formal control of conformity with the law, and they finally add a formal requirement for the divorce to take effect.

Yet, this approach (*Sonnentag*/*Haselbeck*) has one obvious **defect**: It seems to leave Art. 64 *et seq*. Brussels II *ter* almost no scope of application. If every formal involvement (merely guiding and

[33] Kammergericht March 30, 2020, 1 W 236/19 FamRZ 2020, 1215 (reviewed by *Dutta*).
[34] *Sonnentag/Haselbeck,* IPRax 2022, 23 (27 *et seq*.) with further references.

controlling) – which is a requirement for the validity of the divorce – of a judicial or non-judicial public actor qualifies as a "court" decision, only Art. 30 *et seq*. will apply. But which will then be the cases in which notaries draw up the authentic instruments on divorce or in which public authorities or notaries register party agreements on divorce in the sense of Art. 64 *et seq*.? Therefore, at first sight, this interpretation of Art. 2 No. 1 and 2 Brussels II *ter* seems to deprive Art. 64 *et seq.* Brussels II *ter* of their scope of application.

Other authors think that Art. 2 Brussels II *ter* proclaims a rather **narrow notion of "court"**:[35] This can be supported by a look into the drafting history of the recast of the Regulation. Many people involved in the drafting process were of the opinion that out-of-court divorces, under the old Brussels II *bis* Regulation, neither fit into the category of "court decision" (of Art. 2 Brussels II *bis*), nor into the category of enforceable instruments of Art. 46 Brussels II *bis*. It was, therefore, the goal of the new provisions in Art. 64 *et seq*. Brussels II *ter* to close a gap in the legislation by directly addressing these new out-of-court forms of divorce and by providing clear rules for their (fully fledged) international recognition. Following this equally plausible argument, most out-of-court divorces would be a matter of Art. 64 *et seq*. Brussels II *ter* and would qualify as "authentic instruments" or "registered agreements" on divorce.

This interpretation has the disadvantage that it requires drawing an uncertain line between court (Art. 2 Brussels II *ter*) and non-court (Art. 64 *et seq.* Brussels II *ter)* out-of-court divorces. It leaves us with the unanswered tricky question of where to draw a dividing line between those out-of-court marriages involving other authorities (like notaries or administrative authorities) which are "court decisions" in the sense of Art. 2 Brussels II *ter*, because they "grant" divorces in a judiciary function, and those which are *not* "court decisions". Both interpretations (broad and narrow "court" definition under Brussels II *ter*) do not answer the question of the relationship – similarity or difference – between the notions of "court" under the SR and the Matrimonial/Partnership Property Regulations and Brussels II *ter*.

Another author suggests a third way of interpretation of Art. 64 *et seq*. Brussels II *ter*:[36] *Dutta,* in a first step, subscribes to a rather narrow notion of "court" under Art. 2 No. 2 Brussels II *ter*. All non-judicial acts falling under Art. 64 *et seq*. Brussels II *ter* are, in a second step, not treated in exactly the same manner as "court decisions", but as mere "**block references**" on the level of PIL (private international law). "Block reference" is an order to the authorities in the country of reception of the divorce to apply the law in exactly the same manner as the authorities in the state of origin of the divorce had to. This means that the authorities in the Member State of reception of the divorce act may not apply their own PIL rules for divorce (which are applicable in their jurisdiction), but they have to put themselves into the shoes of an authority acting in the Member State of origin of the divorce. If the notary in state A effecting the divorce did not apply the family law applicable in state A correctly (which is not necessarily the substantive law of state A), the courts or other authorities in state B (state of receipt of divorce) may correct the divorce themselves. They are not bound by a prohibition of *revision au fond*. However, if the law is applied correctly by the authority in the state of origin A, the divorce has to be recognized by the authorities in state B, even though they would have applied different legal rules when asked for the divorce themselves.

Treatment as "court decisions" means a recognition of the legal acts on a procedural level, excluding any review as to substance (no *revision au fond*). In my view, this treatment seems to be clearly ordered

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35 *Dutta*, FamRZ 2020, 1428, with further references.

36 *Dutta*, FamRZ 2020, 1428 (1429 *et seq*.).

by Art. 64 and 65 No. 1 Brussels II *ter,* also for consensual divorce by authentic instrument or registration, without leaving any room for differing interpretation. In particular, it does not allow for an interpretation of ordering a block reference. As explained above, under the block reference model, the courts of state B of receipt would be able to correct the court of state A of origin in applying the PIL of state A and the applicable substantive law of divorce.

Summary: Thus, our preliminary interpretative analysis of the definitions of "court" under the relevant EU regulations offers the following picture:

Many **EU regulations** adopted under Art. 81 TFEU (judicial cooperation in civil and commercial matters) are aware of the fact that legal activities of non-judicial actors, in particular notaries, play an important role in the areas covered by them: succession, matrimonial and partnership property, taking of evidence, European payment order and enforcement order, dissolution of marriage and parental responsibility, the service of documents abroad, the drafting of authentic instruments in civil and commercial matters. In addition, notaries as non-judicial actors performing important judicial functions are integrated in the European Judicial Network (EJN) in civil and commercial matters. The system of EU regulations under Art. 81 TFEU, assisted by the EJN, mainly ensures the free circulation of judgements and other "public acts", including those of notaries, cross-border within the EU, in a system of mutual trust and recognition and enforcement among the Member States.

However, **not** every notarial activity is **covered** by the above-mentioned **EU regulations**. Where this is not the case, the free cross-border circulation and recognition of their acts (within the EU) is not guaranteed. This means that the conduct of these activities with respect to cross-border-cases may be inhibited by the national law of other Member States. Falling not within the scope of one of the EU regulations may, therefore, have serious negative consequences for the respective act and parties concerned. Examples for such notarial acts under present EU law are: the writs of execution issued by Croatian notaries, notaries receiving declarations of family status under national law (of maternity, paternity to a child), notaries dissolving registered partnerships (Brussels II *bis* and Rome II only apply to marriages). Where these areas of law (like establishment of parenthood or dissolution of partnerships) are not covered by an EU regulation at all – even for acts of traditional courts, the non-regulation is not a question of allocation of competences to courts or notaries as alternatives. Non-regulation then is a policy decision to leave the field to the Member States for whatever reasons. Such policy decisions are outside the scope of this project and will, therefore, not be discussed here.

This means that for notarial activities in the judicial sphere it takes two actors:

(1) The national legislator providing the enabling rules for the notary to become active within the national justice system of her place of residence;

(2) the EU legislator providing the enabling rules for the notarial acts to become effective also in other Member States and to take part in the system of free circulation of public acts[37] within the EU.

Within the realm of EU regulations providing for notarial activities, different systems have to be distinguished:

1. **System 1**: Older regulations like **Brussels I (*bis*)** and **Brussels II (*bis*)** take care of enforceable authentic instruments issued by notaries and declare the extension of their (evidentiary) and enforcement effects in all other Member States. In the area of origin, the civil and commercial

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

matters of Brussels I (*bis*) Regulation, not the cross-border *recognition*, but the cross-border *enforcement* of claims played a core role. Notarial activities in a judicial function were mainly not taken into account. Notaries are the ones who issue authentic instruments which are subject to a clearly different legal regime of jurisdiction and recognition than court judgements. As the example of Hungary shows, notaries may be accepted as "courts" under very narrow circumstances in Brussels I *bis*: by express inclusion as "court" in Art. 3 Brussels I *bis* or by meeting the "court" requirements of CJEU decisions like *Pula Parking* and *W.B.* In the latter case, notaries would have to fulfill the institutional and procedural guarantees for a fair trial (independence, impartiality, *audiatur et altera pars*) and to have the power to decide a dispute.

2. **System 2**: Later regulations, in particular those in succession and family matters, were confronted with – partly very intense – legal activities of notaries in which *recognition* played a greater role. Some of these activities are clearly judicial by function. Therefore, Art. 3 No. 2 SR and Art. 3 No. 2 **Matrimonial/Partnership Property Regulations** clearly and expressly open up the category of judicial activities to notaries and public authorities.[38] Notaries can make "court decisions" which are subject to the same procedural rules of recognition and enforcement as decisions of traditional courts. At the same time, these regulations take care of the recognition issue of authentic instruments (beyond and separate from their enforceability) in Art. 59 SR and Art. 58 Matrimonial/Partnership Property Regulations. The notion of "acceptance" of an authentic instrument is created. But still, authentic instruments are open to a *revision au fond* by authorities of the receiving Member State. And notaries issuing authentic instruments are not bound by the rules of international jurisdiction of the respective regulation. These rules of international jurisdiction, however, apply for notaries acting as "courts" under the regulations. Thus, the SR and the Matrimonial/Partnership Property Regulations clearly establish a **two-track system for notarial activities**: Track 1 are court decisions, track 2 are authentic instruments.

3. **System 3**: Brussels II *bis* was confronted with an increase of notarial and other non-court activities, in particular in the area of consensual divorce. This confrontation revealed the inappropriateness of the older system 1 for family matters in which notarial activities now play an important role. Considering the fact that public authorities and notaries (acting in the legal forms of authentic instruments and registrations) fulfill exactly the same functions as courts in cases of consensual divorce, the new **Brussels II *ter* Regulation** created a completely new path: Not only notarial activities which meet the requirements for a court decision, but also those cast in other forms will profit from the legal regime that applies to court decisions: namely the same rules of recognition and enforcement coupled with uniform rules for international jurisdiction and *lis pendens*. The line which formally still has to be drawn between notarial court decisions and notarial non-court instruments is currently very unclear. While we await clarification by the CJEU, we also have to constate that the line now is of little practical relevance, as both categories have almost identical legal consequences.

4. **System 4**: Other regulations work with several systems. The European Enforcement Order Regulation allows the privileged enforcement (of a European enforcement order) for authentic instruments on undisputed claims drawn up by notaries (as well as for court judgements). The

[38] See also the same definition in Art. 2 (1) Taking of Evidence Regulation.

possibility to act as a "court" is, however, very narrow (similar to Brussels I *bis*). The European Order for Payment Regulation contains a clear one-track system allowing Member States to include notaries as the competent authorities for issuing European orders for payment (Art. 5 No. 3). In the Taking of Evidence Regulation, notaries may be notified as "courts" under the conditions of Art. 2 No. 1 and Art. 31 No. 3, afterwards enjoying the same rights as traditional courts do under the regulation.

Systems 1 to 3 mark an interesting development in the treatment of the activities of non-judicial actors in several non-contentious matters. In particular, the differences between **systems 2 and 3**, seem very profound: The regulations of both systems cover areas in which notarial activities in non-contentious proceedings are numerous and broadly accepted. In the following, we will, therefore, try to answer the following **questions**:

- (System 3) What characterizes the new trend of out-of-court divorces which are now subject to the most recent EU regulation – Brussels II *ter*? Is the new regime of Brussels II *ter* really an appropriate answer to the new development? Which of the disputed interpretations of Brussels II *ter* (see already above in this chapter) is preferable? – see 2.1.4 *infra*.
- (System 2) What are strengths and weaknesses of the two-track system 2 (SR, Matrimonial/Partnership Property Regulations)? – see 2.1.5 *infra*.

