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Legal Study

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Justice Without Litigation II

JuWiLi Study 2026 Legal Part

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Table of Contents

Abbreviations 1

1 Overview of country reports 3

1.1 Overview of judicial tasks and proceedings outsourced to notaries: Introduction 3

1.2 Overview of notarial tasks that unburden courts 5

1.2.1 Succession 5

1.2.2 Family law (excluding divorce) 13

1.2.3 Enforcement / debt-related tasks 17

1.2.4 Registries 20

1.2.5 Company law 23

1.2.6 Others 25

1.3 Consensual divorce 25

1.3.1 Consensual divorce involving notaries 26

1.3.2 Consensual divorce by non-judicial authorities other than the notary 32

1.3.3 Notaries unburdening courts in judicial divorce proceedings 34

1.3.4 Summary 35

2 Public law 36

2.1 Notarial independence as a keystone for outsourcing tasks to notaries 36

2.1.1 Introductory remark: The guarantees of Art. 6 ECHR 36

2.1.2 Notarial independence: country reports 37

2.2 Provisions preventing a future transfer of competences to notaries 40

3 Private Law 41

3.1 JuWiLi I and JuWiLi II 41

3.2 EU law in cross-border cases (conflict of laws) 41

3.2.1 Basic structures of EU regulations 41

3.2.1.1 Explanation of the two-track system 42

3.2.1.2 The many faces of the two-track system in the EU regulations on conflicts of law 43

3.2.2 Problems and research questions 45

3.2.3 OECD people-centred justice approach at the core of JuWiLi II 46

3.2.4 Building on JuWiLi I with respect to EU regulations on conflict of laws 47

3.2.4.1 Notion of ‘court’ and of ‘decision’ 47

3.2.4.2 Consequences of the two-track system and new possible paths 52
3.2.5 Traditional and alternative concepts of 'recognition' in private law 54
3.2.5.1 The traditional concept of 'recognition' 54
3.2.5.2 The Commission's proposal on Parenthood 55
3.2.5.3 The findings and recommendations of the Code-FS Project 56
3.2.5.4 The concept of 'quasi-procedural recognition' of particular agreements 57
3.2.6 Conclusions of the JuWiLi II project (conflict of laws) 58
3.2.6.1 Coherent System - Uniformity in the regulations: from Brussels I *bis* to Brussels II *ter:* 58
3.2.6.2 The cornerstones of a coherent system of recognition for extra-judicial actors ... 59
3.3 Substantive private law – Best practice examples 64
3.3.1 Fair balance of party interests and fundamental rights as guidelines 64
3.3.2 Additional people-centred aspects of best practices 65
3.3.3 Evaluation of notarial services in the administration of justice 66
3.3.4 Best practice examples 67
3.3.4.1 Succession 67
3.3.4.2 Out-of-court divorces 68
3.3.4.3 Division of assets or property 69
3.3.4.4 Execution of claims 69
3.3.4.5 Entry into public registries 69
3.3.4.6 Recognition of maternity or paternity to a child 70
3.3.4.7 Taking of evidence and service of documents 70
3.3.4.8 Company law 71
4 Summary of recommendations (Legal Study) 71
4.1 Public law 71
4.2 Private law 72
5 Executive summary (Legal Study) 74
6 Consortium recommendations of JuWiLi II 76
6.1 Consortium recommendations – National level 76
6.2 Consortium recommendations – EU Level 81

Abbreviations

AußStrG	Außerstreitgesetz (Austrian Non-Contentious Proceedings Act)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BNotO	Bundesnotarordnung (German Federal Code for Notaries)
Brussels II *ter*	Brussels IIB = Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction
BVerfG	Bundesverfassungsgericht (German Federal Court)
CC	Civil Code
C civ	*Code civil* (French civil code)
CJEU	Court of Justice of the European Union
CPC	Code of Civil Procedure
CRC	Civil Registry Code
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECS	European Certificate of Succession
e.g.	exempli gratia (for example)
EheG	Ehegesetz (Austrian Marriage Law)
Enforcement Regulation	Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims
EU-CFR	EU Charter of Fundamental Rights
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (German Code on Proceedings in Family Matters)
HETV	Hungarian Act XXXVIII of 2010 on Succession Proceedings
i.e.	id est (that is to say)
LNP	Law of Public Notaries and Notarial Activity
MainReg	Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation)

Matrimonial Property Reg.	Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes
Payment Order Regulation	Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure
PIL	Private International Law
PKTS	Vital Statistics Act (perekonnaseisutoimingute seadus)
Property Regulation for Registered Partnerships	Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships
RESA Registry)	**Recueil électronique des sociétés et associations** (Luxembourg Business
Rome III	Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
SDG	UN Sustainable Development Goal
SE	Societas Europaea
Service of Documents Reg.	Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)
SPOT	Slovenian Business Points
SR	Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation)
Taking of Evidence Reg.	Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence)
TFEU	Treaty on the Functioning of the European Union
ZGD-1	Slovenian Companies Act

1 Overview of country reports

The project entitled 'Justice Without Litigation II' (JuWiLi II) examines existing modes of outsourcing non-contentious judicial tasks and proceedings from courts to the notarial profession and other non-judicial institutions from different perspectives. It also develops new ideas for improving the way in which these institutions not only help to unburden courts, but also contribute to assuring high quality justice services close to people's needs. JuWiLi II partially builds on ideas developed in the predecessor Justice Without Litigation ('JuWiLi I') project, the results of which were published in 2022.[1]

In a first step, we looked at the legal systems of the 22 participating European Union Member States, on which we built our further analyses (see part 2: Public law, part 3: Private law, Part 4: Policy recommendations). In part 1 we will provide an overview of our 22 country reports. These reports describe the non-contentious tasks and proceedings conducted by notaries and other non-judiciary authorities in 22 EU countries. These non-judicial actors contribute to reducing the workload of courts. This is achieved either because notaries and other authorities draw up documents which can be used by courts without the need for further review or because they perform tasks that were, in the past, handled by courts and later outsourced to non-judicial actors. This overview will focus on selected examples of such tasks to give a broad picture of non-judicial administration of justice. This will give us a better understanding of existing ways in which courts are being unburdened through the transfer of tasks to notaries and other authorities in non-contentious proceedings.

1.1 Overview of judicial tasks and proceedings outsourced to notaries: Introduction

In the following section of the study, selected non-contentious notarial tasks in different areas of law will be presented. Partially referring to results from JuWiLi I, we propose classifying notarial tasks not only according to the area of law concerned (e.g. succession law, family law, tasks in the context of registries etc.), but also by considering the relations between notaries and courts. In this context and on an abstract level, two types of relations can be distinguished.

Type 1: Notary acting as 'court' or 'court commissioner'. This type of relationship can be described as a notary acting as a 'court' (e.g. issuing a decision that has the same legal effect as a decision by a civil court) or exercising certain court functions, pursuant to a delegation of power or under the control of a court. This means that the notary's actions in this regard are equal to those of a court and are regularly (which might also include liability aspects) attributed to the State. Notaries acting as 'courts' or 'court commissioners' are limited to a small number of EU Member States and, even in these countries, only a limited number of tasks of notaries belong to this category. This category was analysed in more detail in JuWiLI I. It can be found in Austria, Croatia, Czechia,[2] Hungary and Slovakia. The definition of 'court' in Art. 3 (2) of the EU Succession Regulation 650/2012 (SR), which defines courts as 'exercis[ing] judicial functions or act[ing] pursuant to a delegation of power by a judicial authority or act[ing] under the control of a judicial authority', resembles this model to a large extent.

Type 2: Notaries reducing workload of courts, but no specific relationship. This type of notarial activity is much more common than the first one and can be found in all countries covered by this study. In this type, there is no specific relationship between court and notary. However, the notarial task is one that can (alternatively) or could (potentially) also be performed by a court (e.g. notarial divorce, public

[1] *Lurger/Stöger* (eds.) Justice Without Litigation. Non-contentious proceedings by notaries in the European Union, 2022, Legal Part, pp. 9–112 (henceforth cited as 'JuWiLi I').

[2] In JuWiLi I, the country was referred to as the 'Czech Republic'. In the meantime, the Czech Republic has declared the name 'Czechia' as being equivalent to the former name.

registration, creation of authentic instruments, succession). As a result, this type of activity leads to a reduction in the workload of courts without creating a specific relationship between court and notary.

Both types described above are '**abstract model definitions**' insofar as there are, in practice, some cases which can be regarded as 'mixed types', e.g. cases where a court order can be given in exceptional circumstances while, normally, there is no specific influence of the court. In this overview of country reports, we will nevertheless point out if the specific tasks performed by notaries in the different countries covered by this study belong to type 1 or 2. It is important to stress here that there are no countries with notaries acting exclusively as type 1. Even in the Central European States covered by the project JuWiLi I, notaries performed both types of activity in non-contentious proceedings. It is also important to note that the proposed qualification of notary as court or court commissioner does not mean that they automatically qualify as 'courts' under EU primary and secondary law. It was shown in the JuWiLi I study that the definition of court under primary EU law requires a decision in an *inter partes* proceeding, where both (all) parties of a case are involved. Therefore, unilateral decisions, which are frequently made by notaries, are excluded from this definition. And, in the context of Art. 267 Treaty on the Functioning of the European Union (TFEU), the decision of a dispute (adversary proceeding) is required.[3] In secondary EU legislation, there is no uniform definition of 'court' as there are, as was again shown in JuWiLi I, considerable differences between the different acts of secondary legislation.[4]

It is also important to stress that the second category (type 2) is very wide and national differences can come into play. On the one hand, notaries can contribute to unburdening courts in a certain legal system by executing tasks which, in principle, are 'notarial' in nature and cannot be handled by courts. For example, entries into the Dutch land registry on the sealing, unsealing or division of property have to be prepared by notaries and cannot, as a basic rule, be submitted by other professions. However, court decisions on these questions that are final will be entered in the registry without the involvement of a notary. On the other hand, for example in cases of consensual divorce in some countries, a couple can choose between a consensual divorce before a court or a notary (e.g. in France or Romania), which means that the court is unburdened through an alternative 'notarial path'. Finally, some notarial tasks are 'exclusively notarial' in nature insofar as they can only be performed by a notary (e.g. the authentication of the articles of association of a company by an notarial instrument). Still, these tasks contribute to an unburdening of the courts, as the role of the notary in the process is precisely to create legal certainty and thereby avoid conflict.

Finally, it is also important to note that there can be considerable national differences as to the judicial or administrative nature of certain tasks. For example, (land) registries are regularly kept by administrative authorities. However, in some countries, they are kept by the courts (e.g. land registries in Austria, Estonia and Poland). Accordingly, notarial services in connection with these registries unburden courts in some EU Member States, while administrative authorities do so in others. In this overview of country reports, examples concerning 'administrative' registries will nevertheless be included.

As a conclusion, the second category of tasks ('type 2') is very diverse, which means that, in the following chapter (1.2), we will restrict ourselves to presenting a rough overview by highlighting specific examples.

[3] See JuWiLi I, pp. 83–86.

[4] See JuWiLi I, pp. 46–62 (Section 2.1.3. of the legal study).

1.2 Overview of notarial tasks that unburden courts

1.2.1 Succession

Succession proceedings are a 'core competence' of the European notarial profession, as notaries play a major role in this task across the European Union.[5] This is also the task where most use-cases of notaries acting as 'courts' or 'court commissioners' can be found. However, it must be acknowledged that the court/court commissioner model is mostly concentrated in central European countries (with the notable exception of Slovenia). Succession proceedings carried out by central European notaries have already been analysed in detail in the JuWiLi I project. This model is also reflected in the definition of 'court' provided by Art. 3 (2) SR. As court/court commissioners, notaries act as part of the judiciary and are instructed or provided with a task by the court. The final decision might nevertheless still require confirmation by judges or be made by the judges themselves (as in Austria). The actions taken by court commissioners replace actions or decisions taken by the court. As already mentioned, the majority of notarial tasks in succession proceedings throughout the EU do, however, fall under 'type 2'. This means that notarial tasks contribute to a reduction of the workload of courts but do not legally replace court decisions. Type 2 is very common in succession proceedings, as illustrated by the following overview of national reports.

Court commissioners or courts:

In several central European countries, notaries are acting as 'courts' or 'courts commissioners' in succession proceedings, directly taking over the functions of courts.

The first example is Austria, where the estate is acquired by the heirs only upon a decision by a court. In principle, succession proceedings are initiated *ex officio*. Notaries act *ex lege* as court commissioners (Court Commissioners Act). They represent the courts as their delegates and are bound to apply the same rules as the courts, with the exception that they have no power to issue judicial decisions (see below). The distribution of cases to notaries as court commissioners in succession matters is based on the yearly provision of the president of the Regional Courts for Civil Affairs, with the parties not having the option to choose the court commissioner. Court commissioners in Austrian succession proceedings have to draw up and complete the recording of the death, identify potential heirs, conduct all other official actions required in the course of succession proceedings, take measures to safeguard the estate located in Austria and issue the European Certificate of Succession (ECS) according to Art. 62 SR.[6] As court commissioners, Austrian notaries are not permitted to make judicial decisions, minute judicial settlements, arrange mandatory measures or request legal assistance abroad.[7] Although the main steps in succession proceedings are carried out by the court commissioner, the final decision is issued by the court.

Croatian notaries also act as court commissioners in succession proceedings. The proceedings are initiated *ex officio* by the competent district court. The notary takes all necessary actions and will also render the decision. The case file must be forwarded to the court if a dispute arises among the potential heirs, e.g. on inheritance rights, the size of inheritance shares or the composition of the estate. In non-

[5] The important role of notaries in succession law (and its potential to unburden courts) was also addressed in the European Commission's 2024 EU Justice Scoreboard, COM(2024)950, p. 25. Before this, the European Parliament had already invited the Commission to address notaries' contribution to rule of law standards in the annual rule of law report (P9_TA(2024)0108; European Parliament resolution of 28 February 2024: Report on the Commission's 2023 Rule of Law report (2023/2113(INI)).