2.1.4 Different types of out-of-court divorces in the EU Member States

2.1.4.1 Slovenia

Under Art. 97 Slovenian Family Code (*Družinski zakonik*), a divorce can be conducted by a notary (uncontested divorce before a notary). Such a divorce is possible if there are no joint minor children and, therefore, no parental duties for the spouses, if they have reached a consensus regarding the division of their joint property and agree on all other essential matters regarding the relationship of the parties after the divorce (an agreement about who of the spouses shall remain or become the tenant of the apartment in which they live and on the maintenance for the entitled spouse). If a divorce by mutual consent before a notary is possible, a divorce in court cannot take place. For the divorce before a notary the spouses can choose every notary in Slovenia. The marriage is considered divorced as soon as the parties have signed the notarial record (= notarial deed). This record constitutes the basis for the entry of the divorce in the civil status register. The record is not enforceable. Within eight days from the signing of the record, the notary has to send the record to the administrative unit, where the divorce will be registered in the civil status register.[39]

In case the parties cannot reach a mutual agreement regarding the divorce before the notary or have joint minor children, the (non-contentious) court alone is competent for the divorce. However, a divorce by mutual consent is still possible in court on a joint proposal and if the necessary agreements between the parties are reached (Art. 96 Slovenian Civil Code). Agreements between the parties regarding their children, e.g., regarding custody or maintenance, are reviewed by the court with regard to the best interests of the minors (if necessary, with the involvement of the social welfare authority)

[39] *Rudolf* in Süß/Ring, Eherecht in Europa[4], Slowenien (2021), No. 46; *Novak* in Bergmann/Ferid/Henrich, Internationales Ehe- und Kindschaftsrecht, Slowenien, updated: 01.05.2020 (no. 237), 45 *et seq.*; *Kraljić*, The New Family Code and the Dejudicialization of Divorce in Slovenia, Balkan Social Science Review, Vol. 15 (2020), 157-177 (164 *et seqq.*).

and concluded in the form of a court settlement. The parties do not have to be represented by a lawyer.[40]

2.1.4.2 Romania

In Romania, there is the possibility of out-of-court divorces before a notary or before a civil registrar. The respective provisions can be found in Art. 375-378 Romanian Civil Code (*Codul civil*). Divorce before a notary is possible only if it is consensual. In case of minor joint children (does not matter if they were born within or outside the marriage or if they have been adopted), there are additional requirements which have to be met: the spouses must have agreed on what the children's surname will be, on their custody, where the children will live and how much the contribution to costs (e.g., for the their education) will be (Art. 375 para. 2 Romanian Civil Code). Moreover, a positive official prognosis for the child's well-being is necessary. If the legal requirements for a divorce by mutual consent before the notary/civil registrar are not met, the divorce must be rejected and carried out in court.[41]

Competent for out-of-court divorces is the notary of the place where the marriage was concluded, or where the last common residence of the spouses was registered (Art. 375 para. 1 Romanian Civil Code, Art. 267 Regulation for the Application of the Law of Public Notaries and Notarial Activity[42]). The spouses have to file an application for divorce by mutual consent with the competent notary. After a 30-days reflection period, the spouses will appear before the notary and the authenticity of the divorce request will be confirmed. If the notary has no doubt, she will declare the marriage to be dissolved through the agreement of the spouses and issue the divorce certificate (Art. 376 Romanian Civil Code).[43]

2.1.4.3 Italy

In Italy, there are two different forms of out-of-court divorces as alternatives to the divorce in court. These two forms are available only by mutual agreement of the parties. There is also the possibility of modifying the divorce consequences out-of-court[44]:

First, there is the possibility of an amicable divorce agreed upon in the presence and by assistance of lawyers (Art. 6 Decreto lege No. 132/2014). Before the negotiations begin, a negotiation period of one to three months must be agreed upon. A one-time extension of this period up to three months is possible. Each of the parties must be represented by a lawyer who will manage the proceedings and record the agreement in writing. The lawyers forward the divorce agreement to the state prosecutor (*Procuratore della Repubblica*) if the parties have agreed on all consequences of their divorce. The latter confirms the divorce agreement if the compliance with the law is established. This kind of divorce is also available to spouses who have minor children or children who cannot (yet) take care of themselves. Then the respective agreement has also to be forwarded to the state prosecutor who has to examine the best interests of the children and can only give her consent to the divorce if it is not endangered. If the state prosecutor has doubts concerning the best interests of the children, the

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40 *Novak* in Bergmann/Ferid/Henrich, Slowenien, 43 *et seqq.*; *Rudolf* in Süß/Ring, Slowenien (2021), para. 46, 48; *Kraljić*, Balkan Social Science Review (2020), 157-177 (164 *et seqq.*).

41 *Bormann* in Bergmann/Ferid/Henrich, Rumänien, updated: 30.04.2014 (no. 207), 31; *Oancea* in Süß/Ring, Rumänien (2021), para. 61; *Kraljić*, Balkan Social Science Review, Vol. 15 (2020), 157-177 (162).

42 *Regulamentul de aplicare a Legii notarilor publici și a activității notariale*.

43 *Oancea* in Süß/Ring, Rumänien (2021), para. 62; *Kraljić*, Balkan Social Science Review, Vol. 15 (2020), 157-177 (162).

44 *Wiedemann/Pertot* in Süß/Ring, Italien (2021), para. 181.

agreement is forwarded to the president of the court for further review. The divorce becomes effective by the time the state prosecutor, or the president of the court confirms the divorce agreement (enforceable document). The divorce has to be registered at the registry office at the place of the last residence of the spouses or at the place the marriage took place.[45]

Second, the parties can conclude a divorce agreement before the mayor, who is the chief civil registrar (*l'ufficiale dello stato civile*). Lawyers are not required (Art. 12 para. 2 Decreto lege No. 132/2014). This kind of out-of-court divorce - in contrast to the first option – is not available if there are minor children or children who cannot (yet) take care of themselves (disabled or financially dependent children). Furthermore, the agreement cannot include property transfers. After a 30-day period for consideration (obligatory otherwise the divorce will not be valid), the parties must appear again in person at the registry office and approve the divorce announcement. The parties sign the divorce announcement and the registrar confirms the divorce. The divorce is valid from the moment of confirmation by the registrar and is registered in the registry office.[46]

2.1.4.4 France

According to Art. 229 French Civil Code (*Code civil*), it is possible for spouses to mutually agree (*consentir mutuellement*) to their divorce out-of-court. The agreement is concluded in front of and drawn up by the lawyers beforehand (*divorce par acte sous signature privée contresigné par avocats, déposé au rang des minutes d'un notaire*). The parties have to be represented by a lawyer and must agree on all divorce consequences (private agreement). After 15 days of consideration, the parties sign the divorce agreement. Their lawyers have to countersign the agreement. The notary (only) authenticates the divorce agreement and checks compliance with the formal requirements. The agreement has to be entered into the relevant register by the notary. This registration gives effect to the divorce and constitutes an enforceable title.[47]

If there is a minor child, a judge must be involved if the child desires so. Sometimes also a mediator is consulted. If the spouses cannot mutually agree on the divorce, a judge must be involved.[48]

2.1.4.5 Spain

According to Art. 87, 82 Spanish Civil Code (*Código Civil*), the spouses may divorce out-of-court in mutual consent by signing their private agreement on the consequences of the divorce in terms of Art. 90 Spanish Civil Code and in form of a public deed (*convenio regulador*) before a notary. Alternatively, there is the possibility of an out-of-court agreement in the presence of a court clerk (*ante el Secretario judicial*). For an out-of-court divorce by mutual consent, at least three months must have passed since the day of the marriage. Such an out-of-court divorce is only possible if the spouses do not have common minor or handicapped children who cannot take care of themselves. However, if they have children who are of full age but economically dependent, this does not hinder the out-of-court divorce, provided that the parties seeking the divorce agree on their economical maintenance. Both spouses have to be represented by a lawyer. It is the notary of the place where the spouses last

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[45] *Wiedemann/Pertot* in Süß/Ring, Italien (2021), para. 181 *et seq.*, 184 *et seqq.*; *Kramme*, GPR 2021, 101 (101).

[46] *Wiedemann/Pertot* in Süß/Ring, Italien (2021), para. 190 *et seqq.*; *Kramme*, GPR 2021, 101 (101).

[47] *Döbereiner* in Süß/Ring, Frankreich (2021), para. 152, 155; *Kraljić*, Balkan Social Science Review, Vol. 15 (2020), 157-177 (160, 169); *Brandhuber* in Bergmann/Ferid/Henrich, Frankreich, updated: 03.05.2019 (no. 232), 50.

[48] *Döbereiner* in Süß/Ring, Frankreich (2021), para. 153; *Kraljić*, Balkan Social Science Review, Vol. 15 (2020), 157-177 (160).

lived together or the notary at the domicile of one of the spouses who is competent for the out-of-court divorce.[49]

2.1.4.6 Greece

In Greece, the possibility of an out-of-court divorce is regulated in Art. 1441 Greek Civil Code (*Astikos Kodikas*). The spouses have to sign the divorce agreement in the presence of the lawyers representing the spouses. After the signing (and ten days of consideration), the divorce has to be authenticated by a notary in form of a public deed. If minor children are involved the spouses have to agree on custody, maintenance, and personal contact before the divorce. For the divorce to take effect, the public deed must be filed by the notary as a copy at the competent registry office (where the marriage had been registered). From the moment the written and authenticated agreement of the parties is filed at the registry office, the marriage is considered divorced. In case of a church marriage, it is also obligatory that the divorce is registered at the competent holy metropolis.[50]

2.1.4.7 Estonia

A notary or a civil registrar (*perekonnaseisuametnik*) can divorce the spouses if there exists a joint written agreement and a joint written application and if there is no dispute regarding the consequences of the divorce (§ 64 Estonian Family Law Act[51]). Both spouses must have their permanent residence in Estonia. In the divorce agreement the spouses have to agree for example on the maintenance of joint children and the division of joint property. The notary or registrar sets a date after the divorce application has been filed (one to three months after the application), on which both parties to the divorce must appear. If there is no justifiable reason, the divorce is granted and entered into the relevant register. From the moment of registration, the parties are considered divorced and get a divorce certificate. If the conditions for an amicable out-of-court divorce are not met, one of the spouses must initiate a contested divorce in court.[52]

2.1.4.8 Latvia

In Latvia, a notary can dissolve a marriage if the spouses file a divorce proposal at the notary's office in which they confirm the disruption of their marriage. Furthermore, they need to have reached an agreement on the consequences of the divorce. The divorce proposal is notarized by the notary and recorded in the register of divorces. After that, the parties have a 30-day period of consideration during which they can revoke the divorce (also unilaterally). If the divorce is not revoked and no dispute arises, the notary public issues a divorce certificate with which the divorce becomes valid (Art. 69 para. 3 Latvian Civil Code[53]). If they have joint minor children, the spouses have to agree on custody, maintenance, personal contact and support of their children (Art. 77 para. 2 Latvian Civil Code). If the spouses cannot reach an agreement, the proceedings must be conducted in court and the notary can no longer carry out the divorce.[54]

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[49] *Kraljić*, Balkan Social Science Review, Vol. 15, June 2020, 157-177 (160 *et seq.*); *Huzel* in Süß/Ring, Spanien (2021), para. 58, 67; Ulrich in Bergmann/Ferid/Henrich, Spanien, updated: 15.02.2021 (no. 241), 37.

[50] *Stamatiadi* in Süß/Ring, Griechenland (2021), para. 50; *Kastrissios* in Bergmann/Ferid/Henrich, Griechenland, updated: 18.03.2020 (no. 236), 46; *Kraljić*, Balkan Social Science Review, Vol. 15, June 2020, 157-177 (161).

[51] *Perekonnaseadus*.

[52] *Schulze* in Bergmann/Ferid/Henrich, Estland, updated: 01.05.2018 (no. 221), 61 *et seq.*; *Kraljić*, Balkan Social Science Review, Vol. 15, June 2020, 157-177 (161).

[53] *Civillikums*.

[54] *Schulze* in Bergmann/Ferid/Henrich, Lettland, updated: 01.12.2019 (no. 235), 57 *et seq*.

2.1.4.9 Portugal

Spouses in Portugal have the possibility to file an agreement on their divorce with the main consequences of the divorce as defined in Art. 1775 para. 1 Portuguese Civil Code (*Código Civil*) out-of-court at the civil registry office (Art. 1773 para. 2 Portuguese Civil Code). According to Art. 1775 para. 1 Portuguese Civil Code, the parties must agree, for example, on the division of joint property, an agreement on the parental authority of minor children and the maintenance for the children, an agreement on the maintenance regarding the spouse and the disposal of the marital home. The agreement concerning the children has to be forwarded to a public prosecutor (*Ministério Público*) who will evaluate the child's well-being and indicate necessary amendments if the agreement does not duly protect the children.[55] Therefore, there exists an additional authority which reviews the divorce agreement to ensure the well-being of minors.[56] If the parties do not make the necessary amendments requested by the prosecutor, the court will decide on the consequences of the divorce (Art. 1778-A para. 3 Portuguese Civil Code). If the agreement of the parties to the divorce meets the requirements of the law, and if the prosecutor's amendments are accepted, the divorce is pronounced and confirmed by the civil registrar.[57]

2.1.4.10 Belgium

In Belgium, there are two ways to get divorced, either on the grounds of marital disruption or by mutual consent. For mutual consent, the parties of the divorce must conclude a property contract on the one hand and a family law contract on the other (Art. 1287 f Judicial Code[58]). In the framework of a divorce by mutual consent, the notary can be involved before the proceedings in court to set up the necessary agreements.

The court still has to approve and confirm the divorce. However, the judicial power of review is limited to formalities, i.e., the judge does generally not assess the content of the contracts (exceptions: *ordre public*, good conduct and violations of the law). But if there are children, the judge may also review the content and suggest changes and hear the children (Art. 1290 para. 1, Art. 931 Judicial Code). The parties do not have to accept the suggestions of the judge, but risk that the judge will refuse to grant the divorce. Otherwise, if all contractual conditions are fulfilled, the judge grants the divorce (court judgement).[59]

2.1.4.11 Analysis

There seems to be a majority view among Member States that – in case of a consensus of the spouses – out-of-court divorces in front of a notary or a public administrative authority, with or without the additional involvement of lawyers, may offer essential advantages to the spouses as compared to court proceedings. This is a view that definitely can be shared based on the following list of possible **advantages** of a divorce executed by a notary:

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[55] *Huzel* in Süß/Ring, Portugal (2021), para. 58 *et seqq*.; *Kraljić*, Balkan Social Science Review, Vol. 15, June 2020, 157-177 (163 *et seq*.); 35; *Nordmmeier* in Bergmann/Ferid/Henrich, Portugal, updated: 07.03.2016 (No. 216), 35 *et seq*.

[56] *Bogdzevič*/*Kaminskienė*/*Vaigė*, Non-Judicial Divorces and the Brussels II *Bis* Regulation – to Apply or Not Apply? International Comparative Jurisprudence 2021 Vol. 7 (1), 31-39 (33).

[57] *Nordmmeier* in Bergmann/Ferid/Henrich, Portugal, updated: 07.03.2016 (para. 216), 35 *et seq*.; *Huzel* in Süß/Ring, Portugal (2021), para. 60.

[58] *Code judiciaire*.

[59] *Pintens* in Bergmann/Ferid/Henrich, Belgien, updated: 01.08.2019 (no. 237), 57 *et seqq.*; *Schür* in Süß/Ring, Belgien (2021), para. 127 *et seqq*.

- *Form, time*: The proceedings can be less formal and take less time than in a court.
- *Costs*: There can be lower costs corresponding to 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 for divorce than to an anonymous state institution (like a court) as such.
- *Privacy, intimacy*: The decision of the spouses to divorce is very intimate and personal. A formal and impersonal state institution might seem less appropriate to deal with it than a legal professional who can better adapt to the need for privacy of the parties.
- *Smoothness*: A divorce is often painful for the spouses, even if consensual. Proceedings as smooth and sensitive as possible for both parties concerned should be provided.
- *Independence, impartiality*: The notary is neutral and non-partisan. She will, therefore, seek a fair balance of the interests of both spouses and of the children involved. Her role is comparable to that of a judge.
- *Legal expertise, advice*: The notary is a legal expert. She can give the spouses 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*: The notary is a bi-partisan contract professional. She can draft fair and balanced agreements on the division of property, on maintenance or even the duties regarding the children that are comprehensive and will last.
- *Expertise in future provision*: A divorce is an investment in a peaceful and prosperous future of the spouses and their children. The tackling of the legal side of personal future provision is one of the key competences of notaries rather than of courts.

It follows from this list of arguments that not all the diverse solutions chosen by the different countries – as described above – are equally able to display all of the listed advantages of out-of-court divorces. If agreements of the parties are not accompanied by legal advice and guidance by a legal professional, but only “registered”, the parties will lack the legal information they need (and would receive from a court or notary in charge with the divorce proceeding). An attorney is a legal expert as well. But she is partisan to one of the spouses. Two attorneys will be needed, one for each spouse. Dual representation by attorneys is not the shortest and best way to a conflict-free and balanced consensus on all issues that have to be provided for by the spouses.

This leads us to the **conclusions**

- that there are serious reasons why out-of-court divorces, mainly in the case of consensus of the spouses, can be preferable to in-court divorces. These reasons partly stem from the particular circumstances of the task: the divorce of a marriage. Therefore, the trend to out-of-court divorces observed in numerous countries in Europe and worldwide should be definitely supported.
- that a notary, trained by its profession to act neutrally in the interest of both parties, to give impartial legal advice and draft comprehensive agreements for future provision, is definitely better suited to conduct successful divorce proceedings than other actors employed by some countries: She is as knowledgeable of the law and neutral (impartial) as a judge in a court. She is not partisan, as the attorney is. And she can give more advice as to substance, i.e., private law, than a registrar’s office or other public authority in charge.

With respect to the cross-border recognition and enforcement of out-of-court divorces within the EU Brussels II *ter* goes a new and courageous way which – in general – seems an appropriate answer to

the changes of the legal environment in the Member States. In chapter 2.1.3.2 above we could show that Brussels II *ter* paved the way for out-of-court divorces executed by a notary (authentic instrument) or by registration being equally respected and enforced as divorces by court decision. This leaves the question of distinction between notaries acting as courts and notaries *not* acting as courts under the regulation in divorcing a marriage open and unanswered. As explained above, this is a particularly tricky question to answer: Are the acts of the court or the notary constitutive or declaratory under national law and what consequences does this have under the regulation? Are they a "decision"? What if notaries comply with constitutional guarantees of a fair trial and are acting by a delegation of power or under court control (as prescribed in Art. 3 No. 2 SR) – are they then acting as "courts" under Brussels II *ter*? The answer is likely to be yes. But in the absence of any decisions of the CJEU on the matter, we simply cannot tell with sufficient certainty. The good news is: The answer to the question is of little practical importance in the regime of Brussels II *ter* (only), because the regulation adopts a uniform approach (system 3): i.e., the consequences of court divorces and out-of-court divorces are practically the same (Art. 64, 65 Brussels II *ter*).

However, this distinction – court or non-court – is an important dividing line in the two track-systems of the SR and the Matrimonial/Partnership Property Regulations where they trigger fundamentally different legal consequences, as will be analyzed in the following chapter.

2.1.5 The strengths and weaknesses of system 2 (two-track system)

System 2 is characterized by **two** distinct **tracks** by which non-contentious succession proceedings are handled. The same applies also for the two regimes in the Matrimonial and Partnership Property Regulations. In principle, the EU legislator followed the old model of system 1: court decisions and notarial authentic instruments are two completely different creatures. The most salient differences between the two are the following:

- The provisions on international jurisdiction in the respective regulation apply only to courts and court decisions, not to notarial instruments.
- The *lis pendens* rules also only apply to courts.
- The recognition and enforcement rules for court decisions rest on a *procedural level*. Neither the international jurisdiction, nor the applicable law or the substance of the decision (no *revision au fond*) may be challenged by the receiving Member State.
- Notarial authentic instruments are not recognized on a *procedural level*. They are "accepted" which means recognized with respect to their evidentiary effects which are extended to the other Member States. And they are enforced in other Member States if they are enforceable in their country of origin. But the courts of the receiving Member States are always free to challenge the substance, i.e., the validity of the legal relationship which is the subject of the authentic instrument. Thus, the content of the authentic instrument is merely recognized on a *substantive level*: The courts of the receiving Member States apply the substantive law applicable according to their PIL rules to determine the validity of the respective legal relationship or right.

That the SR would really follow this old model (system 1) was not clear from the outset. Why? The tasks the SR has to perform are considerably different from those to be performed by earlier Regulations in the field of jurisdiction and recognition and enforcement (like in particular Brussels I as the role model of the whole field):

- Unlike in civil and commercial matters subject to Brussels I (*bis*) and in divorce and parental responsibility matters (several years ago, before the advent of out-of-court divorces) subject to Brussels II (*bis*) – **succession** matters have always been characterized by various **notarial** competences exercised in very different ways in the EU Member States. And the vast majority of succession proceedings (unlike in the original Brussels Convention and Regulations) are **non-contentious** proceedings. Thus, the SR had to deal with two main actors in the field, which were courts *and* notaries who had more or less the *same function* and did the same thing: they had to clarify, determine and finalize the legal succession after the death of a person. Rec. 20 SR states that the Regulation respects the differing systems of the Member States for dealing with matters of succession, be it in court or by notaries. This is, still according to rec. 20, the reason why the notion of "court" was opened up to these other non-judicial actors.
- The overall goal of the SR is the **concentration of the proceedings** in a single Member State. This means that the SR wants to avoid parallel proceedings in two or more Member states dealing with the same estate. Therefore, the rules on international jurisdiction (Art. 4 *et seq*. SR) make sure that the jurisdiction of the court always extends to the whole estate no matter where assets are located, and that the jurisdiction of the respective court is exclusive.[60]

One could, therefore, be tempted to conclude that, in order to reach the two above mentioned goals (treating all national systems, notarial or judicial, alike and concentrating the proceedings in one place) the definition of "court" (Art. 3 No. 2 SR) had to be given a very broad meaning, encompassing all ways in which notaries finalize a succession case: by issuing a declaratory "certificate", a constitutive "certificate" or "decision", or rather an authentic instrument or some other formal instrument. Thus, if a national system places ordinary – non-contentious – succession proceedings in the hands of notaries, the respective notarial activities would be bound by the SR rules on international jurisdiction and exclude any court or notary in another Member State to become active in parallel proceedings.