[6] § 1 para. 1 Austrian Court Commissioner Act.

[7] For details, see JuWiLi I p. 13.

contentious succession proceedings, the notary will schedule hearings and invite all participants. The notary decides on the right of inheritance and the size of respective shares of the heirs, in consideration of the law and submitted declarations of inheritance. This decision has the same effect as a court decision and can be appealed. In such a case, the court will hear the heirs who file the appeal. After the court of appeal's decision, the file is returned to the court commissioner, i.e. the notary, to render the final decision based on the evaluation of the court. The court commissioner reaches its decision independently.

In Czechia,[8] notaries act as court commissioners only in succession proceedings (all other tasks in Czech law must be classified as 'type 2': reducing the workload of courts without a specific relationship between notary and court). After initiating the proceedings, the competent district court assigns the notary to conduct the succession proceedings. The assignment is based on a schedule issued by regional courts following a proposal by the regional notarial chamber, which is publicly available. The notary conducts preliminary research to identify potential heirs, wills, assets and debts of the deceased. Court commissioners have the power to file enquiries to registries or other relevant institutions. After scheduling a hearing, the court commissioner draws up an inventory. In practice, the inventory can be replaced by a declaration of the heirs. During the hearing, creditors may assert their claims. In case of an insolvent estate, liquidation might be necessary (a proceeding that is only initiated by the notary). In case of a dispute on the facts between potential heirs, the case must be referred to the court to render a decision. However, notaries can issue a binding decision on legal questions (which is appealable). Decisions in succession proceedings are issued by the court commissioner in the name of the competent district court and do not require confirmation by the court.

The Hungarian notaries are fully responsible for the succession proceedings and act as 'courts', not only 'court commissioners'. This includes proceedings where there is a dispute between the parties (even though these proceedings are still conducted under the rules for non-contentious proceedings).[9] Those notarial proceedings have the same effect as court proceedings and end with a formal decision.[10] The notary issues the final decision determining heirs and succession. If the parties make contradicting submissions, the notary may assess the dispute based on the facts provided in the proceedings (which they have to clarify) and issue a decision on the release of the estate. While this decision is binding for the parties, an appeal can be filed with a court, which then issues the final decision. In case of an appeal, the notary may grant a release of the estate with temporary effect.[11] Succession proceedings under Hungarian law also allow for settlement agreements supervised by the notary.[12] In JuWiLi I, the role of Hungarian notaries in succession proceedings was described as going beyond the role of a court commissioner as the notaries replace the court's decision in the first instance.[13] This strong role is unique among the legal orders analysed in the project.

In Slovakia, notaries act as court commissioners in succession proceedings.[14] When there is a court order, the notary is entitled to conduct the succession proceedings and to issue the final decision. This includes decisions on legal acts of minors and persons deprived of their legal capacity. The court commissioner's decision is considered a decision of first instance. The competent district court initiates the succession proceedings *ex officio* as soon as they receive the information about the person's death. The court

[8] For details, see JuWiLi I p. 19.
[9] JuWiLi I, pp. 21 seq.
[10] HETV 2. § (1)-(2) ph. (Hungarian Act XXXVIII of 2010 on Succession Proceedings).
[11] JuWiLi I p. 22.
[12] HETV 12. § (1) ph.
[13] JuWiLi I, p. 21.
[14] JuWiLi I, p. 23.

authorises a notary based on the annual working schedule to conduct succession proceedings. 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. The notary makes a remark upon enforceability and effects for an execution regarding their decision. If the notary concludes insolvency of the estate, they terminate the proceedings. The notary serves as liquidator in case the value of debts exceeds the value of the estate. In case a dispute arises and the attempt to settle this dispute fails, the matter must be referred to the courts for them to decide.

In the French region of Alsace-Moselle, notaries also have a specific role in succession proceedings, which is different from the other parts of French territory and has already been analysed in JuWiLi I.[15] In partition proceedings in Alsace-Moselle, the notary is appointed as *délégué du tribunal*, with the obligation to ensure procedural guarantees under Art. 6 ECHR. Furthermore, the notary issues an instrument of affirmation, which enables the heirs to prove their status and assert their right against any third party. The notarial affirmation establishes the inheritance status also for the court, which will issue a certificate of inheritance to confirm the status. The court is requested by the notary to issue the certificate of inheritance based on the notarial authentic instrument.

There are also some cases in which notaries are appointed by a court to propose a division of assets in contentious proceedings. In these situations, notaries do not strictly speaking act as courts or court commissioners, but their intervention depends on a court decision. For example, in Belgium and the Netherlands, notaries can be appointed by a court (in contentious proceedings) to propose and execute a plan for the division of assets between the parties concerned. This applies in succession but also in divorce proceedings. While notaries in these countries normally only act at the request and in conformity with the wishes of the parties involved, in this case, they are appointed by the court, and the parties are instructed to submit the necessary documentation to the appointed notary. If the parties do not accept the appointed notary's proposal, a final confirmation by the court is required. A similar notarial task can, e.g., be found in Latvia, where a judge can appoint a notary (often, but not limited to, the notary who issued the inheritance certificate or the European Certificate of Succession (ECS) to supervise the drawing up of a division plan.[16] The notary seeks to find agreement between the parties and, if this is not possible, submits the property inventory list, an evaluation and the draft division to the judge. In practice, courts only rarely resort to this option. French law also provides for a similar model if heirs cannot agree on the division of assets. In this case, it is possible for the court to instruct a notary to intervene as *notaire désigné* and to propose a partition plan. In French legal literature, this role has also been linked to that of a 'court commissioner'.[17]

Notarial roles in succession proceedings below the 'court commissioner' threshold

In all other countries covered by this study, notaries play a more or less important role in succession proceedings, which, however does not amount to the role of a court or a court commissioner and can be qualified as a type 2 activity. However, by conducting the majority of tasks which are necessary to finalise a succession proceeding, they also contribute to unburdening the courts.

Belgian notaries are responsible for handling succession proceedings. Potential heirs can freely choose a notary to handle the proceeding. Notaries receive declarations of a waiver or acceptance of succession (see Art. 13 SR) and are, if an amicable settlement is possible, also competent to issue a certificate of

[15] JuWiLi I, pp. 28 *et seq*.
[16] Section 250² para. 3 and Section 250³ of the Civil Procedure Act.
[17] *Vix,* Le notaire, le juge et l'auxiliaire de justice. Variations sur le statut du notaire dans le domaine gracieux, La semaine juridique – notariale et immobilière, n 36 of 6 september 2019, p. 7–8: Notary as 'auxiliaire de justice'.

succession. Notaries are also the first authority to assess the division of assets.[18] The notary considers, with regard to the parties' submissions, whether assets can be divided or must be sold for the price to be divided. The notary proposes how the value should be divided. If this proposition is not contested by the parties, it becomes binding. Under these circumstances, courts have only a subsidiary role. This is different in case of disagreement between potential heirs, in which case courts become involved and can also, besides other options, appoint a notary to propose and execute the division of assets (judicial division of assets).

In Bulgaria, the role of notaries in succession proceedings is, also in comparison to other EU Member States in the project, a minor one. They can draw up notarial wills and keep them safe. They can also, upon request of the entitled persons, act in the context of the sale of the inheritance and the voluntary division of inherited property. However, the identification and certification of the heirs is the competence of the municipal authorities and not of the notary. An ECS is issued by the court.

In Estonia, inheritable rights and obligations are transferred *ex lege* to the heirs following the principle of universal succession. However, a potential heir can renounce the succession within three months from the moment that they became aware of the death of the deceased and of a right to inherit. Succession can no longer be accepted after the renunciation. While registration of death happens automatically, succession proceedings are only opened upon application.[19] The purpose of such an application by interested parties who can choose a notary (NB only one notary handles a specific succession case) is to establish who the heir is and thereby avoid further dispute.[20] The notary does not act as a court commissioner. If the parties do not agree with the determinations of the notary, they may initiate a dispute in court. Even though Estonian notaries are *not* 'courts' in the sense of Art. 3 (2) SR, they comply with the rules for international jurisdiction of the SR[21] and can initiate succession proceedings only where they have jurisdiction under these provisions.[22] The notary's tasks include a verification of the *causa* of the succession, a verification of the heir, in case of multiple heirs their share of the estate, collecting information concerning rights and obligations attached to the estate, coordination of the inventory, legal advice to the parties and entering information into the Succession Registry.[23] The national succession certificate as well as the ECS are issued by the notary. However, the instrument does not create or terminate property rights.[24] It is in the full power of the notary to decide whether there is sufficient proof for universal succession and thereby determine the heir. The notary takes their decision in full independence and impartiality. Disputes must be resolved by the courts.

In France, acceptance of succession can be explicit, tacit or in some cases *ex lege.* Just repudiation must be confirmed by a public document authorised by a notary. However, proof of the capacity as heir is often provided by notarial instrument as well.[25] The devolution of an estate is formalised in an authentic instrument prepared by a notary, based on the declarations of the heirs. The heirs confirm, under their own responsibility, that they are the sole beneficiaries. In practice, the notary identifies the rightful heirs

[18] Art. 1205–1225 of the Belgian Judicial Code.
[19] *Karm,* Estonia, in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 94.
[20] *Karm,* Estonia in Code FS para. 97.
[21] Art. 165 (3) (1) Estonian Succession Act.
[22] *Karm,* Estonia in Code FS para. 98.
[23] *Karm,* Estonia in Code FS para. 99.
[24] *Karm,* Estonia in Code FS para. 102, § 171(1) Estonian Succession Act.
[25] *Berre,* France, in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 53.

using available civil status records and, if necessary, with the assistance of a genealogist.[26] The notary is also responsible for the administration of estate. They draw up the notarial instrument and set up the inventory before carrying out mortgage and tax formalities and distributing the estate.[27] They also issue the ECS. It should be stressed that the notary can only act upon request of the parties and cannot therefore be regarded as a court commissioner.[28]

In Germany, due to the principles of universal succession and self-acquisition,[29] the heir acquires the entire inheritance by operation of law upon the death of the testator, without any action on their part and without their knowledge. This may well be contrary to the wishes of the heir, particularly in the case of an over-indebted estate. Therefore, the heir has the right to renounce the inheritance to be able to reverse this acquisition if necessary.[30] The renunciation must be declared in a public document or recorded by the probate court. Notaries are competent to furnish the required public form for the declaration of renunciation. In practice, most renunciations are given the correct form by notaries, which thereby also reduce the burdens on probate courts. Furthermore, the rules on notarial property division also apply to property division in case of succession. These rules will be presented in detail in the context of family law below (see 1.2.2.below).

In Greece, the estate passes to heirs *ex lege* at the time of death of the deceased.[31] This also applies to immovable property, where Art. 1198 Greek Civil Code (requiring registration to the land registry of the instrument of acceptance of the inheritance) is, by common doctrine, understood as a mere *conditio juris*, which means that the acquirement of ownership is deemed to have taken place already at the time of death. Heirs may waive or accept the succession. In parallel to the national certificate of succession issued by the court, the notary may confirm the *acceptance of inheritance* as well. This notarial instrument serves also as proof for the land registry.[32] The heirs may wish to avoid personal liability with their own property. For this reason, they can accept the inheritance with the benefit of an inventory, which limits liability to the items of the estate.[33] The inventory is ordered by the court in non-contentious proceedings at request or *ex officio.*[34]

In Italy, notaries are the only competent authority for the registration and publication of wills and for the issuing of an ECS.[35] Accordingly, a notary with whom a will was registered will also inform potential heirs. Apart from these tasks, the participation of a notary in succession proceedings is not obligatory and depends on a decision of the potential heirs. Notaries can draw up instruments about full acceptance of an inheritance as well as a declaration on the acceptance with the benefit of inventory (in the latter case, the heirs can choose between a notary and a court for this declaration) and can also submit the tax-related succession declaration with the Italian Revenue Agency by electronic means. This is how they contribute to a well-organised succession process.

[26] *Berre,* France in Code FS para. 47.
[27] *Berre,* France in Code FS para. 58.
[28] *Berre,* France in Code FS para. 54: "However, the notary cannot be described as a court within the meaning of the [European Succession] Regulation. They do not have the power to rule on their own authority on points in dispute between the parties concerned; rather, their jurisdiction depends solely on the will of the parties."
[29] § 1922 BGB (German Civil Code).
[30] § 1942 BGB.
[31] Art. 1710 of the Greek Civil Code; see also *Zervogiani,* Greece in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 120 and Balis, Inheritance Law, 5th edition 1965, § 11.
[32] Art. 1962, 1963 Greek CPC.
[33] *Zervogiani,* Greece in Code FS para. 123.
[34] *Zervogiani,* Greece in Code FS para. 123.
[35] Law 161 of 30 October 2014.

Latvian notaries are competent to conduct succession proceedings, limited to uncontested cases concerning the confirmation of heirs. This competence covers actions necessary to determine the last will of the deceased and to identify the rightful heirs, such as the opening of the will and the devolution of the estate. The proceedings end with the notary issuing a certificate of succession, which officially identifies the people recognised as heirs. However, notaries are not responsible for the administration of the inheritance or for any actions involving the actual items included in the estate. Their role is confined to establishing whether the inheritance requires trusteeship or protection of the estate and, if necessary, deciding on its establishment. Once such a decision is made, the appointment and supervision of guardians of the inheritance fall within the competence of local government institutions, while the physical protection of the estate is entrusted to bailiffs. Additionally, notaries are required by law to collect information regarding the deceased person's property and debts from the relevant State-controlled registries of movable and immovable property. Latvian notaries are not 'courts' within the meaning of the SR. In undisputed succession proceedings, they do not act under the supervision or instruction of a court (no court commissioners). If any of the inheritance applicants believes that their rights have not been respected by the notary or if a dispute regarding inheritance rights arises, the parties have to initiate court proceedings.