However, the CJEU does not treat all notarial proceedings in matters of succession in the Member States in the same way. From its judgements in the cases C-658/17 *W.B.* and C-80/19 *E.E.*[61] we could learn that a notary issuing a notarial document upon unanimous application of all parties of succession proceedings – in the eyes of the CJEU – did not qualify as a "court" in the sense of Art. 3. No. 2 SR. In such cases, the notarial document might qualify as an "authentic instrument" and be "accepted" as such in other Member States (Art. 59 SR). The recognition proceeding of Art. 39 *et seq*. SR will, however, not be available to the parties in such cases. And the rules on international jurisdiction (Art. 4 *et seq*. SR) will also not apply to such notarial acts.[62]

This relatively rigid view of excluding some types of notarial acts which terminate an out-of-court succession proceedings from the "court" regime (jurisdiction, recognition) despite a rather broad notion of "court" in Art. 3 No. 2 SR seems to be supported by some recitals of the SR: In rec. 20-22, the legislator seems to accept that notaries in matters of succession "issue acts" which circulate in the EU not under the rules of Art. 39 *et seq.* SR, but under Art. 59 SR, the rule for the "acceptance" of authentic instruments. But probably these are other notarial acts than those terminating succession proceedings? Albeit rec. 36 states that notarial succession proceedings – as an example, amicable out-of-court settlements are mentioned – and court proceedings in another Member States dealing with

60 This is also confirmed in para. 55 by the CJEU June 21, 2018, C-20/17 *Oberle.*

61 CJEU May 23, 2019, C-658/17 *W.B.*; CJEU July 16, 2020, C-80/19 *E.E*.

62 For an excellent analysis see *Wilderspin*, The Notion of "Court" under the Succession Regulation, 26, 45 *et seq*.

the same succession and estate may be conducted in parallel, with no rule in the SR preventing or ending this duplicity.

There is no question that the situation of **parallel proceedings** in two Member States described in rec. 36 SR and in the CJEU judgements in the cases *W.B.* and *E.E*. is not desirable in the view of the concentration goal of the Regulation and in view of the parties concerned. This situation results in two different – most certainly contradictory – public acts[63] (one circulating under Art. 39 *et seq*. SR, the other under Art. 59 *et seq*. SR). The litigation arising will have to be decided by the courts having jurisdiction under Art. 4 *et seq*. SR.

Example: If the notarial proceedings, resulting in the act over a party agreement, take place in state A, because, in **state A,** non-contentious succession proceedings are exclusively entrusted to *notaries*, and the non-contentious court proceedings take place in **state B**, where succession proceedings are always conducted by *courts*, never by notaries, the earlier notarial act can always be ignored by the court in state B in so far as it wants to depart from its content according to the applicable law. Notarial proceedings in the Member States like A will always be the weaker ones in cross-border exchange, because they do not have the same force in recognition as the court decisions of state B. It was certainly not the goal of the SR to put Member States with notarial systems of succession regulation in a hierarchically worse position than Member States with court traditions. In so far there seems to be a contradiction with sentence 1 rec. 20 SR which expresses the respect for the different national systems.

How can this problematic situation of parallel proceedings be avoided under the present SR and in future amendments to the Regulation?

Under the present SR, we have to look at Art. 3 No. 2 SR once again. The exclusion of notarial decisions on the basis of unanimous party applications is not necessarily the right interpretation of the requirement of a "decision" with "a similar force and effect as a decision of a judicial authority on the same matter". Art. 3 No. 2 SR seems to rely on the principle "same quality – same function": If the notary guarantees procedural fundamental rights of the parties (like impartiality, right to be heard) just as courts have to, and exercises a judicial function, or works for a court (in delegation) or under a court's control, and her decisions are of the same kind of what otherwise a court would do in the same matter, the requirements of Art. 3 No. 3 SR are met. The notary is a "court" in the sense of this provision. From this definition, relying on the "same quality – same function" principle, one can conclude that it is not possible that the same type of act resulting from the same type of proceedings is classified differently, depending on who issued the act: notary or court. This applies in particular in a comparison of legal systems.

Consider the following *example*: In many Member States, the heir acquires her rights *ex lege* at the time of the death of the deceased. It is nevertheless necessary that a public actor, like a court or a notary, clarifies the legal situation and issues a *declaratory document* on – among other things – what is part of the estate and who is the heir. In Germany, this task is performed by the courts: They issue a certificate of succession under German law, the "*Erbschein*". This certificate is not a "decision" in the formal sense under German procedural law. It has *no* "force of law" (= *res iudicata*, in German:

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

"*Rechtskraft*"). Nevertheless, what the German court does will qualify as a "court decision" under Art. 3 No. 2 SR. And it will constitute *res iudicata* under the SR.[64]

If in some Member States A, similar certificates are issued by notaries in proceedings similar to those conducted by courts in other Member States B (like Germany), these notarial certificates should certainly *be treated in the same way* as the German "*Erbschein*". Where court acts in matters of succession in Member States B are classified as "decisions" under the SR, similar notarial acts in matters of succession in Member States A should to be classified as "decisions" as well, and not as "authentic instruments" (leading to completely different legal consequences). To refer to the Brussels II *ter* Regulation above, one could say: For the spouses, a divorce is a divorce, no matter whether it was issued by a judge or by a notary. For the parties in succession proceedings, a (national) certificate of succession is a (national) certificate of succession, no matter whether it was issued by a judge or a notary.

We, therefore, propose, in a first step, the following interpretation of the notion of "court" and "decision" under Art. 3 No. 2 SR, which is based on the judgements of the CJEU. In a second step, we explain why this interpretation still runs short of what we want to achieve (see the preceding paragraph) and how this deficit can be removed.

Step 1 - Our interpretation is based on the following arguments:

- In the decisions in the cases C-551/15 *Pula Parking*, C-267/19, C-323/19 *Parking and Interplastics* and C-484/15 *Zulfikarpašić* the CJEU held that the notion of "court" under the Brussels I *bis* and the European Enforcement Order Regulation includes the following requirements: the authority must offer the guarantees of independence and impartiality and compliance with the principle of *audiatur et altera pars*, and it has to conduct two-party proceedings. The CJEU said at the same time that this did not apply to the SR (and Matrimonial/Partnership Property Regulations, Takings of Evidence Regulation) because these regulations expressly included other non-judicial authorities in their notions of court.[65]
- It is clear from the *Oberle* judgement[66] that the notion of "decision" (or "judgement") must be given a broad meaning under the SR when traditional courts (like in France or Germany) issue a national certificate of succession. This certificate, even if merely declaratory and without force of law (*res judicata*) under national law, will be considered sufficient to evoke track 1 (decision, court) of the SR: *lis pendens* (Art. 14, 17 SR), international jurisdiction (Art. 4 *et seq.* SR), *res iudicata* and recognition and enforcement (Art. 39 *et seq.* SR).
- In *Oberle* the CJEU justified its decision by the principle of concentration: There should be only one competent jurisdiction for a single estate and "the succession as a whole" (Art. 4 *et seq.* and 23 No. 1 SR).[67]

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64 This conclusion can be derived from CJEU June 21, 2018, C-20/17 *Oberle*: The German court had the intention of issuing a national certificate (Erbschein) in a French case. The court considered the German court to be restricted by the rules on international jurisdiction in Art. 4 *et seq*. SR. In this sense see also *Wilderspin*, The Notion of "Court" under the Succession Regulation, 45 (53).

65 *Wilderspin*, The Notion of "Court" under the Succession Regulation, 45 (49) expressed this more elegantly: "The Court thus wisely avoided prejudging the definition of court for the purposes of the Succession Regulation."

66 CJEU June 21, 2018, C-20/17 *Oberle.*

67 CJEU June 21, 2018, C-20/17 *Oberle,* para. 54 and 55.

- In the decision in the *W.B.* case, the CJEU makes a remarkable statement with respect to the following **alternative requirements** of Art. 3 No. 2 SR:[68] the non-judicial authority (including notaries) will either

  (1) "exercise judicial functions" *or*

  (2) "act pursuant to a delegation of power by a judicial authority" *or*

  (3) "act under the control of a judicial authority".

  According to para. 55 of this decision, **alternative 1** – "the exercise of judicial functions" – means that the non-judicial authority "must be given the power to decide a legal dispute" between two parties. In para. 56 the *W.B.* case, the CJEU says:

  "*Therefore, an authority must be regarded as exercising judicial functions where it may have jurisdiction to hear and determine disputes in matters of succession. That criterion applies irrespective of whether the proceedings for issuing a deed of certification of succession are contentious or non-contentious*"

  This means in short that the German court is such an institution which can – *in abstracto* – decide disputes. When issuing a national certificate of succession, *in concreto*, in non-contentious proceedings, the German court still "exercises judicial functions". The same will apply to a notary having the power to decide disputes between parties.[69]

This means that the real area of activity for notaries as court-commissioners rests in **alternatives 2 and 3**: **delegation of power** and **control by a judicial authority**. Where national law provides for either of those (like in the case of notaries as "court commissioners"), notaries will be "courts" under Art. 3 No. 2 SR, provided they meet all the other requirements of this Article (in particular the appeal and decision requirements). The notary must be equipped with a **close institutional link to a traditional court** in the form of a delegation of powers or acting under the control of the court, by the national legal system of the Member State. In the cases of *W.B.* (Poland) and *E.E.* (Lithuania) such an institutional link was lacking: the notaries there were not acting as court commissions, i.e., as court delegees or court controlled, but on their own.

It is important to note that Art. 3 No. 2 SR, in alternatives 2 and 3, requires a "power-link" to a traditional **court**: the *court* empowers the notary by a delegation of its powers or the *court* exercises control power over the notary's judicial activities. An empowerment also takes place when a **state** (by means of its legislation) directly entrusts a notary with public functions like the creation of authentic instruments (see the CJEU *Unibank* decision as explained in 2.1.1.3 *supra*). In this case, however, the notary is directly entrusted with public function and power by the state (a state legislative act). In the case of alternatives 2 and 3 of Art. 3 No. 2 SR, the powers are first vested in a court (by state law) and, in a *second step*, delegated by the court to the notary. In Poland (*W.B.*) and Lithuania (*E.E.*) notaries are entrusted with their powers of conducting succession proceedings directly by state law, not by a court. In Member States with a court commissioner (or notary acting officially as court), like in Austria, Croatia, Hungary, Czech Republic, Slovak Republic and Alsace-Moselle, the powers of notaries conducting succession proceedings are closely linked to and derived from a court. This *one-step* (state) or *two-step* (state and court) entrusting of notaries seems to be a mere difference in institutional **organization** between the legal systems of the States entrusting notaries with the conduct of succession proceedings, without any implications to the **substance** of their activities or powers.

68 CJEU May 23, 2019, C-658/17 *W.B.*, para. 55.

69 For the same result see also: *Wilderspin*, The Notion of "Court" under the Succession Regulation, 45 (52, 53).

Here a certain parallel development in the decisions of the ECtHR (European Court of Human Rights) construing **Art. 6 ECHR** (fair trial) can be observed: Whereas the ECtHR held in its judgement ECtHR August 24, 2018, No. 4523/04 *Alaverdyan vs. Armenia* (§ 37) that Art. 6 ECHR does not apply to non-contentious and unilateral proceedings which do not involve opposing parties and which are available only where there is no dispute over civil rights, the court ruled in the *Siegel* case[70] and in the *Omdahl* case[71] that the activities of legal professionals (notary, attorney) which form part of proceedings for the partition of an estate conducted by a traditional court are *within* the scope of Art. 6 ECHR (see also 2.2.1.2.d *infra*). The similarity to Art. 3 No. 2 SR is the close link of the activity of the non-judicial authority to a traditional court (delegation or control by the court; link to a court proceeding). The link required in Art. 3 No. 2 SR seems looser than the one required under Art. 6 ECHR (activities were part and parcel of court proceedings or were at least very closely linked to such proceedings). However, the CJEU held in its *OKR* judgement[72] that those activities of legal professionals (notaries) mentioned by Art. 3 No. 2 SR (delegation or control), even though "court" activities under the SR, do not make the notary a "court" under Art. 267 TFEU (preliminary reference proceedings of the CJEU).

Step 2: The CJEU decisions interpreting Art. 3 No. 2 SR leave us with two types of notarial proceedings in the Member States: The ones of court commissioners – or even as courts – (like in Hungary, Croatia, Slovak Republic, Czech Republic; in Austria and Alsace-Moselle without a final decision) with an appropriate institution link to a traditional court and the ones without such a link (like for instance in Poland and Lithuania). The national certificate of the first type is included in Art. 3 No. 2 SR and thus, in track 1 for court decisions. The national certificate of the second type is considered an "authentic instrument" (if at all): There are no uniform rules of international jurisdiction for it. And there is no recognition on a procedural level, courts of other Member States can question its content. In the eyes of Brussels II *ter*, this means different consequences for the same thing, which is not in the interest of all parties concerned.

It would, therefore, be wise to **include all national certificates of succession**, those issued by traditional courts, by notaries with an institutional link to a court and by other notaries directly entrusted by the state, **in the same system of legal consequences under the SR**: concentration of proceedings in one Member State by uniform jurisdiction rules, recognition and enforcement in the same manner.[73] This can definitely not be achieved by interpreting the SR. As explained above, rec. 20-22 and 36 SR and the wording of Art. 3 No. 2 SR stand against this interpretation. The institutional link to a court in form of a delegation of power or control by a court is an express requirement of Art. 3 No. 2 for the qualification of an authority as a "court" under the regulation.

We, therefore, propose an amendment of the SR which is modelled on the similar case of consensual divorce under Brussels II *ter* Regulation. In both cases, non-contentious proceedings are conducted by courts and/or notaries. Whereas the older Regulation, the SR, still requires an institutional link to a traditional court to trigger the same consequences as court decisions (track 1), the younger and more modern Regulation, Brussels II *ter*, gives up this distinction: Divorce decisions, certificates or authentic instruments of notaries with or without an institutional link to a court will be recognized and enforced in the same way as court acts. The same should apply to all national certificates of succession. All

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70 ECtHR November 28, 2000, No. 36.350/97 *Siegel vs. France* §§ 33-38.

71 ECtHR April 22, 2021, No. 46371/18 *Omdahl vs. Norway* § 47.

72 CJEU, September 1, 2020, C-387/20 *OKR*, para. 31.

73 For the same conclusion see: *Remien*, Die Europäische Erbrechtsverordnung und die vielen Fragen der europäischen Rechtsprechung – fünf Jahre nach Inkrafttreten, Praxis des Internationalen Privat- und Verfahrensrechts, IPRax 2021, 329 (337).

notarial certificates should be included in the same track of legal consequences (track 1) as certificates of succession issued by courts.

This one-track approach definitely seems more appropriate to the goals and purposes of the SR: It ensures the *concentration* of the succession proceedings in one Member State for the estate and the succession as a whole. It pays *respect* to the (very) *different* systems of the Member States to tackle legal succession. Where a Member State A places non-contentious succession matters mainly with notaries and not with courts, this Member State and its residents should not incur disadvantages by being subjected to proceedings which are not recognized and equally respected in other Member States. *EU citizens* obtaining a certificate in such notary focused state A should not be treated differently from other citizens who are able to resort to a more court-based system B.

In a comparison of the legal regime of Brussels II *ter* for consensual divorce and the SR regime for non-contentious succession proceedings the following similarities and differences can be observed:

All actors (courts, notaries, public authorities) achieve the same result by their acts: a valid divorce, a national certificate of succession. So, they definitely fulfill the same function. Brussels II *ter* applies exactly the same rules to all actors by aligning the regime for authentic instruments and registrations with the regime for court decisions (Art. 65 No. 1 referring to Art. 30-41 Brussels II *ter*). One could say that the "**same function** – same consequences" principle applies. At the same time, Brussels II *ter* does not even seem to require the "same quality" of the respective public acts: Unlike in Art. 3 No. 2 SR, procedural guarantees and judicial functions or delegation/control are not a requirement for Art. 64 and Art. 65 Brussels II *ter.* And the same consequences even apply to mere registration divorces, which means that no legal advice or guidance may have been given to the parties drafting their agreement.

The core argument for a uniform regime for consensual divorces under Brussels II *ter* as well as for certificates of succession under the SR is that – from the perspective of the parties (spouses) – there should be no divorces of first and second class and no certificates of succession of *first* and *second class*, when it comes to cross-border recognition within the EU. Under the principle of *equal treatment* (and the rule of law)[74] it cannot be justified to treat spouses that are divorced by court in a different manner than spouses divorced by a notary. The same applies to heirs with a court certificate and a notarial certificate of succession.

What is notable, however, is that Brussels II *ter* does not seem interested in the **same quality** of the respective legal act, as long as the functional outcome – valid divorce – is the same. It does not require any procedural guarantees similar to Art. 3 No. 2 SR, not even any legal guidance and advice, the mere registration of the divorce agreement suffices. This is most probably a step too far. However, the direction is right. This does not apply to the succession situation: Notarial certificates do not have to be suspected to be of minor quality as compared to court certificates. And the procedural guarantees mentioned in Art. 3 No. 2 SR could also be kept for the amended version of the regulation.

This means that the correct equation would be: "**same function + same quality = same consequences**".

Summing up, the future EU legislator would be well advised to amend the SR in a way that assures that all public documents terminating succession proceedings, no matter whether issued by a notary or a court, are treated in the same way (track 1), namely in the way "court decisions" are now treated (with uniform rules of international jurisdiction – Art. 4 *et seq*. SR, and uniform rules of recognition and enforcement – Art. 39 *et seq*. SR). Brussels II *ter* – for consensual divorces – goes in the right direction

[74] Art. 20 EU-CFR.

in this respect. However, Brussels II *ter* should be amended to require a higher standard of quality of the recognized divorce act by eliminating mere registrations and including procedural guarantees.

2.1.6 A More Systematic Approach

We have seen from the national law of the Member States examined in the project and from EU law that contemporary notarial activities go far beyond the traditional authentic instruments (already taken account of in very old EU instruments like Brussels I) and have strongly expanded in a range that could be called court or "court-like" or judicial activities. It is well recognized in practically all younger EU instruments that notaries can take up "court work" in numerous areas of non-contentious administration of justice. And most importantly, in these younger EU instruments, ensuring the free circulation of public acts[75] under Art. 81 TFEU, the legal consequences of notarial court activity are generally exactly the same as of the activity of traditional courts (track 1).

However, there are some **grey areas** and **incoherencies** in the system:

In the two-track system of the SR and the Matrimonial/Partnership Property Regulations, there is a detailed definition of a non-judicial authority acting as a "court". Only where this definition's requirements are met by notaries, their acts will trigger the same legal consequences as acts of traditional courts (track 1). Otherwise, their acts, if in the form of an authentic instruments, will be referred to track 2: "acceptance" of evidentiary effects and enforcement, with a "*revision au fond*" by the Member State of receipt staying possible.

But is this dividing line between court and non-court activity of a non-judicial authority (a notary) drawn on solid ground? The notion of "court" in Art. 3 No. 2 SR struggles with the traditional notion of court under EU primary law (Art. 19 TEU, Art. 267 TFEU, Art. 47 EU-CFR) and the ECHR (Art. 6) which requires – besides fair trial and institutional standards –two-party proceedings and the power to determine a dispute (see also 2.2.1.2.c *infra*). This is of little help where – as in matters of succession or consensual divorce – you are dealing with non-contentious proceedings, which – by definition – do not include a litigation, and which might sometimes even involve only one party (for instance in registration proceedings or succession proceedings with only one heir). This conflict relating to the "court" definition – traditional (primary law, fundamental rights)[76] and new (Art. 81 TFEU regulations) - principally applies to all areas of non-contentious proceedings in which notaries are involved. Notaries are primarily involved where the proceedings are non-contentious, as all comparative studies of the Member States' legal systems amply show. They will almost never decide a *litigation*. So, in how far can a "court" definition be of help that requires dispute and litigation? In particular, how can it be modified and adapted to the needs of non-contentious proceedings?

Art. 3 No. 2 SR goes already in the right *direction*: If we base our interpretation on the *Oberle*[77] (para. 54, 55) and the *W.B.*[78] (para. 55, 56) judgements of the CJEU, a notary who has a close institutional link to a court (under national law) in the form of a delegation of power or of being controlled is not required to have the court characteristic of being able to determine *disputes*. This means that the notion of "court" in the SR has been opened up to non-judicial authorities which are

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

[76] See chapter 2.2 *infra*.

[77] CJEU June 21, 2018, C-20/17 *Oberle.*

[78] CJEU May 23, 2019, C-658/17 *W.B*.

neither *in abstracto* nor *in concreto* deciding disputes between opposing parties. If you want to say so, an *emancipation* of the notion of "court" from the traditional court definition of EU primary and constitutional law took place in the SR.[79] The same applies, of course, to the similar definitions in the Taking of Evidence Regulation and in the Matrimonial/Partnership Property Regulations.

However, it has to be noted that this particular type of emancipation of the notion of "court", heading towards the realm of non-contentious proceedings, as shaped by Art. 3 No. 2 SR, has not been followed by other, even younger, regulations:

- **Art. 5 No. 3 European Order for Payment Regulation** provides: "'court' means any authority in a Member State with competence regarding European orders for payment or any other related matters."
- **Art. 2 No. 2 Brussels II *ter* Regulation** provides: "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."

This definition of "court" is less detailed and probably also less demanding: No. institutional link to a court in form of a delegation or control is mentioned and respectively required. Even procedural fair trial and other justice quality standards are not mentioned. And, Brussels II *ter* shows that the EU legislator can even envisage to equip mere notarial authentic acts with the legal consequences of court decisions in cross-border cases in the areas of family law and divorce. This reveals two things: The EU legislator, in these cases (unlike in the SR), basically leaves it to the Member States to equip notaries with the appropriate "competences", powers or "jurisdiction" in a certain area of the law. And it shows that even notaries who are not in this category can issue authentic instruments fulfilling the same function and triggering the same legal consequences as court decisions (in Brussels II *ter*).