Notaries in Lithuania are competent for succession proceedings.[36] Courts are only responsible for disputed matters between the parties. The court may also renew the deadline for accepting the inheritance if it was missed. The notary in the district where the deceased had their last place of residence is responsible for acceptance or waiver of inheritance and issues the certificate of succession. If an heir specifies in their application to the notary that they wish to accept the succession in accordance with the inventory of the estate, the inventory is prepared by the judicial officer and the heir's liability for debts is limited accordingly.[37] In the process of issuing these certificates, the notary undertakes several tasks: they must authenticate the deceased's death and the time and location of the inheritance, examine the composition and location of the inheritance, and determine whether the inherited property belonged to the deceased by right of ownership.[38] Furthermore, they must assess the number of co-owners, liens and other pertinent details by consulting public registries and other official sources. To substantiate these conditions, the notary can demand evidence from the applicants.[39] Lithuanian notaries are not 'courts' within the meaning of the SR.[40] In undisputed succession proceedings they do not act under the supervision of or under instruction by a court (no court commissioners).

Notaries in Luxembourg are responsible for inheritance settlements after they have been contacted by potential heirs. They are the ones who draw up succession instruments in authentic form, such as the *acte de notoriété* (to prove the heirship) and *partage* (to divide the inherited property). They handle the opening of wills (authentic wills), determine the heirs and the composition of the deceased's estate, oversee and proceed to the partition of property among the heirs and assist in preparing the inheritance tax declaration. In these cases, as long as there is no dispute among heirs, there is no specific relationship between the notary and the court. However, in some cases there is closer cooperation between the notary and the court, which to some extent resembles the court commissioner model. Courts can appoint a specific notary to handle inheritance settlements, in which cases they delegate a specific mission to

[36] Art. 5.50 of the Civil Code of the Republic of Lithuania.
[37] *Bogdziewicz,* Lithuania, in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 95.
[38] *Bogdziewicz,* Lithuania in Code FS para. 106.
[39] *Bogdziewicz,* Lithuania in Code FS para. 106.
[40] CJEU 16 July 2020 C-80/19, *E. E*., ECLI:EU:C:2020:569, para. 46-56; confirmed by the Supreme Court of Lithuania 04 November 2020, case No e3K-3-422-378/2020.

notaries and the powers to achieve it. If the notary is presented with a handwritten will, they have to deposit the will to the President of the Court, who proceeds to make a description of the will and orders its deposit with the notary that they will appoint. The courts are also competent in the event of disagreement between the heirs or in the presence of a minor or protected adult such that they can authorise the acceptance of the inheritance by the protector.

In Malta, relatives of a deceased person approach a notary with the death certificate and request that the notary conducts testamentary searches to establish whether there is an existing will. Notaries can receive a copy of the will by requesting it from the signing notary or through the Notary of Government Archives. If there is no existing will, the notary files an application in court to declare that the succession of the deceased be opened in favour of the heirs in accordance with Maltese Law on Intestate Succession.

In the Netherlands, the involvement of a notary is necessary for a set of legal transactions in the context of succession. In these cases, parties are free to choose their notary. First of all, wills have to be drawn up as a notarial instrument to have full legal value. After signing, the notary registers the will in the Central Registry of Wills. Secondly, notaries issue national certificates of inheritance as well as the ECS. Finally, under Dutch law, the drafting of an instrument for the purpose of transfer and/or division of immovable property (and its registration with the land registry) is an exclusive notarial competence, which also applies in the context of succession. The overall involvement of a notary in a succession proceeding is therefore quite common in practice. If disputes arise, succession proceedings are handled by the courts. In this context, the court can – as already mentioned above – appoint a notary to prepare a proposal for the judicial division of assets.

In Poland, notaries open and announce the will. In inheritance matters, heirs may either accept or reject the estate, which includes both assets and liabilities or which limits their liability for debts. Their declaration of acceptance or rejection can be made before a notary in the form of a notarial instrument or before a court.[41] The notary's role is to formally record this declaration, ensuring that it meets all legal requirements and is made within six months from the date when the heir becomes aware of their entitlement.[42] If no declaration is made within this period, the inheritance is deemed accepted with the benefit of inventory.[43] Proceedings to confirm inheritance acquisition determine who inherits, in what shares and whether by law or by will. When handled outside the court, a notary is competent to conduct these proceedings and issue a notarial instrument of succession.[44] In comparison, the notarial inheritance proceeding is a quicker alternative to the judicial decision.[45] As the notary acts only upon request of the parties, they cannot be regarded as a court commissioner.[46] There is only one exception to this rule: While the notary is competent to issue the ECS, a court can – upon request of the parties – oblige the notary to rectify, modify, withdraw or suspend the effects of an ECS. This means that, in this case, the notary is bound by the court's decision (irrespective of any objections by interested parties; Art. 95r and Art. 95x of the Law on Notaries). There is no relevant domestic case law on this special relationship, as such cases are extremely rare.

[41] *Kaminska,* Poland in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 68.
[42] Art. 1015 § 1 Polish Civil Code.
[43] Art. 1012 Polish Civil Code.
[44] *Kaminska,* Poland in Code FS para. 69.
[45] *Kaminska,* Poland in Code FS para. 72.
[46] See also CJEU 23 May 2019 C-658/17, *W.B.*, ECLI:EU:C:2019:444, para. 50-64: Polish notaries are not 'courts' as defined by Art. 3 para. 2 of the Succession Regulation.

In Portugal, competences in succession proceedings are shared between the notaries, the civil registry offices and the courts, depending on the choice of the initiator of the proceedings or the parties' agreement on jurisdiction. Attorneys and solicitors can also play a role in this matters by authenticating particular documents. Civil registry offices are competent only where there is no dispute between the presumptive heirs. If there is a dispute between the presumptive heirs, this has to be resolved either in an ordinary court proceeding or in an inventory process in the notarial offices requiring final validation by the court. The notary is responsible for processing all acts and scheduling proceedings, including receiving statements from the parties, scheduling preparatory and interested parties' conferences, and presiding over sealed-bid proceedings. When several heirs accept an inheritance and do not wish to keep the estate undivided, the assets must be divided among them through a sharing operation.[47] If all parties agree, the division of assets can take place without an inventory, either at a notary's office or a civil registry office and recorded by an authentic instrument.[48] If an inventory process is required, it can be carried out either judicially or before a notary, as decided by the parties.[49] If the status of successor is not certified in the inventory process, it may also be stated by notarial qualification,[50] simplified hereditary succession proceedings,[51] judicial qualification out of the inventory process[52] or ECS. During succession proceedings, the notary is not bound by the instructions of the court. Once the distribution of the estate is finalised by the notary, this decision must be approved by a judge. This judge is responsible for verifying the legality of all acts carried out and has to validate them (or refuse to do so), thereby providing them with the force of a court decision. This means that the notary does not make its own 'decisions' under Art. 3 (2) SR (i.e. it is not a 'court commissioner' in the full sense of the term), but there is very intense cooperation between courts and notaries.

Romanian notaries have primary competence for non-contentious succession proceedings (in case of dispute, the courts are competent). The notaries are responsible for issuing the national certificate of inheritance and the ECS, thus providing proof of the heir's status and their ownership of the estate's assets.[53] Furthermore, the explicit declaration of acceptance or disclaimer (renunciation) of the inheritance must be executed by an authentic notarial instrument. Notaries also record the agreement on the division of co-owned assets.[54] If registrable assets are involved, the corresponding contract must be recorded by a notary.[55] Notaries have exclusive competence for the liquidation proceeding in case of an overindebted estate. This proceeding concludes with the notary issuing a certificate of estate liquidation.[56] Notaries may appoint a special curator or individual administrators for specific assets, particularly if no eligible heir exists or accepts the estate.[57] They are involved in the inventory proceeding and the sale at auction of estate assets. Notaries do not act as court commissioners in succession proceedings in Romania.

[47] *Pedro,* Portugal in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 100.
[48] *Pedro,* Portugal in Code FS in Code FS para. 101 *et seq*.
[49] *Pedro,* Portugal in Code FS Code FS para. 104.
[50] Articles 82 to 88 of the Portuguese Notarial Code.
[51] Article 210-A of the Portuguese Civil Registry Code (PCRC).
[52] Articles 351 to 357 of the Portuguese CPC.
[53] *Vlad,* Romania in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 149.
[54] *Vlad,* Romania in Code FS para. 129.
[55] *Vlad,* Romania in Code FS para. 138.
[56] *Vlad,* Romania in Code FS para. 147.
[57] *Vlad,* Romania in Code FS para. 165.

In Slovenia, the estate of a deceased person passes *ex lege* to the heirs at the time of their death.[58] The decision of the court on this matter has only declaratory effect. The court declares the legitimate persons as heirs.[59] The court can delegate some competences in succession proceedings to the notaries. This can include the inventory, appraisal of assets and securing the estate. A notary can be appointed to act as administrator of the estate. The law provides only the delegation of certain tasks but not for a delegation of decision-making power. This makes Slovenia not only the only country analysed in JuWiLi I where notaries do not act as full court commissioners,[60] but also one of the EU Member States where the role of the notary in succession proceedings is rather weak, even when compared to States who do not use the court commissioner model.

In Spanish succession law, the notary is the main professional involved. The courts' responsibilities are limited to disputed cases.[61] Succession proceedings begin at the moment of a person's death, called the '*apertura*'. The presumptive heirs can, with some limitations, choose, at their own discretion, the notary to handle the case.[62] Notaries play a key role in these proceedings by locating any valid wills through the Registry of Last Wills and Testaments and determining the deceased's estate based on the information provided by the interested parties. If a closed, holographic or oral will is found, the notary conducts a homologation process to transform it into a public document, verifying its authenticity and compliance with legal requirements.[63] Afterwards, the notary evaluates the legal capacity to succeed.[64] Simple acceptance can be made without any form requirements. On the opposite, repudiation must be confirmed by authentic notarial instrument.[65] In some cases, acceptance or a waiver may require judicial authorisation (in particular, waiver by minor children).[66] If the heirs wish to limit their liability for the deceased's debt, they can do so with the benefit of an inventory. In this case, acceptance must be explicit and conducted before a notary.[67] If there are intestate heirs, they may request the notaries to initiate proceedings to declare their succession.[68] Despite the necessity of judicial authorisation in some cases, there is no specific relationship between the court and the notary, which would qualify their role as that of a court commissioner.

1.2.2 Family law (excluding divorce)

Notaries also play an important role in family law matters across the EU.[69] This is not only the case in notarial divorce – which will be covered under 1.3 – but also applies in the context of other tasks (some

[58] Art. 132 Slovenian Inheritance Act.
[59] Art. 214 Slovenian Inheritance Act.
[60] For a recent dogmatic proposal to change this, cf. Prof. Dr. Aleš Galič from the Faculty of Law in Ljubljana, who has prepared Expert Grounds for the Reform of Procedural Aspects of Succession Law: Transfer of Jurisdiction in Uncontested Succession Matters to Notaries.
[61] *Alguacil,* Spain, in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 182.
[62] *Alguacil,* Spain in Code FS para. 202.
[63] *Alguacil,* Spain in Code FS para. 201.
[64] Art. 758 CC.
[65] Art. 1008 CC.
[66] *Alguacil,* Spain in Code FS para. 207.
[67] Art. 1011 CC.
[68] *Alguacil,* Spain in Code FS para. 233 *et seq*.
[69] The important role of notaries in family law (and its potential to unburden courts) was also addressed in the European Commission's 2024 EU Justice Scoreboard, COM(2024)950, p. 25; it was mentioned again – with specific reference to divorce by mutual consent – in the 2026 EU Justice Scoreboard (COM(2026) 273), pp. 25 and 26 (including figure 26). Before this, the European Parliament had already invited the Commission to address the contribution of notaries to rule of law standards in the annual rule of law report (P9_TA(2024)0108; European Parliament resolution of 28 February 2024: Report on the Commission's 2023 Rule of Law report (2023/2113(INI)).

of which are difficult to separate from divorce matters but will also be presented here). The following section will give an overview of selected examples. The following notarial tasks can mostly be classified as 'type 2' as there is no special relationship between the notary and the court.

In many EU Member States, notaries are competent for the establishment or changes of **matrimonial property regimes** between spouses (before or during marriage). Generally speaking, the main types are separation of property, community either of all property or acquired property only or an accrued gains' system. While there is regularly a statutory 'default' option, the choice of another regime or a later change requires a notarial instrument, often in the form of a marriage contract: This is the case, for example, in Austria, Belgium, Czechia, Estonia, Germany, France, Hungary, Malta, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovenia (where the Chamber of Notaries also keeps a registry of Matrimonial Property Agreements, see below 1.2.4.), Spain and Slovakia.

- In France, for example, spouses who wish to change their matrimonial regime must do that before a notary of their choice. The notary verifies the change with regard to the interests of the family. This is a case of full delegation of power. A judge is therefore not involved. However, in case of objection, e.g. by adult children or third parties, the case is to be decided by a judge.
- In Hungary, spouses may choose their matrimonial regime through a prenuptial or nuptial agreement, made either before a notary or an attorney-at-law. Moreover, at the request of the parties, the notary may approve the parties' out-of-court settlement on marital property made before the notary. The decree of approval has the same effect as a court decree.
- In Latvia, spouses may establish, alter or terminate their property rights in a notarial marriage contract before as well as during a marriage.
- In Malta, for separation of estates, prospective spouses may exclude the community of property regime through a notarial instrument before marriage. If already married, court approval is required, and the parties must engage an attorney to initiate and follow up on the relative court proceeding before the couple proceed to sign the instrument before the notary.
- In Portugal, spouses may freely choose their matrimonial regime through a prenuptial agreement, made either before the civil registrar or by a notarial instrument. To be valid and enforceable against third parties, the agreement must meet formal requirements and be duly registered together with the marriage contract.[70]
- In Romania, the choice of a contractual matrimonial regime or a subsequent change to the regime can only be made through a matrimonial agreement concluded before a notary in authentic form.[71] The agreement may be concluded before marriage but only takes effect at the time of marriage.[72] Agreements are binding on third parties only if registered in public registries.
- In Spain, matrimonial property regimes can be established or modified through marriage contracts. These agreements, which may also include other family or patrimonial provisions, must be executed as an authentic instrument before a notary to be valid.[73]

[70] Article 189 of the Portuguese CRC. See *Pedro,* Portugal in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 70.
[71] 330 *et seq.* from Romanian Civil Code.
[72] *Vlad,* Romania in Code FS para. 112.
[73] Art. 1327 CC; *Alguacil,* Spain in Code FS, para. 175.

In the context of **divorce** or the termination of a marriage and/or registered partnership, notaries also play a decisive role in the non-contentious **division of assets**, e.g. in Belgium, Luxembourg, Estonia, Germany, Hungary, Netherlands, Poland, Romania and Slovenia. In Belgium and the Netherlands, notaries can – as discussed in the sub-chapter 1.2.1. on succession above – be appointed by a court to propose and execute a plan for the judicial division of assets. In these countries, notaries are also involved in the voluntary **division of spousal assets** as their participation is mandatory insofar as they have to draft a notarial instrument for the purpose of division of immovable property (and initiate its registration with the land registry). Notaries may also contribute to the process of termination by drafting an instrument concerning the legal situation of **children**. The possibility of a notary being instructed by a court to assist in the division of assets in divorce proceedings can also be found in French law (see in the sub-chapter 1.2.1. on succession above).

For example, German notaries have procedural authority in property division matters.[74] These include court duties related to distributing property from estates or communities of property after the end of a marriage, partnership or other joint ownership (and also applies in succession proceedings, as mentioned in 1.2.1. above). The parties are not free to choose the notary; competences are assigned by law. The State is not liable for any actions by the notary. In such proceedings, notaries act mainly as mediators and authenticators. They cannot decide disputes against the will of a party, but have to suspend proceedings until a competent court decides. However, if the parties reach an agreement, the notary may finalise the settlement by including their declarations in the agreement. Thus, while responsibility for handling property division matters has been transferred to notaries, they do not have the authority to make binding substantive decisions with the effect of *res judicata*. This makes this competence one that should be qualified as type 2.

In Latvia, a notarial instrument can be drafted in the context of the division of spousal property. The same applies for agreements regarding custody of a minor child, rights of contact and child maintenance. This is a prerequisite to have the marriage dissolved. Furthermore, as from March 2026, all agreements concerning minor children must be concluded in the form of an enforceable notarial instrument.

Slovenian notaries have the competence to draw up an enforceable authentic instrument for the division of joint property of the spouses. Furthermore, spouses may conclude a maintenance agreement in the form of an enforceable notarial instrument.[75] The notary can also draw up an authentic instrument covering the maintenance between parents and their children.[76] Furthermore, parents can state in advance who should take care of their children in the event of their death or permanent inability to exercise parental responsibility. This can be done through a special formal declaration in which they may propose a person to whom the child is entrusted for care and upbringing, a relative to be granted parental responsibility, an adoptive parent or a guardian. For the declaration to be legally valid, it must be made in the same form as a will under inheritance law. Therefore, parents can arrange this declaration with a notary in a form of an authentic instrument, to ensure proper legal form and validity.

In Latvia, **civil partnership** has been available for partners who do not wish to marry or cannot marry (the latter is the case for same-sex couples) since 2024. A civil partnership is exclusively established through a notarial instrument before a notary, who also registers the partnership with the State-run Registry of Natural Persons. Estonia had already established a comparable model, the cohabitation under the Registered Partnership Act, a decade earlier. The respective contract must also be concluded and

[74] See Gesetz zur Übertragung von Aufgaben im Bereich der freiwilligen Gerichtsbarkeit auf Notare of 26 June 2013 (BGBl. I 2013, 1800).
[75] Art. 101 Slovenian Family Code.
[76] Art. 182 Slovenian Family Code.

authenticated before a notary. A similar cohabitation model in which the relevant agreement must be concluded in the form of a notarial authentic instrument can be found in Malta. Furthermore, Maltese notaries are also competent for the termination of such cohabitation agreements. Finally, Maltese law provides for notaries drawing up reconciliation agreements between legally separated spouses who wish to resume their marital relationship. These agreements restore all marital rights and obligations under the Civil Code and require prior court authorisation, which is attached to the notarial instrument.

In several States, **recognition of fatherhood** is possible before a notary: Such a notarial instrument can, e.g., be found in Austria, Hungary, Italy, Lithuania, Luxembourg, Malta[77], Poland, Romania and Slovenia. In Germany, the notarial authentic instrument must be transferred to the Civil Registry Office.

In Lithuania, for example, this voluntary acknowledgment (which also requires the mother's consent) can either be declared before a notary or a civil registry office, with the parents free to choose between the two.

In Spain, notaries can be involved not only in the recognition of fatherhood but also in the rejection of legally presumed fatherhood according to Art. 117 of the Spanish Civil Code. If a child is born within 180 days following performance of the marriage, fatherhood of the husband is presumed. However, this presumption can be challenged by the husband by declaring otherwise in an authentic instrument (notarial instrument or declaration before a civil registrar) executed within six months of them becoming aware of the birth.[78]

In Malta, for agreements on **child** maintenance, contact and custody, **unmarried parents** must engage the services of a notary to formalise their arrangements. The agreement is drafted by the parties and their attorneys. Once the draft is prepared, and before the attorney submits the draft agreement in court, the notary may, of their own volition, request that the parties or their attorneys send them a copy of the draft agreement to ensure that it complies with the formal requirements of notarial acts, without examining the substantive terms. After this review, the parties go through a mediation process before the draft agreement is submitted to court. Once the judge issues the authorisation decree, the notary collects the signed minute together with a copy of the relative decree from the court, and the parties attend the notary's office for the final reading and signing of the instrument, with the court decree attached for record. The same proceeding applies to personal separation contracts.

In Romania, notaries are competent to issue diverse powers of attorney for various parental matters in the form of a notarial authentic instrument, including the designation of a guardian for a minor child in the event of the death of the parents.[79]

There are also notarial tasks in connection with **legally incapacitated persons**. With the clear intention of unburdening the courts, Italian notaries have been entrusted with responsibility concerning the protection of legally incapacitated persons ('legge Cartabia' (Cartabia law) of 2022)[80]. The legislator has granted notaries jurisdiction to issue the legal authorisations required for such individuals (and their representatives) to perform certain transactions. These authorisations concern the assets of the estate and any other acts of extraordinary administration carried out by the legal representative of minors and incapacitated adults. In these cases, the parties can choose whether to apply to the judicial authority or to the notary in order to obtain the authorisations required for executing the instruments involving a

[77] Art. 87 Civil Code: Notaries are competent to publish contracts concerning child acknowledgment.
[78] *Alguacil*, Spain in Code FS para. 62.
[79] Art. 114 Romanian Civil Code.

[80] https://miolegale.it/norme/riforma-cartabia-processo-civile-dlgs-149-2022/.

minor or a legally incapacitated person. However, authorisations to promote, waive, settle or compromise in arbitration judgments, as well as for the continuation of the commercial enterprise, remain exclusively with the judicial authority.

In Austria, it is possible for a person having full legal capacity to draw up (alternatively before a notary, an attorney or, if no complex legal question arises, an adult protection association) a precautionary power of attorney which only becomes valid if the person becomes legally incapacitated later. In this case, a person named in the power of attorney can fully represent the incapacitated person in all matters (including, e.g., medical care) mentioned in the document.[81] If an adult did not draw up a precautionary power of attorney, they can choose a representative in person and by written confirmation at a notary, an attorney or an adult protection association, while still able to do so.[82] If an incapacitated adult is unable to choose their representative, close relatives are assigned as their representative by law. Together with attorneys and the adult protection association, notaries are responsible for registering the legal representation of incapacitated adults in the Central Austrian Representation Registry (*Österreichisches Zentrales Vertretungsverzeichnis – ÖZVV).*[83] As a last resort, if no close relative is available for representation, the court appoints an adult protection association, a notary or an attorney as representative for the incapacitated person.[84]

In Romania, notaries are competent to authenticate a protective mandate, whereby a person designates another individual to act on their behalf in the event that they lose legal capacity in the future, thereby ensuring advance protection of vulnerable persons in a manner similar to the Austrian precautionary power of attorney.[85]

1.2.3 Enforcement / debt-related tasks

As is well known, notarial authentic instruments in most (civil law based) EU Member States which have been drafted jointly by a potential creditor and a potential debtor qualify as enforcement titles ('enforceable instruments') and are insofar equivalent to a court decision. A few examples shall be given here:

- Austrian notarial authentic instruments can be executed like a court order if the debtor has voluntarily declared that they accept immediate execution of this instrument in case of default in fulfilling an obligation described in this instrument. The legal basis for this can be found in Art. 3 of the Notaries' Act (*Notariatsordnung*).
- Estonian notaries authenticate mortgage agreements, which constitute enforceable instruments. They also authenticate debt instruments, which constitute enforceable instruments as well. Agreements on the payment of maintenance are similarly authenticated by notaries and are enforceable instruments.
- In Germany, notaries may issue a writ of execution by a notary based on an authentic instrument. The legal basis can be found in § 52 German Authentication Act, §§ 725 *et seq*., § 794 para. 1 Nr. 5, § 795 German Code of Civil Procedure (ZPO) concerning the notary's own authentic instruments and §§ 796c, 1053 para. 4 ZPO concerning specific settlement documents. The notary's

[81] §§ 260 *et seq.* Austrian Civil Code.
[82] §§ 264 *et seq.* Austrian Civil Code.
[83] §§ 268 *et seq.* Austrian Civil Code.
[84] §§ 271 *et seq.* Austrian Civil Code.
[85] Art. 2029^1 Romanian Civil Code.

duty to check before issuing the writ of execution is generally limited to the formal requirements for enforcement.

- In Greece, notarial documents are – with a few exceptions[86] – enforceable titles, no matter whether a separate enforceability clause is included.[87] Moreover, Greek notaries are responsible for performing a compulsory public auction.[88] If the proceeds are insufficient to cover the creditor's claims, creditor, debtor and other creditors may file some submissions within a specified time limit to the auction officer, i.e. the notary. Taking account of all the written submissions, the notary draws up a ranking list. The draft of the ranking list may not be later than two months after the deadline to the creditors. In case of conflicting claims submitted by creditors, the notary is responsible for resolving the dispute.[89] After the ranking list is issued, it can be disputed before the court. Furthermore, notaries may conduct a voluntary auction of movable and immovable property, if the auction is stipulated by law or ordered by a court decision. The notary in the district where the property is located is competent to carry out the auction.[90]
- In Hungary, some notarial instruments may be directly enforced without a court proceeding. A notary is only entitled to affix an enforcement clause to the notarial instrument that they prepared if all legal requirements are met. If the underlying obligation is rendered contingent upon some condition or date, the enforceability of an instrument also requires an authentic instrument and the occurrence of such condition or date. Furthermore, the notary attaches an enforcement clause to an authentic instrument incorporating a pledge agreement if the time limit for performance has expired. A notarial authentic instrument affixed with an enforcement clause is a 'decision' in the sense of national law. A decision in a notarial enforcement proceeding is treated in the same way as a decision in a court enforcement proceeding.[91]
- In Latvia, an authentic instrument may be submitted for compulsory enforcement in respect of the payment of money, the delivery of movable property or documents, a tenant's or lessee's obligation to pay rent or lease payments and vacate the property, as well as maintenance obligations, child custody arrangements and contact rights. Art. 107³ of the Latvian Notary Statute provides that an authentic instrument may be submitted for compulsory enforcement only if it complies with the statutory requirements prescribed therein. For example, the notarial instrument must clearly specify the amount of the debt to be recovered or, in matters concerning contact rights, it must clearly define the procedure, time and place for exercising such rights, as well as the parties' respective obligations and the allocation of expenses related to their exercise.
- In Lithuania, notaries may issue a writ of execution based on notarial instruments from which monetary obligations arise, mortgage agreements, bills of exchange or cheques. Notaries may also issue a European Enforcement Order based on mortgage agreements, bills of exchange and cheques.

[86] This does not apply to claims whose satisfaction, by operation of law, requires specifically and exclusively a judicial decision as the relevant title – for example Art. 947 and 949 Greek Code of Civil Procedure (for details, see *Mazis* in *Kerameus/Kondylis/Nikas*, Greek Code of Civil Procedure: Article by Article Commentary[2] (2021), Art. 904, para. 24).
[87] Art. 904 (2d) Greek CPC.
[88] Art. 959 Greek CPC.
[89] *P. Yessiou-Faltsi*, Civil Procedure in Hellas, Athens, 2020.
[90] Art. 1021 Greek CPC.
[91] Hungarian Act LIII of 1994 on judicial enforcement; Art. 3 a Brussels I *bis*.

- In Luxembourg, in accordance with Art. 37 Notarial law of 9 December 1976, notarial authentic instruments with an enforceability clause can be executed without any further court decision. A bailiff can obtain payment on that basis. Notaries who have drawn up the notarial authentic instrument relating to an enforceable claim may issue the certificate certifying the status of European Enforcement Order using the standard form set out in Annex III to Regulation (EC) No 805/2004.
- In Poland, a notarial authentic instrument in which the debtor submits to enforcement has the force of an enforcement order.[92] This means that, after obtaining an enforceability clause from the court, the creditor can directly initiate enforcement without the need to carry out lengthy order for payment proceedings in the court.
- Romanian notaries are authorised to issue enforceable authentic instruments in cases where the law allows it, such as loan agreements, debt acknowledgments or maintenance obligations. These documents gain the status of enforceable titles when explicitly stated in the notarial act.[93] If the debtor fails to comply, the creditor may initiate enforcement directly, without any prior court intervention.

In some countries, however, notaries cannot only enforce notarial authentic instruments but are also competent to enforce other instruments. In these cases, they act as court or court commissioners in performing this task.