In the preceding chapter 2.1.5, we have shown that serious arguments speak in favor of a full recognition and enforcement in the sense of track 1 (Art. 39 *et seq.* SR) of all notarial certificates of succession – even those without the prescribed link to the court system under Art. 3 No. 2 SR. There should be no difference between notaries entrusted with judicial tasks in succession proceedings *directly* by the law of a Member State and notaries entrusted with the same tasks by the *courts* of a Member State. This result is in line with the trend of Brussels II *ter* and Art. 5 No. 3 European Order for Payment Regulation. It should be up to the Member States to decide to whom they attribute the competence to conduct non-contentious proceedings in a certain area of law: to traditional courts or to notaries. The **limits** to this national attribution of competence imposed by the respective EU regulation applicable in the particular area of law should be procedural fair trial and other justice quality standards (like permanency, independence, appeal to a court etc.) rather than the requirement of specific institutional links to a court in the form of delegation or control.

Having said this, we would like to emphasize the **generalizability** of this model: 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

[79] The CJEU (September 1, 2020, C-387/20) in its *OKR* judgement (para. 31) clearly stated that "*the term thus defined in Article 3(2) of that regulation has a broader meaning than the same term in Article 267 TFEU*."

the notary does the same, *both* should be on track 1 (or *both* not). This should, 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**:

- The notaries have to offer the guarantees of independence and impartiality and
- comply with the principle of all parties to be heard.
- Their decisions must be subject to review by a judicial authority in the national justice system and
- their public acts (decisions, certificates, etc.) must have the same force and effect as the respective acts of judges would have in such matter (see 2.2.1.2.d *infra*).

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.

This leaves us with the following landscape or **systematic overview**:

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, with tasks and functions in the **national justice system** which would otherwise be fulfilled by traditional courts. This is normally done 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 (*not* if the question is: who is the heir?) the notary will often have the power to decide the (minor) issue. Disputes over core or minor issues arising in non-contentious proceedings before a notary may always be settled within the respective proceedings without giving rise to a litigation in court.

When it comes to the free **cross-border circulation** of public acts produced by notaries in the above-mentioned 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: Track 1 offers a regime of international jurisdiction, *lis pendens*, and full recognition and enforcement for the respective public act, normally a court decision. Where notaries are (incoherently or not) 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". Here, a more systematic approach seems to be needed:

Where – in non-contentious proceedings –

(a) what the notary does, could *interchangeably* be done by a traditional court and
(b) certain *procedural quality standards* are met by notaries, like independence, impartiality, *audiatur et altera pars*, review by court,

the notarial acts should cause the same legal consequences as the respective court acts:

"**Same function + same quality = same consequences**".

2.2 Part II: Public Law

2.2.1 Constitutional Considerations on the Allocation of Tasks in the Field of Non-Contentious Proceedings to Notaries

2.2.1.1 Preliminary remark

This analysis discusses to what extent EU constitutional law (i.e., primary law, including the EU-CFR) and, on the basis of the results of chapter 1.2, national constitutional law regulate the possibility to allocate judicial tasks in non-contentious proceedings to public notaries. If such an allocation takes place, notaries act as court commissioners or as courts (notaries-as-courts; e.g., in Hungary), partially or fully taking over tasks that are normally exercised by judges. A full takeover of judicial tasks takes place if the notary is given the competence to issue a decision that is binding for the parties of the non-contentious proceedings (irrespective whether national law qualifies the notary as a court commissioner[80] or as a "notary-as-court"). In case of a partial takeover, the final decision will still be issued by the court, while it is the notary`s task to take essential preparatory steps in the non-contentious proceedings which enable the court to issue the final decision.

The acting of public notaries instead of judges raises questions under European and national constitutional law, in particular two main questions:

1. Does EU primary law preclude the transfer of judicial tasks in non-contentious proceedings to notaries?
2. If this is, in principle, not the case (as will be shown in this analysis), it will be necessary to discuss whether national constitutional law (of the countries covered by this study) precludes the transfer of tasks or allows them, and if so, under which conditions.

The answers to these questions are of significant relevance since notaries as courts (in the national legal terminology) or court commissioners can contribute to ease the caseload on courts, resulting in faster decisions for the citizens. Furthermore, if it can be guaranteed that the (constitutional) quality of these decisions is equivalent to those of "court decisions", a transfer of tasks from courts to notaries will have no negative impact on the quality of the decisions.

[80] In this context, it is important to point out that the term "court commissioner" does not imply that the notary makes a final binding decision: While this is the case in the Czech Republic, Croatia and the Slovak Republic, the Austrian notary as court commissioner cannot issue final decisions in succession proceedings as this task is reserved for courts).

2.2.1.2 EU primary law framework

a. Institutional autonomy and its limits

In principle, the regulation of the national judicial systems, and thus also the distribution of tasks between courts and notaries, falls within the legislative competence of the Member States (institutional autonomy of the Member States[81]). This is in principle also recognized by EU primary law: Regarding judicial cooperation in civil matters, Art. 81 TFEU distinguishes between "judgements and decisions in extrajudicial cases" and "judicial and extrajudicial documents" respectively, thereby making clear that Member States can also enact national legislation which provides for extrajudicial decisions and documents in addition to court decisions or court documents.

However, due to Art. 19 No. 1 sp. 2 TEU, Member States are obliged to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". Indeed, numerous fields of law, which Member States have designed as non-contentious proceedings, are covered by EU law, e.g., succession proceedings or matrimonial law (see 2.1.1.1 *supra*). Furthermore, the notion "covered by Union law" is widely interpreted by the CJEU.[82] Accordingly, the interpretation of Art. 19 No. 1 sp. 2 TEU is of importance for the transfer of judicial tasks to notaries: If notaries exercise "judicial tasks", they must do so in accordance with the requirements of "effective legal protection" of citizens' legal interests.

Another important provision of EU primary law in this context is Art. 47 EU-CFR, which is modelled after Art. 6 ECHR and grants everyone (1) "whose rights and freedoms guaranteed by the law of the Union are violated [ ] the right to an effective remedy before a tribunal", (2) the right to a "fair and public hearing within a reasonable time" by a tribunal and (3) the right to legal aid "in so far as such aid is necessary to ensure effective access to justice". As to notaries exercising "judicial tasks", Art. 47 EU-CFR requires that their role must not impair the guarantees to a fair trial as spelt out by Art. 47 and that notaries must either meet the requirements of a "tribunal" themselves or, if this is not the case, their decision must be appealable before a tribunal in the sense of Art. 47 EU-CFR. [83]

In the following, it shall be analyzed whether the role of notaries as courts or court commissioners under national legislation on non-contentious proceedings – which means that they exercise "judicial tasks" – is compatible with Art. 19 TEU and Art. 47 EU-CFR. This will be done in two steps: First, it will be discussed if notaries acting as court commissioners can be regarded as "tribunals" or "courts" under EU primary law. In this context, it will be shown that the definition of "court" in EU primary law is sometimes narrower than that already in use in relevant secondary law (see in particular Art. 3 No. 2 SR discussed in parts 2.1.3.1 and 2.1.3.2 *supra*). As a result, notaries acting as courts or court commissioners will normally not meet all the requirements of a "court/tribunal" as defined by primary law, in particular due to the fact that they are regularly not competent to decide disputed facts in non-contentious proceedings. Second, it will be shown that notaries acting as courts or court commissioners still meet the requirements of fair trial as defined by Art. 47 EU-CFR which means that their exercising of "judicial functions" is compatible with EU primary law as long as their decision can be appealed with a court/tribunal.

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81 On the case law see *Klamert/Schima* in Kellerbauer/Klamert/Tomkin (Eds.), The EU Treaties and the Charter of Fundamental Rights: A Commentary, Art. 19 TEU (2019) para. 30.

82 Cf. CJEU February 27, 2018, C-64/16 *Associação Sindical dos Juízes Portugueses*, para. 29.

83 This reading corresponds to the common reading of Art. 6 ECHR, see *Harris et al.*, European Convention on Human Rights[4] (2018) 393 *et seq*.

b. The definition of "court/tribunal" under EU primary law

Art. 19 TEU and Art. 47 EU-CFR stipulate a right to effective legal protection before a court/tribunal. Member States are obliged to guarantee this right "in the fields covered by Union law" through their domestic judicial system. Several CJEU decisions on the interpretation of this guarantee of "effective legal protection" by the Member States have been issued in recent years, most recently concerning the judicial reform in Poland. However, the first significant decision concerned the remuneration of judges in Portugal.[84] In this decision, the CJEU addressed, among other things, the question under which conditions a "court or tribunal" within the meaning of national law can be considered to provide "effective legal protection" within the meaning of Art. 19 TEU. In this context, the CJEU ultimately relied on the **definition** ("tribunal") of **Art. 6 ECHR**, which in turn was also adopted in Art. 47 EU-CFR,[85] although Art. 19 No. 1 sp. 2 TEU itself does not use the term "court or tribunal".

As we have already mentioned, the CJEU summarized the main requirements of the court definition in, amongst others, its judgement CJEU February 27, 2018, C-64/16 *Associação Sindical dos Juízes Portugueses* as follows: In para. 38 of the judgement, it stated "*that the factors to be taken into account in assessing whether a body is a 'court or tribunal' include, inter alia, whether the body is **established by law**, whether it is **permanent**, whether its **jurisdiction** is **compulsory**, whether its **proceedings are inter partes**, whether it applies rules of **law** and whether it is **independent***". In para. 44, it stated that the "*concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions*". In the later judgement of June 24, 2019, C-619/18 *Commission/Poland*, the Court added that this above-mentioned concept should be understood as the "external aspect" of independence (para. 72) and is complemented by an internal aspect of independence which "*requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law*", thereby ensuring "*that an equal distance is maintained from the parties to the proceedings and their respective interests regarding the subject matter of those proceedings*" (para. 73 of the judgement).

In addition to these definitional elements of a "court or tribunal", the CJEU derives another one primarily from **Art. 267 TFEU**,[86] namely the necessity "to decide a legal **dispute**". Art. 267 is the central provision of the cooperation between national and European courts and enables national courts to seek preliminary rulings from the CJEU. However, according to settled case law, they are only competent to do so if they are performing judicial functions.[87] In this context, the CJEU has denied a notary the competence to refer a question for a preliminary ruling to the CJEU if she or he is not "deciding a legal dispute" (CJEU September 1, 2021, C-387/20 *OKR* para. 24 *et seq.*). However, it should also be noted that under Art. 19 TEU, the CJEU also requires a court to "decide *inter partes*", thereby

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84 CJEU February 27, 2018, C-64/16 *Associação Sindical dos Juízes Portugueses*.

85 For details, see *Lock/Martin* in Kellerbauer/Klamert/Tomkin (Eds.), The EU Treaties and the Charter of Fundamental Rights: A Commentary, Art. 47 EU-CFR (2019) para. 5.

86 However, the notion of "tribunal" in Art. 47 EU-CFR must be understood in the same manner as in Art. 267 TFEU: see *Lock/Martin* in Kellerbauer/Klamert/Tomkin (Eds.), Art. 47 CFR (2019) para. 32.

87 For details, see *Schima* in Kellerbauer/Klamert/Tomkin (Eds.), The EU Treaties and the Charter of Fundamental Rights: A Commentary, Art. 267 TFEU (2019) para. 27.

excluding unilateral decisions (in which there cannot be a legal dispute between two parties) from the definition of a court or tribunal.

To sum up, the notion of a court or tribunal under primary law comprises the following elements:

- A permanent body established by law
- with compulsory jurisdiction
- and proceedings *inter partes*,
- applying rules of law and
- being independent, which has an external (not being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever) and an internal (objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law) aspect.
- Furthermore, even if a body fulfils all these requirements, it is only competent to demand a preliminary ruling according to Art. 267 TFEU if it has to decide a legal dispute.

This means that a notary can indeed act as a court if all these requirements are met. Even if these conditions are not met, they are – as mentioned above – still relevant insofar as the inclusion of notaries in parts of non-contentious proceedings is permissible if as long as this does not compromise the requirement to guarantee "remedies to ensure effective legal protection" and recourse to a "court or tribunal" in the narrow sense (state judicial authority) is provided.

c. Notaries as court commissioners and the definition of "court/tribunal" in EU primary law

Taking the results of the comparative overview (see chapter 1.2 *supra*.) into account, it becomes clear that not all notaries acting as courts (notaries-as-courts) or court commissioners in non-contentious proceedings in the legal orders selected for this study fully meet the EU primary law definition of "court/tribunal". This is most obvious in Slovenia, where a notary only has auxiliary functions in succession proceedings and decisions are exclusively made by judges. Accordingly, notaries cannot issue any decisions which are binding on the parties of succession proceedings. In Austria and Alsace-Moselle, the final decision which is binding on the parties is issued by the competent court, the role of the notary being limited to preparatory steps. In Croatia, the Czech Republic, Hungary and the Slovak Republic, the notary may issue a final decision in succession proceedings (which is appealable with a court). However, if a dispute arises between the parties, the notary regularly (there are some exceptions for disputes on the law; furthermore, in Hungary, the notary has some decision-making power even in disputed succession cases) has to refer them to the competent court or instruct the parties to initiate contentious proceedings. This means that notaries must, in most cases, not make a binding decision against the will of the disputing parties unless these refrain from initiating litigious court proceedings (for details, see 1.1.2, 1.1.3, 1.1.4, 1.1.5 *supra*). This means that, in these countries, the notary can issue a binding decision *inter partes* in non-disputed succession proceedings only, while disputes regularly have to be decided by the competent court. In Croatia and Hungary, notaries as court commissioners are also competent to enforce claims that are uncontested. If the claim is contested, however, the case has to be referred to the competent court. This outcome is quite understandable as notaries as courts and court commissioners act in non-contentious proceedings which are characterized by the absence of a classical situation of litigation, with only minor points being in dispute (see 2.1.1.1 *supra*.). At the same time, this also shows that EU primary law is still based on a rather "traditional" definition of a court which does not take the participation of other judicial actors in non-contentious proceedings (very much) into account. In contrast to this, secondary legislation is more flexible in this regard (see 2.1.3 *supra*).

As a result, it is quite clear that notaries as courts or court commissioners in national non-contentious proceedings regularly cannot be regarded as courts under EU primary law although they meet most of the required preconditions: Notaries can be regarded as permanent bodies established by law, having compulsory jurisdiction while applying rules of law. Court commissioners also meet the requirements of external and internal independence as they are free from instructions and bound by law to act in strict objectivity. The latter requirement is a cornerstone of notarial professional law: Notaries have to keep equal distance to all parties involved which also distinguishes the notarial profession from other legal professions which are rather obliged to act as unilateral advisers in the best interest of one party only (see 2.2.1.2.d *infra*).

In contrast to this, notaries acting as courts or court commissioners in non-contentious proceedings will not always issue binding decisions in proceedings *inter partes* as they regularly have to refer a case to the competent court if a dispute arises (see once again 1.1.2, 1.1.3, 1.1.4, 1.1.5 *supra*) and may also act in proceedings with only one participating party. This should, as mentioned above, not come as a surprise as court commissioners act in non-contentious proceedings which are regularly characterized by the absence of a dispute or at least by a reduced importance of a dispute as compared to contentious proceedings (see the definition of non-contentious proceedings in 2.1.1.1 *supra*).

Again, the following conclusion can be drawn: The notion of "court/tribunal" in EU primary law is to a large extent characterized by courts ("judicial authorities") acting in contentious proceedings (= "deciding a dispute" in the sense of CJEU decisions on Art. 267 TFEU), while notaries as courts or court commissioners act in non-contentious proceedings and do not normally decide disputes between the parties. As a result, they will regularly not fulfil the definition of a "court/tribunal" under EU primary law even if they decide instead of a court ("judicial authority").

In the context of this survey, it follows from the above-mentioned that the national legislator must, to meet the requirements of Art. 19 TEU and Art. 47 EU-CFR, provide for the possibility of legal recourse ("appeal") with a court ("judicial authority") against the decision of a notary acting as court or court commissioner in non-contentious proceedings. Furthermore, it must be guaranteed that a provision of national law which provides that the acting of notaries as courts or court commissioners does not have any adverse effect on the requirement of effective legal protection of the parties concerned. If these requirements are met, there seems to be no obstacle from the point of view of primary law that would hinder Member States from transferring tasks in non-contentious proceedings to notaries as court commissioners.

d. Notaries as court commissioners and the guarantees of Art. 47 EU-CFR (Art. 6 ECHR)

As was shown above, notaries acting as court commissioners will regularly not meet all criteria of a court/tribunal in the sense of Art. 47 EU-CFR (Art. 6 ECHR). The national law framing the activities of notaries as courts or court commissioners in non-contentious proceedings will, in most cases, meet the procedural criteria of fair trial as defined by these articles. Therefore, the employment of notaries as court commissioners is well compatible with the requirements of "effective legal protection" under Art. 19 TEU and Art. 47 EU-CFR.

This is even more the case if one takes the case-law of the European Court of Human Rights (ECtHR) into account. As the CJEU has so far not ruled on the applicability of Art. 47 EU-CFR on notarial non-contentious proceedings, the ECtHR case-law is of particular interest in this regard. In several decisions, the ECtHR made clear that Art. 6, the right to fair trial, applies to "non-judicial" proceedings only to a limited extent, if at all. From this, it can be deduced that insofar as a notary acting as court or court

commissioner meets the guarantees of fair trial, he or she acts well above the "minimum threshold" set by the ECtHR.

In this context, three ECtHR decisions are worth mentioning:

- In the case ECtHR August 24, 2018, No. 4523/04 *Alaverdyan vs. Armenia* (a case which did not involve a notary but unilateral proceedings before a national court), the ECtHR held that Art. 6 ECHR did not apply to a "*non-contentious and unilateral procedure which did not involve opposing parties and was applicable only to cases where there was no dispute over rights*" (para. 35). This corresponds to the requirements in the CJEU's case law that a court has to decide "*inter partes*" on a "legal dispute".
- Another case which is of interest is ECtHR November 28, 2000, No. 36.350/97 *Siegel vs. France* in which the ECtHR argued that Art. 6 para. 1 may also apply to proceedings which, although not wholly judicial in nature, are nonetheless closely linked to supervision by a judicial body. This case concerned a proceeding for the partition of an estate which was conducted on a non-contentious basis before two notaries but was ordered and approved by a court. This case confirms, in our understanding, the conclusion drawn above that the guarantees of a court proceedings are still relevant if notaries are included in parts of non-contentious proceedings. In this case, it is necessary to provide "remedies to ensure effective legal protection", including recourse to a "court or tribunal" (state judicial authority).
- In its recent case ECtHR April 22, 2021, No. 46371/18 *Omdahl vs. Norway*, the ECtHR reiterated that non-contentious proceedings will not be fully covered by Art. 6 ECHR if they do not include a "dispute".[88] However, the Court also made clear that a precise division lime can be difficult to identify. In para. 47 of the judgement, it held:
  "*Whether Article 6 of the Convention is applicable to the administration of an estate and similar types of proceedings depends on their characteristics and the relevant provisions of domestic law. As the parties have presented the characteristics of the administration proceedings in this case, they appear to contain a mixture of contentious and non-contentious elements once they have commenced (see, mutatis mutandis, Siegel v. France, no. 36350/97, § 33, ECHR 2000-XII; and Zongorová v. Slovakia, no. 28923/06, 19 January 2010). It is also the case, as the Government have submitted, that they may in some respects appear to have elements of a 'service' to heirs and an alternative to the heirs' dividing the estate privately. At the same time, public administration proceedings may also be instituted by heirs precisely because there are disputes between heirs about rights to the assets of the estate and the result of the administration proceedings will be decisive in that regard. The Court therefore considers that there are not grounds for removing them from scrutiny under Art. 6 and that the complaint is accordingly not inadmissible ratione materiae.*"

From these decisions, it is possible to conclude that non-contentious proceedings do not have to meet the guarantees prescribed by Art. 6 ECHR. This result might be transferred to the understanding of Art. 47 EU-CFR. Accordingly, Art. 47 EU-CFR does not exclude national legislation which provides for non-contentious proceedings which are handled by institutions that do not meet the requirements of a "court/tribunal" under Art. 6 ECHR or Art. 47 EU-CFR.

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88 See also, however, *Harris et al*., European Convention on Human Rights[4] (2018) 391 *et seq.* who state that this criterion is normally not interpreted in a very strict manner by the ECtHR.

However, it can also be concluded even if this might not be required, it is indeed desirable that non-contentious proceedings, including those by court commissioners, meet the procedural requirements of Art. 6 ECHR and Art. 47 EU-CFR.

In this respect, the comparative overview (see chapter 1.2 *supra*) shows that the notaries in the Hexagonale states (Austria, Croatia, Czech Republic, Hungary, Slovak Republic, Slovenia) and in Alsace-Moselle, while regularly not acting as a "court/tribunal" in the understanding of EU primary law and Art. 6 ECHR due to the absence of a dispute to be settled in most non-contentious proceedings, can in principle nevertheless fulfil the criteria of independence set forth by Art. 6 ECHR / Art. 47 EU-CFR. This is particularly evident in their function as "notary-as-court" (Hungary) "court commissioner" (Austria, Croatia, Czech and Slovak Republic) or "*delegué du tribunal*" (Alsace-Moselle) in inheritance cases, which exist in all states except Slovenia. In Alsace-Moselle, however, it should be noted that the notaries issue an "act of sacramental affirmation" which is confirmed by a judicial "certificate of inheritance"; the ECS, however, is issued by the notaries. In Austria, the court commissioner does not make a final decision, either, as this comes from a court, but he or she issues the ECS. The situation is different in Croatia, the Czech Republic and the Slovak Republic, where the court commissioner makes a decision equivalent to that of a national court in non-contentious proceedings (but not in contentious proceedings). The same applies to Hungarian notaries acting as "notaries-as-courts" under national legislation. Furthermore, while national legislation on non-contentious proceedings normally provides for a hearing of the parties, in some cases, the public can be excluded in the interest "of protection of the private life of the parties" which is in conformity with Art. 6 ECHR and also relevant under Art. 47 EU-CFR.[89] Accordingly, the national reports confirm that procedural guarantees in the context of non-contentious proceedings in the Hexagonale states and Alsace-Moselle regularly go beyond the extent required by Art. 6 ECHR and Art. 47 EU-CFR for non-contentious proceedings.