- Croatian notaries are entitled to issue enforcement orders based on *trustworthy documents*, e.g. invoices, at the request of a creditor. In this function, they act as court commissioners.[94] This notarial competence as it stands now is rather novel. The system in place before 2020 led to some CJEU case law.[95] As a consequence, major amendments to the Croatian Enforcement Act were passed in 2020. Under the amended law, notaries act as court commissioners and perform functions equivalent to those of courts within the scope defined by law. A notary is not competent when the debtor resides or has a registered seat in another EU Member State. However, notaries are competent to issue an enforcement order for foreign creditors. Furthermore, the principle of *audiatur et alteram pars* proceedings has been introduced, as the debtor is notified of the initiation of enforcement proceedings. This ensures the right to be heard and effective legal protection, meaning that the Croatian enforcement system now aligns with the standards established by the CJEU's case-law.
- In France, notaries are the authority to issue a European Enforcement Order under Regulation 805/2004 for uncontested claims. In addition, in Alsace-Moselle, the notary is in charge of forced execution of real property. The notary is thereby appointed by the competent execution court and acts as *délégué du tribunal* (court commissioner). The notary is in charge of summoning the debtor, the creditor and the third-party holder to discuss the price, conditions, time, place and method of the auction. The notary organises and publicly announces the auction. The court is

[92] Art. 777 of the Polish Code of Civil Procedure.
[93] Art. 641 of the Romanian Code of Civil Procedure and Law No. 36/1995.
[94] JuWiLi I, p. 16.
[95] For details, see JuWiLi I, p. 90.

only responsible for ordering the execution and appointing the notary in charge of it.[96] After the sale through execution, the notary is also responsible for the distribution of money.[97]

- Hungarian notaries may issue an order for payment. Claimants may submit their request electronically to the Hungarian Chamber of Civil Law Notaries, which assigns the competent notary on the matter (automatically by the Chamber's central system). Natural persons may submit their requests in a paper-based form to any notary. The notary issues the payment order within three working days in case of requests submitted electronically and within 15 days in case of requests submitted in paper form. The debtor can respond in 15 days. If the order is challenged by the debtor, the case is heard by the court where proceedings continue. If the order by notary is not challenged, it has binding legal effect like a court judgement. If the notary rejects issuing a payment order, the claimant my appeal to commence non-contentious proceedings at the Regional Court with jurisdiction at the seat of the notary.[98]

Another interesting example for a notarial task can be found in Latvia where the notary can try an amicable settlement between a creditor and a debtor to stop a dispute from going to court. If the creditor unreasonably refuses to accept the fulfilment of obligations offered by the debtor, or the creditor cannot be found, or there are other reasons why the creditor cannot receive performance, the debtor may deposit the money owed, securities, documents or valuables with a notary for safekeeping. In the application to the notary, the debtor must provide the creditor's details, describe the nature of the obligation and explain the reasons preventing its fulfilment. The notary then notifies the creditor and invites them to apply to collect the items deposited within one month from the date of receiving the invitation. If the creditor refuses to accept performance of the obligation, the notary shall return the deposited items to the debtor and inform both parties of their right to resolve the dispute before a court. If a dispute arises among creditors as to which creditor is entitled to the object of the obligation, the sworn notary shall inform the creditors that the dispute must be resolved through court proceedings. Upon receipt of a final and binding court judgment, the sworn notary shall deliver the object of the obligation to the creditor designated in the judgment. Where non-cash funds have been deposited for safekeeping, the funds shall be transferred to the bank account indicated by the creditor.

1.2.4 Registries

Notaries are involved in registry-related tasks in two different contexts:

- Entries into public registries: Firstly, they can prepare, submit or enter data, either by presenting them to the registrar or by directly entering data into State-run registries (in some countries, they are obliged to initiate registration of those instruments which, under notarial law, must be registered by the notary within a specific period of time, e.g. in Malta). It should be noted that, in many EU countries, registries are not kept by courts or the judiciary authorities (as is the case for land registries in, e.g., Austria, Estonia and Poland) but by administrative authorities. Nevertheless, careful preparation of a submission to a registry by a notary can reduce the workload of the personnel responsible for handling the registries in question.
- Keeping of registries: Secondly, the notarial chambers themselves can keep registries, which may be accessible to members of the notarial profession and other legal professionals. While these

[96] JuWiLi I, p 29.
[97] For details, see JuWiLi I p. 30.
[98] JuWiLi I p. 22; Art. 3a Brussels I *bis*.

registries are not 'State registries' strictly speaking, they can nevertheless reduce the State authorities' workload by creating legal certainty and being used by notaries to fulfil their notarial duties.

Both contexts can be found across the EU Member States covered by this project, as the following examples shall demonstrate. Examples of the first context (**entries into registries**) can be found here:

- Generally speaking, in many EU Member States notaries are not only (more or less exclusively) competent to issue authentic instruments for the transfer or division of immovable property, but also competent to register those instruments with a land registry (e.g. Benelux countries, Greece). In other States, while registration requests can also be made by other legal professions, it is nevertheless notaries who handle the majority of such registration requests. For example, in Slovenia, notaries handle about 70% of registration requests with the land registry. Generally speaking, the role of notaries concerning register entries in this country ensures legal certainty through preventive legal checks and reliable entries in registries, especially in cross-border cases and digital settings.
- Austrian notaries do not only handle registration requests but also grant access to data in the company registry and the land registry. The law explicitly qualifies these latter activities as those of a court commissioner.[99]
- Bulgarian notaries submit entries to the real estate registry, the commercial registry and the registry of non-profit organisations, the register of marital property relations and the registry of special pledges (which are operated by the registry agency, an independent State body under the Ministry of Justice). However, notaries do not have public registration powers.
- In Czechia, notaries' competences (in their function as notaries[100]) go beyond that, as they are entitled to make direct entries in public registries, such as the company registry. Those entries are automatically displayed and notaries do not need confirmation by the court. Similarly, notaries in Slovakia are also entitled to make direct entries into the business registry.
- In Germany, entries in company registries must be examined by a notary prior to submission, with any errors being corrected beforehand. The purpose of this review is to relieve the burden on the courts responsible for maintaining the registries by ensuring that the mandatory preliminary review either results in the rejection of applications that are not eligible for registration or, in any case, that the notification of the review results provides information on any obstacles.
- Very often, notaries have to submit entries to registries via electronic means. For example, in Croatia, notaries submit applications for entries to the company registry and to the land registry electronically with an electronic signature. They may also issue authenticated excerpts from these public registries[101], which have the same legal effect as excerpts by the court. Also in Poland, in certain cases, especially when a notarial authentic instrument involves the transfer or encumbrance of real estate, or when an heir so requests upon issuance of a notarial certificate of inheritance, notaries are required to submit applications for registration in the land and

[99] JuWiLi I, pp. 14 *et seq.*
[100] JuWiLi I, p. 18: In Czechia, notaries only act as court commissioners in succession proceedings.
[101] This is not a court commissioner's activity: see JuWiLi I, p. 17.

mortgage registry through the electronic system.[102] An electronic entry option is, amongst other States, also available in Slovenia.

- Latvian notaries can directly register civil partnerships in the State-run Registry of Natural Persons.
- In Romania, notaries are required to collaborate with the land registry authorities. Prior to the authentication of any instrument relating to immovable property, notaries are required to conduct searches in the land registry and, following authentication, to submit applications for entries, annotations or cancellations of real rights with the competent land registry office. This obligation applies each time that a notary authenticates an instrument affecting immovable property, such as sale and purchase agreements, mortgage contracts, instruments concerning dismemberments of ownership rights and certificates of inheritance, thereby ensuring legal certainty in property transactions.

The second context, namely the **keeping of registries** by the notarial chamber, can also be found in several States:

- The Belgian Chamber of Notaries holds and manages (so entries do not require confirmation by a court) several registries, namely that of wills, marriage contracts and care mandates.
- In Germany, the Federal Chamber of Notaries maintains a central registry of wills (wills, inheritance contracts) and a central registry of advance directives (Power of attorney for healthcare and general matters, living wills).
- In Greece, Law No. 5221/2025[103] transferred the competence for the publication of wills and the validation of holograph wills from the district court to the notaries. A Wills Registry, maintained by the notarial chambers of the country, has been established. The publication protocol or the notary's refusal to publish a will can be challenged through the legal remedy of objection before the court of succession.[104] It should nevertheless be mentioned that some concern was raised from the side of the notarial profession that this 'unburdening exercise' could lead to notaries facing claims for damages, suits for faulty judgement and even criminal prosecution for false certification in case of errors.
- The Latvian Chamber of Notaries also maintains (since 2014) a registry of powers of attorney and a registry of wills, in which data on last will documents are entered. The notary who certifies such documents as authentic instruments provides data for these registers about the powers of attorney or their revocations, wills and inheritance agreements.
- The Austrian Notarial Chamber is also authorised by § 140b of the Austrian Notaries' Act to keep several registries, amongst others the 'Central Registry of Wills' and the 'Central Austrian Representation Registry' (*Österreichisches Zentrales Vertretungsverzeichnis*).
- In Romania, several national notarial registries are maintained by the bodies of the Union of Notaries of Romania, including the Registry of Powers of Attorney, the Registry of Liberalities (testaments and donations), the Registry of Succession Options, the Registry of Matrimonial Property

[102] Art. 92 § 4 and Art. 95ga Polish Law on Notaries.
[103] Government Gazette A 133/28.7.2025.
[104] The core provision is Art. 88 of Law No 5221/2025.

Regimes, the National Registry of Creditors, the Registry of Successions, the Registry of Divorce Records and the Registry of Legal Capacity of Persons. Notaries are required to conduct searches in and enter relevant data into these registries either prior to or following the completion of the related notarial procedure, thereby ensuring comprehensive record-keeping and legal certainty in the exercise of their functions.

- The Notarial Chamber of Slovenia is the keeper of the Central Registry of Wills. This contains information on wills drawn up or kept by notaries, by attorneys and by courts based on the Inheritance Act. The Chamber keeps the Registry of Wills as an electronic data base. Applications for entry or information can be made electronically or in written form. Furthermore, the Registry of Matrimonial Property Agreements is established and maintained by the Chamber of Notaries of Slovenia. The registry contains data on concluded agreements, and the Chamber of Notaries ensures public access to registered information in accordance with the law.

1.2.5 Company law

Notaries have always played a decisive role in company law. The main role of notaries in company law, which is very widespread in the countries covered by this study, is to draft authentic instruments (notarial instruments) which are required by law for the formation of a company. For example, under Austrian and German law, the authentication of the articles of association of a company with limited liability by notarial authentic instrument is – with minor exceptions in Austria – required by the Limited Liability Company Act. This is regularly accompanied by the instrument being filed with the company registries (see already in the 'Registries' section 1.2.4.). Many other EU Member States also provide for an optional or compulsory role of a notary in the establishment of certain types of companies (e.g. Poland and Slovenia). In Slovenia, a limited liability company can be registered online, with a one-stop shop service provider (SPOT; Slovenian Business Points) or with a notary. Other examples include:

- Estonian notaries authenticate transactions concerning the transfer and encumbrance of shares in private limited companies. These transactions are registered in the relevant registries, with ownership transferring and encumbrances arising as of the registration entry.

- In matters relating to companies, Latvian notaries may certify the proceedings of company meetings, prepare and authenticate the required documents, and submit them to the Latvian company registry. However, Latvian notaries do not have the authority to make decisions regarding company registration. Such decisions are made exclusively by officials of the company registry, known as State notaries.

- Notaries in Luxembourg are exclusively competent to draw up authentic instruments relating to certain types of limited companies (*société à responsabilité limitée, société anonyme, société en commandite par actions, société européenne*) concerning incorporation, capital increases or reductions, mergers, divisions, transfers of registered offices, conversions, amendments to the articles of association and more. Notaries are in charge of recording and publishing these authentic instruments in the business registry (RESA).

- Romanian notaries authenticate certain company-related documents when required by law, such as articles of association involving contributions in kind, changes to company structure or founding documents of associations. Although company incorporation is generally managed through simplified administrative proceedings, the involvement of a notary is mandatory for specific acts requiring legal certainty and formal validation.

- Under the Companies Act (ZGD-1), Slovenian notaries hold substantial competences in company law, many of which require documents to be drawn up in the form of a notarial authentic instrument. Among these competences, one can find the contract on the transfer of a business to a successor entrepreneur, the preparation of the articles of association of a joint-stock company, the formation of an SE Holding Company (Societas Europaea), the contract on the transfer of a business share of a limited liability company and a variety of shareholder declarations, including in the context of company mergers.

In some States, the role of notaries, though again partially optional, goes beyond authentication (and registration) of articles of association or of other company-related documents.

- Belgian notaries are exclusively competent for the constitution of most company types, such as the limited and public company, including directly entering them into the registry via a digital application on the notarial intranet. The Belgian notary can be qualified as the one-stop-shop for company founders.
- In the Netherlands, notaries mandatorily draw up (together with the founders) authentic instruments of incorporation which include the articles of association of private and public limited liability companies. The notary will normally also file this instrument electronically at the Chamber of Commerce.
- Greek notaries hold a 'one-stop-shop' position regarding formation of companies. However, since 2016,[105] *no* notarial instrument is necessary for the formation of private limited liability companies and public limited liability companies, if the parties agreed on using the model articles of association provided by the Ministry of Finance. The exclusive competence of notaries in the company formation was upheld where mandated by provisions outside commercial law, such as in case of contribution of immovable property to the company as part of the share capital and in cases of mergers, divisions and conversions of companies.
- In Italy, the involvement of a notary is mandatory for company incorporation of partnerships and limited liability companies. A share-capital company can be operational in urgent cases by date of the instrument or otherwise in three to four days. The notary functions as a 'one-stop-shop', providing all the checks required by law for the establishment of companies and forwarding all necessary documents online to the registry. It is possible to incorporate limited liability companies and simplified limited liability companies through a process conducted entirely online under the supervision of a notary.[106] Since 15 December 2021, it has also been possible for a notary to receive an instrument of incorporation for a Limited Liability Company by electronic authentic instrument with the participation of all or some of the founders via videoconference.

Despite considerable differences as to the degree of involvement of notaries in the establishment of (and in changing) companies, this involvement also contributes to a significant unburdening of company registries and/or courts as they guarantee that articles of association have been pre-checked by a qualified legal professional.

[105] Greek Law Nr. 4441/2016 (G. G. 227 A 6.12.2016).

[106] Italian Legislative Decree No. 183/2021, implementing Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ L-186/80.

1.2.6 Others

Bulgarian notaries can, under Article 587 of the Civil Procedure Code, certify the right of ownership of a person to immovable property if this person does not possess a document proving their right. This has been qualified as a case where a notary 'administers justice' by the national rapporteur.

Czech notaries are entitled to draw up declarations of insolvency. They can also exercise the function of an insolvency administrator. This is a rare activity for notaries in Czechia.

Estonian notaries authenticate transactions involving the transfer and encumbrance of immovable property. These transactions are also recorded in the relevant registries, with ownership and encumbrances taking effect upon registration.

Hungarian notaries are competent to annul securities and authentic instruments.[107] Holders of lost, stolen or destroyed security or people who have a right or are subject to an obligation under the security may approach the notary to declare annulment. The notary's decision on annulment has the same effect as a judgement in court.[108]

Latvian notaries may also release up to 5,000 Euro from consumer credit obligations. This proceeding is designed to assist individuals with limited financial means, including those receiving disability benefits or old-age pensions, as well as people caring for at least three children or a child with a disability. To initiate the process, an applicant must submit a written application to a notary, accompanied by documents verifying their status and the circumstances prescribed by law, along with an explanation of why they are unable to fulfil their obligations. Each debtor may use this proceeding only once in their lifetime. However, the creditor retains the right to object to the process and may bring the matter before a court in the event of a dispute.

Netherlands: Under the Dutch Code of Civil Procedure, the notary plays a key role in matters concerning estates and community of property. The notary is empowered to seal and unseal property belonging to an estate or community of property and to oversee its division.[109] Similar powers to seal property are also granted under the Dutch Bankruptcy Act. Similarly, Belgian law requires that the transfer of immovable property must be concluded with an authentic notarial instrument. This goes beyond the role of the notary in other jurisdictions, where the notary is limited to authenticating the signatures of the parties to enable the filing of a property transfer contract with the land registry (e.g. in Austria, where this authentication of signatures can be performed alternatively by a notary or the court).

In Slovakia, the court authorises a notary to conduct the proceedings for redemption of authentic instruments and decide on the matter.[110] Notaries in proceedings for the redemption of authentic instruments act as court commissioners. Those proceedings are rather rare.

1.3 Consensual divorce

Out of all the participating EU Member States, 20 have adopted the concept of divorce by mutual consent. Poland and Slovakia are the only ones that do not offer the option of divorce by mutual consent. In Poland, some discussions are underway aimed at introducing extrajudicial consensual divorce, and there was a draft law providing for such divorce before the civil registrar. However, none of those proposals has resulted yet in the introduction of binding legislation. Ten EU Member States have already outsourced

[107] Act XLV of 2008 on Certain Notarial Extrajudicial Proceedings, short KJNP§ 28-36.
[108] JuWiLi I, p. 23.
[109] Art. 658, 668, 677 Wetboek van Burgerlijke Rechtsvordering (Dutch Code of Civil Procedure).
[110] JuWiLi I, p. 25.

consensual divorce proceedings from the judicial system to notaries or public administrative authorities, either entirely or partially. In eight of those EU Member States, notaries dissolve marriages by mutual consent, either with exclusive competence or as an alternative to court proceedings.[111] In principle, non-consensual = unilateral forms of divorce – which do not imply litigation (non-contentious proceedings) – could be also handled by non-judicial authorities. However, in the EU Member States examined in this study, only consensual divorce can be handled by non-judicial institutions. Notaries and other non-judicial institutions in some countries perform tasks (e.g., division of property) integrated in otherwise judicial court proceedings, which are briefly mentioned below and in 1.2.2 (Family law tasks) above.

In the following, the extra-judicial models of consensual divorce will be summarised. Thereby, the following questions will be examined:

- Which extra-judicial actors/authorities are involved in the proceeding? Do the parties have a choice between different authorities and, if so, between which ones?
- Is the extra-judicial authority (most often a notary) bound by the rules of international jurisdiction of the Brussels II *ter* Regulation? Is it authorised to apply foreign law (according to Rome III Regulation No. 1259/2010)?
- What are the requirements for a consensual divorce? In particular, is an agreement on certain consequences of divorce mandatory (e.g., maintenance, division of property, parental responsibility and residence of minor children)? Does the presence or absence of minor children have an influence on the proceeding? Are there any particular form requirements?
- Do the parties have to comply with any time limits or deadlines: for reconciliation, for separation or with requirements to prove an irretrievable breakdown of marriage?
- Is there any control of the fairness of the agreement submitted by the parties integrated in the proceedings or available to the weaker party elsewhere?

1.3.1 Consensual divorce involving notaries

Estonia

In Estonia, spouses have the option to either approach the civil registrar or the notary for their divorce.

The civil registrar can only grant divorce if both spouses reside in Estonia and Estonian law applies. Notaries can always grant divorces if Estonia has jurisdiction under the Brussels II *ter* Regulation.[112] Spouses may agree on the law applicable to their divorce.[113] Notaries are entitled to grant divorce in domestic and cross-border cases, even when foreign law is applicable.

The couple must only agree on getting divorced. They can agree that they wish to divorce and submit a written application for divorce either jointly or separately. If disputes arise concerning matrimonial property, children or maintenance, this does not prevent the spouses from getting a consensual divorce and having the disputed matters heard in court. Agreements concerning maintenance and custody of minor children are not mandatory but can be filed anytime, also during the marriage. Furthermore, there

[111] The role of notaries in divorce by mutual consent was explicitly mentioned by the European Commission in its 2026 EU Justice Scoreboard (COM(2026) 273), pp. 25 and 26 (including figure 26). In this context, the Commission stresses that this notarial activity is "aiming at unburdening courts and in that way potentially enhancing the efficiency and quality of the justice system".
[112] *Karm,* Estonia in Code FS para. 17.
[113] *Karm,* Estonia in Code FS para. 17.

is no obligation to divide property. The spouses can keep joint property. The application can be submitted remotely to both notary and civil registrar. Both the notary and the civil registrar put the entry into the Population Registry on the day that the divorce is finalised.[114]

Divorce is not granted earlier than one month or later than three months after the joint application for divorce.[115]

The agreement on consequences of divorce is not required for spouses to get a consensual divorce. Spouses are legally advised by the notary when reaching the agreement on maintenance, joint property and custody of children.[116] The civil registrar does not provide legal assistance.[117] The content of the agreement on the consequences of the divorce is not subject to any specific review. However, as a contract it remains subject to the general rules of contract law.

France

In France, divorce by mutual consent is granted by a notary or a court. In both cases, the spouses must by represented by attorneys.

Notaries can only grant divorce if French law applies, regardless of whether the parties are domiciled in France.[118] Notaries are not subject to the rules of international jurisdiction.[119] However, it should be noted that notaries may liquidate matrimonial property under a foreign regime.

The spouses can choose the court as authority to grant divorce. Only when a minor child demands to be heard by the court does the court have exclusive authority to grant divorce.[120] If the agreement is recorded by the court, the court grants divorce if they are convinced that the spouses agree freely and are fully informed.[121]

The court may refuse divorce if the agreement does not sufficiently consider the best interests of children or of one of the spouses.[122]

Spouses are also free to choose the notary even when minor children are involved and no minor child asks to be heard by the court. The divorce agreement is drawn up and countersigned by the spouses' attorneys and registered by a notary. The notary has to ensure that both parties consented to the agreement.[123] If the spouses opt for non-judicial divorce, they have to agree on the personal and property consequences of the divorce, i.e. maintenance, custody and division of property.[124]

The notary does not perform a review of content. They carry out a formal check.[125]

Greece

[114] § 46 (3) Vital Statistics Act (PKTS).
[115] *Karm,* Estonia in Code FS para. 19.
[116] § 18 (1) of the Notarisation Act (*tõestamisseadus*).
[117] *Karm,* Estonia in Code FS para. 20.
[118] Circular from France's Minister of Justice, 26 January 2017.
[119] *Berre,* France in Code FS para. 9.
[120] C civ, Art. 229 (2).
[121] C civ, Art. 232.
[122] C civ Proc, Art. 1100; *Berre,* France in Code FS para. 8, 14.
[123] *Berre,* France in Code FS para. 13.
[124] *Berre,* France in Code FS para. 11.
[125] *Berre,* France in Code FS para. 11.

In Greece, divorce by mutual consent is granted exclusively by a notary.[126] In divorce proceedings, each of the spouses must be represented by an attorney.[127]

Greek notaries may grant divorce if Greece has jurisdiction under Brussels II *ter*.[128] Notaries identify the applicable law according to the Rome III Regulation. However, some Greek legal scholars suggest that, if Greek law is not applicable, the notary must inform the parties and refuse to draw up a notarial authentic instrument. [129] In practice, this hurdle is often circumvented by the spouses entering into a choice of law agreement under Art. 5 of the Rome III Regulation.

The spouses submit a written agreement or joint digital declaration on their divorce. If minors are involved, an additional agreement must include exercise of parental care, place of residence of the child, contact rights and the amount of maintenance.[130] The agreement is submitted to a notary, who draws up the authentic instrument on dissolution of marriage and validates additional agreements for children. The spouses and their attorneys sign the instrument, which is then filed to the civil registry for registration.

This proceeding does not involve a review of fairness of the agreement by the notary on the basis that the agreement is considered to be neither in the children's nor in the spouse's best interest.[131]

Latvia

In Latvia, consensual divorces are handled exclusively by notaries.[132]

Notaries comply with Latvia's international jurisdiction under the Brussels II *ter* Regulation.[133] Parties are free to choose their notary; there are no national rules on territorial jurisdiction. In consensual divorce proceedings, notaries apply the Rome III Regulation to determine the applicable law. Notaries may apply foreign law in divorce proceedings.[134]

The spouses submit a joint application for divorce and their marriage certificate. The notary can grant a divorce with minors involved. If the spouses have minors and joint property, the agreement must include custody, access, maintenance and property division. Both a private agreement without the involvement of a notary or attorney and an agreement as a notarial instrument are allowed for property division. However, where the spouses have joint minors, as of 1 March 2026, any agreement concerning child custody, maintenance and contact rights is required to be concluded in the form of a notarial authentic instrument.

There is a mandatory waiting period of 30 days. In this period, the spouses can revoke their submission.

For an authentic instrument the notary ensures that the agreement is in accordance with the parents' intent and that it includes the mandatory arrangements for minors. The notary does not hear minors. However, the notary does not issue a notarial instrument that is obviously not in the children's best interests. A content review by any other authority is not conducted.

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[126] Art. 22 Law 4509/2017.
[127] Art. 1441 Greek CC.
[128] *Tsitsias*, Issues arising out of Regulation 2019/1111 (Brussels IIb or ter), Epitheorisi Politikis Dikonomias (EPolD) 2020/4, 321, 351.
[129] *Zervogianni,* Greece in Code FS para. 26; *Katras*, Divorce by mutual consent after Law 4800/2021, EllDni 2021/4, 1050 (1054).
[130] *Zervogianni,* Greece in Code FS para. 18.
[131] *Zervogianni,* Greece in Code FS para. 21.
[132] Amendments to the Notariate Law, 28 October 2010.
[133] Art. 326 (1) Latvian Notariate Law.
[134] Art. 326 (3) Latvian Notariate Law.

Lithuania

In Lithuania, notaries and courts have authority to grant consensual divorce. Spouses have no choice as to which institution to apply to. If they meet the conditions for divorce by notarial proceeding, they must apply to a notary.

Notaries comply with the rules of international jurisdiction under the Brussels II *ter* Regulation. There are no national rules preventing notaries from applying foreign law in accordance with the Rome III Regulation.

A marriage may be dissolved by a notary only if the spouses do not have minor children together. To obtain a notarial divorce by mutual consent, spouses must submit a written declaration that they have not lived together for over one year and an agreement on the consequences of divorce, i.e., property division and maintenance.[135] A key requirement for property division is to provide evidence of information to all known creditors, who have 30 days to object.[136] If objections are not resolved, the notary will not authenticate the agreement. If authenticated, the agreement has legal force from the next working day.

To apply for consensual divorce, the marriage must have lasted for over a year. The spouses must agree on property division and maintenance.[137] Furthermore, to apply for notarial divorce, spouses must not live together for one year.[138] Both spouses must have legal capacity. The notary proposes a reconciliation period of up to six months. The spouses can refuse the reconciliation.[139]

The notary performs a content review to ensure that the agreement complies with the legal requirements and does not contravene public order or substantially violates a spouse's rights.

If the spouses have minors, the court is the competent authority to grant divorce. Judicial divorce by mutual consent requires spouses to submit a joint application and an agreement on property division, child support and maintenance.[140] The civil registrar registers the dissolution of marriage *ex officio* based on the court's decision or on the notary's submission.

The substantive requirements for divorce in court are the same as for a notarial divorce: the duration of marriage was for over one year, the spouses must agree on property division, custody and maintenance, and both spouses must have legal capacity.[141] However, only the notarial divorce requires spouses to not live together for one year.

The court reviews the agreement on compliance with spouses' and children's best interest and public order. If the agreement does not comply, the court orders them to reach a new agreement.

Romania

Under Romanian law, consensual divorce can be granted by the notary, civil registrar or the court.