In this context, it should also be noted that the CJEU accepted in principle that strict rules on the exercise of the notarial profession might even justify certain restrictions to the freedom of establishment of legal professions; see CJEU March 9, 2017, C-342/15, *Piringer*, para. 60:

> "[T]*he Court has already held, in its judgement of 24 May 2011, Commission v Austria, C-53/08, EU:C:2011:338, paragraph 96, in relation to the freedom of establishment, that the fact that notarial activities pursue objectives in the public interest, in particular that of guaranteeing the legality and legal certainty of documents concluded between individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article 49 TFEU resulting from the particular features of the activities of public notaries, such as the restrictions which derive from the procedures by which they are appointed, the limitation of their numbers and their territorial jurisdiction, or the rules governing their remuneration, independence, disqualification from other offices and protection against removal, provided that those restrictions make it possible for those objectives to be attained and are necessary for that purpose.*"

This means that, in particular, specific rules on the independence of notaries (which are necessary for them to act as "courts") can be justified even if they need justification under the freedom of establishment. Here, it should be specifically noted that the independence requirements for notaries are always significantly stronger than for other legal professions.

89 *Lock/Martin* in Kellerbauer/Klamert/Tomkin (Eds.), Art. 47 EU-CFR (2019) para 38.

e. Conclusion on the compatibility with EU primary law of notaries acting as courts or court commissioners in non-contentious proceedings

In principle, national legislators are competent to decide whether and to what extent notaries can take over judicial functions as courts or court commissioners in non-contentious proceedings. However, this role must be exercised in conformity with the requirement of "effective legal protection" in matters covered by EU law as prescribed by Art. 19 TEU and Art. 47 EU-CFR.

In this context, it is important to note that Art. 6 ECHR, and accordingly Art. 47 EU-CFR, only apply to non-contentious proceedings to a limited extent as these provisions, according to the case-law of the ECtHR, only fully apply to "disputes" on the one hand and do not cover merely unilateral proceedings on the other hand. To the extent that Art. 47 EU-CFR is applicable to non-contentious proceedings, notaries as courts or court commissioners must either meet the criteria of "courts/tribunals" as defined by Art. 47 EU-CFR (which is modelled after Art. 6 ECHR) or issue decisions that must be appealable with a court ("judicial authority") that meets the relevant requirements.

Notaries as courts or court commissioners in the selected states regularly will not meet all the requirements of a court/tribunal as defined by EU primary law as they normally only decide undisputed matters – if a dispute arises, the case will usually be referred to the competent national court. Furthermore, in some states (e.g., Austria), they do not issue the final decision even if the matter remains undisputed. This means that, if they issue decisions, these must be appealable with a national court (which is indeed the case).

Nevertheless, from an institutional and a procedural point of view, while notaries as courts and court commissioners normally do not settle "disputes", they meet the essential requirements of fair trial under Art. 6 ECHR / Art. 47 EU-CFR: They are independent and have to act in a strictly impartial manner, they also have to hear all parties involved (even though the public may be excluded). Accordingly, notaries acting as courts and court commissioners do not meet all the requirements of Art. 47 EU-CFR (as they are no courts/tribunals), however, their acting does not contradict any of the guarantees of this provision. Accordingly, the role of notaries as courts or court commissioners in non-contentious proceedings does not contradict the guarantees of primary EU law under Art. 19 TEU and Art. 47 EU-CFR.

As a result, decisions by national legislators to attribute judicial tasks in non-contentious proceedings to notaries are compatible with EU primary law.

2.2.1.3 The wider notion of "court" in EU secondary law

As we have demonstrated above, notaries as courts or court commissioners in non-contentious proceedings will regularly not qualify as "courts/tribunals" under EU primary law (Art. 47 EU-CFR; Art. 267 TFEU; implicitly Art. 19 TEU). However, it must not be overlooked that several pieces of EU secondary law based on Art. 81 TFEU use a wider definition of court which goes beyond the narrow meaning of primary law. This has already been confirmed by the CJEU.[90] More details on this wider notion of court used in secondary legislation can be found in parts 2.1.3.1 and 2.1.3.2 *supra*.

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[90] See CJEU September 1, 2020, C-387/20 *OKR*, para. 31: "That finding is also not called into question by the fact that Art. 3 No. 2 SR states that the term 'court' within the meaning of that regulation encompasses not only judicial authorities but also all other authorities and legal professionals with competence in matters of succession which exercise judicial functions and which satisfy the conditions laid down by that provision (judgement CJEU July 16, 2020, C-80/19 *E.E* (Jurisdiction and law applicable to inheritance),

However, the narrow court definition in primary law still has some impact on court definitions in secondary law.

On the one hand, non-judicial actors will only qualify as courts if they are bound to act impartially and if they must hear all parties before making a decision (see, e.g., Art. 3 No. 2 SR). Insofar, there is an overlap between the court definition in primary and secondary EU law. Under some regulations, unilateral proceedings in which the other party is not heard will not produce "judicial decisions" which are recognized and enforced in other Member States. This has been determined by the CJEU's case-law on several occasions: In the "Croatian cases" (see 2.2.1.2.b *supra*) the Court held that Croatian notaries who issued enforcement orders (writs of execution) unilaterally did not qualify as courts as defined by Regulations (EU) No. 1215/2012[91] and (EC) No. 805/2004[92] as these proceedings were not "legal disputes" in which both parties were heard.

On the other hand, non-judicial actors like notaries will, under primary law, only qualify as courts (and can consequently render "judicial decisions") if they have the power to decide a dispute between parties[93] (see immediately above). This criterion has also been applied by the CJEU in the interpretation of secondary law. In determining under which conditions notaries exercise "judicial functions" in the sense of Art. 3 No. 2 SR, the CJEU stated in the *W.B.* case[94] (para. 55) that for a notary to exercise "*a judicial function, it must be given the power to decide a legal dispute*", which "*is not the case where the powers of the professional concerned are entirely dependent on the will of the parties*". The *W.B.* judgement was confirmed by the judgement in the *E.E.* case[95], with para. 53 stating very clearly that a notary does not exercise judicial functions if he or she is "*not competent to decide on matters in dispute between the parties, and is not empowered to establish facts that are not clear and obvious, or to decide on facts in dispute*". However, this does not mean that a notary cannot act as a "court" in the meaning of Art. 3 No. 2 SR. Under this definition, a non-judicial actor can still qualify as a court if it – as an alternative to the exercise of judicial functions – "act[s] pursuant to a delegation of power by a judicial authority or act[s] under the control of a judicial authority". In other words: The court definition of Art. 3 No. 2 SR is wider than that of primary law and can also include non-judicial actors acting pursuant to a delegation of power or under the control of a court.

In the context of this survey, it is important to note that this creation of a wider definition of "court" in legislation based on Art. 81 TFEU clearly shows that the EU legislator has accepted the important role of notaries and other non-judicial actors in non-contentious proceedings. This indirectly confirms the compatibility of notaries acting as court commissioners with primary law as well.

To sum up, from the point of view of EU primary law, the national legislators enjoy considerable leeway when deciding on the transfer of additional tasks to public notaries in non-contentious proceedings. This leads to the final question, namely to what extent such a transfer is compatible with national constitutional law.

para. 50 and the case-law cited), since the term thus defined in Art. 3 No. 2 SR has a broader meaning than the same term in Art. 267 TFEU".

91 CJEU March 9, 2017, C-551/15 *Pula Parking*; CJEU May 7, 2020, C-267/19 and C-323/19 *Parking and Interplastics*.

92 CJEU March 9, 2017, C-484/15 *Zulfikarpašić*.

93 On the interpretation of Art. 267 TFEU, see CJEU September 1, 2021, C-387/20 *OKR* (admissibility of a preliminary ruling).

94 CJEU May 23, 2019, C-658/17 *W.B*.

95 CJEU July 16, 2020, C-80/19 *E.E*.

2.2.1.4 The role of national constitutions

The comparative overview (see chapter 1.2 *supra*) shows that the Croatian, the Czech, the Slovak, and the Slovenian constitutions do not comprise any provisions which would prevent the transfer of additional tasks in non-contentious proceedings to notaries. The same holds for the French constitution and Alsace-Moselle.

In Hungary, there are some limits, as – according to the Hungarian Constitutional Court's interpretation – Art. 25 para. 7 of the Constitution permits the transfer of tasks from courts to other authorities if these are "non-substantive adjudicating activities". It is common agreement that in particular payment proceedings, the keeping of registers, questions of enforcement and undisputed succession proceedings count among these "non-substantive adjudicating activities". The Hungarian legislator could therefore extend the role of notaries to comparable tasks in non-contentious proceedings, including family law.

The "strictest" constitutional regime can be found in Austria where the interpretation of the relevant articles of the Federal Constitution is disputed. Historically (and currently), Austrian notaries as Court Commissioners in succession matters only pursue – in contrast to those in the Czech Republic, Hungary, Slovenia, and the Slovak Republic –activities without decision making powers (which are reserved to the courts). As explained in more detail in chapter 1.2.1.3), parts of the doctrine argue that notaries as court commissioners are *ex constitutione* limited to activities without decision-making powers ("auxiliary activities"). This also raises the question whether, for example, a notarial divorce might be conceivable in Austria. Another reading of the Austrian Constitution concedes that there are indeed some "core tasks" of judicial adjudication, however, non-contentious proceedings will not fall within these "core tasks". This reading of the Constitution would, somewhat comparable to the Hungarian model, allow for the transfer of further non-contentious tasks to notaries in Austria as well.

While it thus appears that the Hungarian Constitution already offers sufficient flexibility for the assignment of additional tasks to notaries, it seems desirable in Austria, for reasons of legal certainty and in order to put an end to the considerations outlined above, to make an explicit clarification at the Federal constitutional level concerning the role of notaries with decision-making power in non-contentious proceedings. This would bring the Austrian constitutional framework in line with the ongoing developments in secondary law which allow for an increasingly prominent role of non-judicial actors in non-contentious proceedings if the national legislators choose to establish such a role (see chapters 2.1.3.1 *et seq. supra*).

2.2.2 Recommendations from a constitutional law perspective

As a result of the preceding analysis, the following recommendations can be made:

- From the point of view of EU law, a far-reaching transfer of tasks of non-contentious proceedings to notaries is unproblematic. A major reason for this is that notaries meet strict criteria of independence and are also obliged to hear all parties before them under the respective national legal systems. EU secondary law regulations also already provide 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 relieving the courts.
- The role of the notary in Croatia, the Czech Republic, the Slovak Republic, and Hungary, which is connected with a decision-making competence, especially in inheritance law matters, should

serve as a role model for other states with comparable notaries. This applies in particular to Slovenia, where the activity of notaries as court commissioners is currently not permitted in any way (even though there are no constitutional obstacles), but also to Austria, where notaries as court commissioners have no final decision-making competence.

- 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 that prevent a further transfer of tasks in non-contentious proceedings to notaries for organizational reasons should be amended. This primarily concerns Austria, where it would at any rate be possible as a first step to grant notaries at least a non-contentious area of activity with decision-making power to the extent of the role model of court commissioners as established in Croatia, the Czech and the Slovak Republic. To alleviate fears of a too-far reaching transfers of judicial powers in Austria (which were aired during the discussions in the 1990s mentioned in chapter 1.2.1.3 *supra*), the enactment of a constitutional provision comparable to Art. 25 para. 7 of the Hungarian Constitution (see chapter 1.2.4.3 *supra*) could also be considered.