International jurisdiction of Romanian authorities is determined under the Brussels II *ter* Regulation. The applicable law to the divorce is determined under the Rome III Regulation. It must be noted that Art. 137 (2) Law of Public Notaries and Notarial Activity (LNP), a provision of Romanian Notarial Law dating back to 1995, invites interpretation in a sense that Romanian notaries are limited to the application of

[135] *Bogdiewicz,* Lithuania in Code FS para. 21.
[136] Art. 3.54 Lithuanian CC.
[137] *Bogdiewicz,* Lithuania in Code FS para. 21.
[138] *Bogdiewicz,* Lithuania in Code FS para. 21 and 33; this is a unique requirement for notarial divorce.
[139] *Bogdiewicz,* Lithuania in Code FS para. 33.
[140] Art. 3.53 Lithuanian CC; *Bogdiewicz,* Lithuania in Code FS para. 21.
[141] *Bogdiewicz,* Lithuania in Code FS para. 21.

Romanian law.[142] Although this national provision could lead to restrictive interpretation, the applicable law is, in notarial practice, determined under the Rome III Regulation and applied by notaries accordingly.[143] Civil registrars are not explicitly limited to the application of Romanian law and thus can apply foreign law as well. The territorial competence of both the civil registrar and the notary is determined by the place where the marriage was concluded or the spouses' last common residence.[144]

The notary can grant divorce with or without minors being involved. The civil registrar may only grant divorce if no minors are involved.[145] The spouses must submit an application covering parental responsibility, maintenance and division of matrimonial property to the notary. With regard to minors, the spouses must agree on the surname, custody, children's residence and contribution to costs.[146] If the spouses opt for notarial divorce, joint parental authority is mandatory. The divorce is officially entered into the civil status and matrimonial registry.

This proceeding requires a 30-day reflection period. Furthermore, a social inquiry report by the tutelary authority is submitted when children are involved, evaluating whether the parents' draft agreement on custody, residence, maintenance and contact is in the child's best interests.[147] The notary must also hear minors over the age of ten. Otherwise, they cannot grant the divorce.

The agreement is reviewed by the tutelary authority based on the children's best interests.

The civil registrar is strictly limited to divorces without minors involved and cannot deal with property or maintenance issues.[148] The application for divorce must be filed in person and jointly by the spouses. The divorce is officially entered into the civil status and matrimonial registries.

This proceeding also requires a 30-day reflection period before issuing the certificate.[149]

The civil registrar does not review the agreement for fairness between the parties.

An application for divorce to the court must be submitted with a joint signature of both spouses. The spouses can be represented by the same attorney. Spouses must agree on post-divorce measures, in particular parental responsibility, maintenance and the name after divorce. If the spouses want their property divided, the matter is seperated from the divorce proceedings and decided separately. In contrast to the notarial proceeding, spouses may agree that parental responsibility will be exercised by one of them exclusively.

The court examines the validity of the spouses' consent and ensures children's best interests.

Slovenia

In Slovenia, notaries and courts have the power to grant consensual divorce.

[142] Art. 137(2) LNP, *Vlad,* Romania in Code FS para. 43.
[143] *Popescu/Oprea*, Remarks on International Jurisdiction in Matters of Divorce and Parental Responsibility, Bulletin of Public Notaries no. 4/2024 75-78.
[144] Art. 375 of the Romanian CC and the Implementing Regulation of Law no. 36/1995.
[145] See Art. 375 Romanian CC.
[146] See JuWiLi I p. 63.
[147] *Vlad,* Romania in Code FS para. 33.
[148] *Vlad,* Romania in Code FS para. 28.
[149] *Vlad,* Romania in Code FS para. 38.

Both, notaries and courts are competent to conduct divorce proceedings if Slovenia has jurisdiction under the Brussels II *ter* Regulation.[150] The applicable law is determined under the Rome III Regulation. There is no provision under national law preventing notaries from the application of foreign law.

Spouses who have no joint minor children and who mutually agree to divorce can request a notary to execute an authentic instrument if they have already reached an agreement on three specific issues: division of co-owned property, tenancy of their shared home and maintenance for any spouse who is unemployed without fault and lacks means of subsistence.[151] The divorce becomes final immediately upon the signing of the notarial instrument. The notary forwards the act to the civil registry for declaratory purpose.

The notary does not conduct a review of the parties' agreement. The notary merely has an obligation to inform and warn parties in a clear and understandable manner about the foreseeable consequences of their decisions and statements drawn up in the notarial instrument.[152]

If minors are involved, divorce is heard by court. A court may grant a consensual divorce only if the spouses agreed on division of co-owned property, tenancy of their shared home and maintenance for each other. Specifically, the couple must agree on the care, upbringing, maintenance and contact schedules for all joint children.[153] Divorce is registered by the civil registry.

Crucially, before granting the divorce, the court must verify that the agreement concerning the children is in the children's best interests. If the court determines this condition is not met, the request for consensual divorce must be rejected.

Spain

In Spain, notaries, court officers and courts are responsible for granting consensual divorce. The parties are free to choose between the notary and the court officer, provided there are no minors or psychologically disabled children in need of special support. Otherwise, judges have exclusive competence to grant divorce. In all cases, both spouses must be legally assisted by an attorney.[154] If the spouses agree on divorce, they can share the representing attorney.

Notaries comply with the rules of international jurisdiction of the Brussels II *ter* Regulation.[155] Notaries may apply foreign law in divorce proceedings (Rome III Regulation).

The notarial divorce is only possible if the spouses do not have common minors or disabled children.[156] The spouses must agree on divorce and post-divorce measures[157] in the form of an authentic document. The post-divorce measures include property division and maintenance. If the spouses have economically dependent adult children, these children also have to agree upon post-divorce measures.[158] The competent notary is the one where the spouses had last lived together or at the domicile of one of the spouses. The parties are not entirely free to choose the notary that they approach.[159]

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[150] *Erjavec,* Slovenia in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 37.
[151] Art. 97 Slovenian Family Code.
[152] Art. 42 Slovenian Notarial Act.
[153] Art. 96 Slovenian Family Code, see *Erjavec,* Slovenia in Code FS para. 19.
[154] *Alguacil*, Spain in Code FS para. 38.
[155] *Alguacil*, Spain in Code FS para. 40.
[156] JuWiLi I p. 65.
[157] Art. 90 Spanish CC.
[158] *Alguacil*, Spain in Code FS para. 38.
[159] JuWiLi I p. 65.

An application for divorce is possible at the earliest time three months after marriage.[160]

If the notary finds the agreement to be illegal or harmful to either spouse, they refuse to grant divorce.[161]

The spouses can also approach the Counsel of Administration of Justice (referred to as court officers, former court clerks) for consensual divorce. The competent court officer is within the court in whose territory the spouses were habitually resident or either of the spouses is habitually resident. Cases are assigned mandatorily to officers, with the spouses not able to choose.

The content of the agreement between the spouses on post-divorce measures is the same as in notarial divorce.

The court officer approves the agreement between the spouses unless it is harmful to either spouse.[162]

If the spouses have minors or disabled children, the marriage must be dissolved in judicial proceedings. The spouses must agree on property division and maintenance, in addition to custody, maintenance and contact with the children.

As in notarial divorce, the earliest possible time to apply for divorce before a judge is three months after marriage.

Extra-judicial bodies and courts will review the content of the agreements submitted by the parties. If the effects are found to be illegal or harmful to either party, the notary and the court officer must refuse further action. Parties are able to circumvent a refusal by entrusting a different notary.[163] In judicial proceedings, the court will check and approve the agreement on property and maintenance for the spouses, and will take particular care to ensure that the agreement by the spouses fits the children's best interest.[164]

1.3.2 Consensual divorce by non-judicial authorities other than the notary

Italy

In Italy, spouses can either get divorced with the assistance of attorneys (*negoziazione assistita*) involving the public prosecutor's office, at the civil registrar or at the court.

All divorce proceedings are subject to the EU rules on international jurisdiction (Brussels II *ter*) regardless of the form chosen. Judicial divorce is always subject to international jurisdiction rules. Jurisdiction is assessed under the Brussels II *ter* Regulation. *Negoziazione assistita* is legally equivalent to a judicial divorce once authorised by the public prosecutor. Italian authorities must verify that Italy has jurisdiction under Brussels II *ter* Regulation. Also, civil registrars must ensure that Italy is internationally competent. The CJEU decided that divorce agreements before the civil registrar constitute a *judgement* under Brussels II *bis.*[165] However, in practice, this form is problematic in cross-border cases and often avoided when one spouse is foreign or habitually resident abroad. The Rome III Regulation applies in Italy regardless of the authority handling the divorce.

During assisted negotiations, the spouses amicably resolve their dispute with the assistance of attorneys. The agreement is authenticated by the attorneys and the certificate is issued by the court. This option is

[160] *Alguacil*, Spain in Code FS para. 34.
[161] *Alguacil*, Spain in Code FS para. 39.
[162] *Alguacil*, Spain in Code FS para. 39.
[163] *Alguacil*, Spain in Code FS para. 39.
[164] *Alguacil*, Spain in Code FS para. 45.
[165] CJEU 15 November 2022 C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht gegen TB,* ECLI:EU:C:2022:879.

available with or without minors. The agreement must be in writing and must specify the time frame for the conclusion of the final agreement on divorce. This period should be between one and three months.[166] Furthermore, financial and custody arrangements must be made. However, in extra-judicial proceedings, no real estate transfers are possible.[167] The agreement can only contain obligations to transfer real estate.[168] Information about the availability of mediation and contact with children must be included by the attorneys.[169] The agreement is transmitted to the public prosecutor of the court for authorisation.

A consensual divorce can only be filed after six months of consensual 'legal separation'[170] or 12 months of judicial legal separation.

Attorneys must verify compliance with mandatory rules and public order. Moreover, they check the fairness of maintenance if it is a lump sum, but not maintenance paid on a monthly basis.[171] Without children present, the public prosecutor reviews the agreement for formal correctness and mandatory rules.[172] If children are involved, the public prosecutor assesses whether the parental plan is in the children's best interests. [173]

The proceeding before the civil registrar is only available if there are no minors involved. The marriage must be validly registered, whether concluded in Italy or abroad and transcribed, and at least one spouse must be resident of the Municipality. This agreement cannot include any transfer of real estate.[174] After the instrument is drafted, there is a mandatory waiting period of 30 days. Afterwards, the instrument can be confirmed and registered. The civil registrar does not perform any content review.[175]

Furthermore, parties have the option to jointly appear before the court with an agreement on their maintenance, property and a parenting plan for the custody of their children.[176] The court verifies that the plan is in the best interests of the children. In addition, the court ensures that the agreement complies with mandatory provisions, including protection of the economically weaker party.[177]

Portugal

In Portugal, spouses have divorce either at the court or at the civil registrar.

The civil registrar and the court must comply with the rules on international jurisdiction (Brussels II *ter*).[178] There are no provisions preventing civil registrars from applying foreign law.

If the spouses want to get divorced by civil registrar, they have to agree on the exercise of parental responsibilities of any child, the maintenance of the spouse in need, the allocation of the use of the family

[166] *Chiricallo/Stracqualursi,* Italy in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (Code FS) para. 97.
[167] *Chiricallo/Stracqualursi,* Italy in Code FS para. 112.
[168] *Chiricallo/Stracqualursi,* Italy in Code FS para. 113.
[169] *Chiricallo/Stracqualursi,* Italy in Code FS para. 99.
[170] *Chiricallo/Stracqualursi,* Italy in Code FS para. 65, 66: Legal separation suspends all spousal duties and allows the parties to live apart. Each spouse retains their succession right and maintenance must be paid to the spouse with lower income.
[171] *Chiricallo/Stracqualursi,* Italy in Code FS para. 100.
[172] *Chiricallo/Stracqualurs,i* Italy in Code FS para. 104.
[173] *Chiricallo/Stracqualursi,* Italy in Code FS para. 104.
[174] *Chiricallo/Stracqualursi,* Italy in Code FS para. 112.
[175] *Chiricallo/Stracqualursi,* Italy in Code FS para. 108.
[176] *Chiricallo/Stracqualursi,* Italy in Code FS para. 83.
[177] *Chiricallo/Stracqualursi,* Italy in Code FS para. 84.
[178] *Pedro,* Portugal in Code FS para. 33.

home and the future treatment of pets, included in the complementary divorce agreement.[179] If all those conditions are met, the spouses can submit a joint request to the civil registrar. The request must be signed by the spouses or their attorneys. If the spouses agree on divorce, they do not have to prove that the marriage has irretrievably broken down.[180] The registrar informs the spouses of available mediation services.

If the spouses insist on divorce, the registrar reviews the documents and assesses whether the agreement serves the interest of both spouses and children.[181] If all requirements are fulfilled, the divorce is decreed and registered.

When a minor child is involved, the file is submitted to the public prosecutor at the court of first instance to verify if it adequately safeguards the interests of the minor child.[182]

If the spouses agree on divorce but cannot agree on necessary consequences, the case is heard by a court. The court reviews the divorce agreements and, if it finds that they do not protect the interests of either spouse or their minor children, it will propose necessary changes or define the conditions for the unresolved matters. Once all conditions are finalised, the court decrees the divorce by mutual consent.

As already mentioned in chapter 1.3 above, it must be noted that, in **Poland**, there is currently a discussion about a reform of the Family and Guardianship Code and other laws. The Ministry of Justice proposed a draft bill enabling spouses to approach the civil registry for consensual divorce.[183] The government's bill amending the Polish Family and Guardianship Code and certain other acts (Sejm Document No. 2121), providing for consensual divorce before the civil registrar, was adopted by the Sejm, the lower house of the Polish parliament, on 13 March 2026. Since the Senate, the upper house of the Polish parliament, did not propose any amendments, the bill was forwarded to the President for signature. The President vetoed the bill on 30 April 2026, and submitted a motion to the Sejm requesting that it be reconsidered (Sejm Document No. 2547). The bill is currently under consideration in the Sejm and is the subject of a political dispute. Opponents of the bill allege that it undermines the stability of the family by simplifying divorce procedures.This option of consensual divorce before the civil registrar would be available to spouses without any minor children who have been married for at least one year. Beside the proposed option of consensual divorce granted by the civil registrar, the option for the spouses to approach the court remains available.

1.3.3 Notaries unburdening courts in judicial divorce proceedings

In all other EU Member States, consensual or unilateral divorces are granted by the courts. However, notaries fulfil important tasks improving and ensuring a smooth proceeding for judicial divorces. This applies to several agreements, which the spouses have to submit to the court in the course of their consensual divorce proceedings or to the division of property in a non-contentious proceeding in general. For more details on these tasks, see our summary in chapter 1.2.2 supra.

[179] *Pedro,* Portugal in Code FS para. 21.
[180] *Pedro,* Portugal in Code FS para. 20.
[181] *Pedro,* Portugal in Code FS para. 22.
[182] *Pedro,* Portugal in Code FS para. 23.
[183] See the Press Release of the Ministry of Justice of 14.11.2025 https://www.gov.pl/web/sprawiedliwosc/nowe-rozwiazania-w-prawie-rodzinnym---mozliwosc-rozwodu-przed-urzedem-stanu-cywilnego (last accessed on 28.04.2026).

1.3.4 Summary

To sum up, ten of 20 participating EU Member States have opted to outsource consensual divorce proceedings to extra-judicial authorities. Two participating EU Member States do not offer the option of divorce by mutual consent.

Institutions with power to divorce: Most outsourced divorce systems offer multiple options for spouses to consider when they want to get divorced. Most options are combinations of notaries, civil registrars and/or courts. In addition, in France and Greece, both spouses must be represented by attorneys. Also in Spain spouses must be legally assisted by an attorney, but if they agree on divorce and post-divorce measures, they can share one attorney. In Greece and Latvia notaries have *exclusive* competence for divorce. In Estonia, France, Lithuania, Romania, Slovenia and Spain, notaries have a shared competence either with courts or civil registrars or both. In Italy and Portugal, competent authorities are civil registrars and courts. In addition, Italy offers the option of assisted negotiations by attorneys, reviewed by the public prosecutor's office.

International jurisdiction and applicable law: In divorce proceedings, notaries are explicitly limited to the application of their national law in France and Greece. This is astonishing as they should comply with the prevailing Private International Law (PIL) provisions of the Rome III Regulation, just as courts and other authorities have to. Furthermore, notaries comply with the rules on international jurisdiction of the Brussels II *ter* Regulation in Estonia, Greece, Latvia, Lithuania, Romania, Spain and Slovenia. Also, in Portugal and Italy, civil registrars comply with the EU rules on international jurisdiction.

Requirements and limitations: Furthermore, the competence of notaries to grant divorce is sometimes limited to cases when the spouses do not have minor children. This is the case in Lithuania, Slovenia and Spain. Overall, spouses usually have to agree on division of property, maintenance and children's custody and maintenance. However, in Estonia parties must only agree on getting a divorce. An agreement on the consequences of divorce can be reached at a later time.

Time periods: Some States have implemented a minimum duration of marriage or a waiting period for one month when divorce may be granted. This applies for Estonia, Latvia and Romania. However, substantive requirements linked to a time period, such as irretrievable breakdown of marriage or separate residence, are not stated in most of the reports. Only in Lithuania must spouses submit a declaration that they have not lived together for one year to apply for notarial divorce. In Spain, an application for divorce can be filed three months after marriage. In Italy, spouses must be 'legally separated' for a certain period of time prior to application for consensual divorce.[184]

Review/fairness check/legality of content: Some EU Member States perform a review of the agreement's content, considering whether it fits the spouses' and/or children's best interests. This is the case in Latvia, Lithuania, Romania, Spain, Italy and Portugal. It is noteworthy that, in Portugal, the review of content is performed by the civil registrar and, when minor children are involved, by the public prosecutor. In Italy, the public prosecutor is responsible for a review of fairness and legality.

[184] *Chiricallo/Stracqualursi,* Italy in Code FS para. 65, 66: Legal separation suspends all spousal duties and allows the parties to live apart. Each spouse retains their succession right and maintenance must be paid to the spouse with lower income. Spouses who have been legally separated for at least six months (if the separation was consensual) or one year if the (separation was judicially contested) have a right to apply for divorce.

2 Public law

2.1 Notarial independence as a keystone for outsourcing tasks to notaries

2.1.1 Introductory remark: The guarantees of Art. 6 ECHR

This project analyses the potential of outsourcing tasks from courts to notaries to reduce the workload of the courts while maintaining or improving the 'quality'[185] of the respective justice service. It is obvious that 'de-judicialisation' must not lead to disadvantages for the people seeking service and/or advice on the relevant task. This also applies to the legal guarantees under which this task is performed.

In principle, courts have to meet the guarantees of fair trial enshrined in Art. 6 ECHR and Art. 47 EU Charter of Fundamental Rights (EU-CFR). This applies to all EU Member States participating in this study as their legal order provides for guarantees according to or equivalent to Art. 6 ECHR and Art. 47 EU-CFR, either through domestic constitutional law or through membership of the Council of Europe (ECHR) and the European Union (EU-CFR). However, case-law by the European Court of Human Rights (ECtHR) and the CJEU (which was discussed in JuWiLi I) has already made clear that these guarantees are fully applicable only to contentious proceedings.[186] As a consequence, courts in non-contentious proceedings regularly do not qualify as a 'tribunal' under Art. 6 ECHR and Art. 47 EU-CFR. However, as these guarantees can be qualified as the 'gold standard' of judicial independence, it is advisable that, even in non-contentious proceedings conducted by courts or outsourced to non-judicial bodies, all of them meet the requirements enshrined in these articles.[187] As the ECHR pointed out in the Kavečanský v. Slovakia case, the professional privilege of legal professions like notaries (in this case: professional secrecy) is also of utmost importance to safeguard the right of the notary's clients to a fair trial under Art. 6 ECHR.[188]

This is why national rapporteurs were asked to confirm that notaries meet the guarantees of 'independence and impartiality' in their respective countries. As will be shown, this confirmation was indeed possible – with certain specific exceptions where notaries act upon the request of one party only (e.g. enforcement). Generally, it must be added that notaries (with the exception of their role as court commissioner) generally only act upon the request of one or several parties.

In the context of notaries acting as *court commissioners*, one important clarification should be made here to avoid misunderstandings. While notaries act independently in this function as well, there is a possibility that they will be subject to direct instruction by a judge or can at least be removed from the case by judicial order. This is the logical legal consequence of the supporting role of a notary to a judge[189] and, as such, does not preclude the applicability of core guarantees of Art. 6 ECHR to notaries – even if they cannot, from a strictly formalistic viewpoint, meet all these criteria due to the absence of a dispute.[190]

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[185] The different aspects of 'quality' include legal standards, such as fair trial rights and the rule of law, but also economic, social and psychological aspects: such as the cost of the service, the ease of access, the quality of communication etc.

[186] JuWiLi I, p. 86 *et seq.*

[187] This has also been stressed by the ECtHR in the context of a notary acting as *délégué du tribunal* (court commissioner) in an estate partition procedure in Alsace-Moselle (ECtHR 28 November 2000, No. 36350/97 *Siegel v France*).

[188] ECtHR 29 April 2025, No. 49617/22, *Kavečanský v. Slovakia*, n. 61.

[189] This was also addressed by the Czech Constitutional Court in its judgment 17 September 2025, Pl. ÚS 29/25, in which it held that a notary, as regards the possibility of referral of a case to the Constitutional Court, is not fully equivalent to a judge as they can be removed from the individual case by court order (it was also mentioned in the case that notaries can be removed from their office by the Minister of Justice. While this is true under Czech law, it does not mean that notaries do not act independently while holding their office).

[190] On these aspects, see comprehensive information in JuWiLi I, p. 84 ff, in particular p. 89.

This should not be confused with the question as to whether notaries as court commissioners qualify as courts according to the definition of EU primary law, in particular Art. 267 TFEU. This question has already been answered in the negative in the project JuWiLi I, in accordance with CJEU case-law.[191] A recent opinion by Advocate General Sánchez-Bordona confirmed this once again for Czech notaries as court commissioners.[192] If this opinion is shared by the CJEU, this will be in line with existing case-law and will not lead to a re-assessment of notarial independence from the viewpoint of EU law.

2.1.2 Notarial independence: country reports

Austrian notaries are, in principle, not bound by any instructions, be that by courts or other State authorities. Only when they act as court commissioners are they under supervision and instruction of the competent judge.[193] They cannot be removed from their function or transferred to another office against their will.[194] Exceptions can be made due to incompatibility, incapacity to work or grave misconduct. Notaries must act impartially and must balance the interests of all parties involved.[195] Their independence is comparable to that of judges. This also applies when notaries function as court commissioners.

Belgian notaries must act impartially and respect Art. 6 ECHR.[196] They must give independent advice to the parties.[197]

The Bulgarian notary is independent in their activities and may refuse to perform notarial certification activities. The notary is independent and impartial. The principles of legality, the search for objective truth, equality of the parties and independence apply.

Under Croatian Law, notaries are independent and free from instructions. In particular, in succession proceedings they are obliged to treat all parties equally. When they fulfil their tasks as court commissioners, they are bound by Art. 6 ECHR. The former tasks (before the major reform of 2020) of Croatian notaries in enforcement proceedings were already discussed by the CJEU, which held that Croatian notaries did not qualify as 'courts' under Regulation 1215/2012 and Regulation 805/2004[198] as they issued the writ of execution without hearing both sides. Therefore, the notary did not qualify as a court in this regard. Since the 2020 amendment, the notaries have provided their tasks in enforcement matters as court commissioners.

In Czechia, the guarantee of impartiality[199] applies to all types of court proceedings and extends to notaries as court commissioners. If the impartiality of a notary is disputed, they can be excluded by the competent district court. All the fair trial guarantees are met in succession proceedings. However, succession proceedings do not entail a public hearing. Notaries act impartially and independently.[200] Only in their function as court commissioner do they receive instructions from the court.

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[191] JuWiLi I, p. 84, referring to CJEU 01 September 2021 C-387/20, *OKR,* ECLI:EU:C:2021:751.
[192] Opinion of AG Sánchez-Bordona from 29 January 2026 C-98/24, *Koda*, ECLI:EU:C:2026:54.
[193] JuWiLi I, p. 12.
[194] § 19 Austrian Notarial Code.
[195] § 7 Austrian Notarial Code.
[196] Art. 12 and 38 of the Code of Ethics of the Notarial Profession.
[197] Art. 1 (3) of the Belgian Notarial Law.
[198] CJEU 09 March 2017 C-551/15, *Pula Parking*, ECLI:EU:C:2017:193*;* CJEU 09 March 2017 C-484/15, *Zulfikarpašić,* ECLI:EU:C:2017:199*.*
[199] Art. 36 and Art. 38 Charter of Fundamental Rights and Basic Freedoms.
[200] See again the judgment of the Czech Constitutional Court from 17 September 2025, Pl. ÚS 29/25, in which it held that a notary, as regards the possibility of referral of a case to the Constitutional Court, is not fully equivalent to a judge as they can be removed from the individual case by court order. It was also mentioned in the case that notaries can be removed from their office by the Minister of Justice. While this is true under Czech law, it does not mean that notaries do not act impartially and independently while holding their office.

Estonian notaries must act in an impartial and reliable manner in all their professional activities.[201]

In France, a notary is a public and ministerial officer, which means that they act on behalf of the State and must guarantee neutrality in the performance of their duties. They do not represent either party, but ensure that the interests of both parties are balanced. This impartiality is essential to ensure confidence in the instruments that they draft and authenticate. When acting in a judicial capacity, notaries must apply the adversarial principle, which requires that each party be able to review the other party's arguments and documents and respond to them. Notaries must therefore organise the exchange of information between the parties and ensure that each party has been able to express its point of view.

In Germany, the notary is an impartial legal adviser and service provider to all parties involved.[202] The notary shall maintain their impartiality when advising, drawing up drafts or offering expert opinions upon the request of only one party involved. The same applies to the lawful representation of a party during proceedings, especially in land registry and other registry matters, in proceedings regarding the issuance of inheritance certificates as well as approval proceedings before authorities and courts.

The Greek notaries are bound by rules containing major parallels to the judicial function, such as *numerus clausus* of the notarial seats,[203] impartiality[204] and retirement upon reaching an age limit.[205]

Hungarian notaries must act free from instructions and without any influence.[206] When they function as 'court' they have to respect all duties of a judge under the Code of Civil Procedure, including an obligation of impartiality.

Italian notaries must perform their tasks independently and impartially. They protect the interests of all parties equally, regardless of who approached them. If there is a conflict of interests, that must be pointed out by the notary. Furthermore, notaries are reviewed every two years by the Ministry of Justice to increase client safety.

Notaries in Latvia perform their duties as an independent and neutral guarantor of civil rights and the lawful interests of persons. Government institutions, courts, prosecutors and investigation institutions must ensure the independence of notaries in the performance of their duties. There is a prohibition on anyone interfering in the professional activities of notaries or attempting to influence or pressure them. Notaries must refuse to draw up notarial instruments or certifications if they are asked to take part in activities that obviously serve illegal purposes. Furthermore, notaries must not issue instruments or certification in their own affairs.

Lithuanian notaries must ensure independence from the influence of public and administrative authorities and must obey the law.[207] Furthermore, they must refuse to perform a notarial act if the act is against the law or does not meet the prescribed requirements. The reasons for refusal must be stated in writing.[208]

In Luxembourg, notaries are public officials responsible for drawing up and authenticating instruments and contracts, giving them legal validity, guaranteeing their date and issuing certified or enforceable copies. They must advise clients objectively and impartially, ensuring that all parties understand the legal

[201] § 3 Estonian Notaries Act.
[202] § 14 German Federal Code for Notaries (BNotO).
[203] Art. 2 Greek Notarial Code.
[204] Art. 5 Greek Notarial Code.
[205] Art. 92 Greek Constitution.
[206] Art. 1(1) and Art. 2(2) Act XLI on Civil Law Notaries (1991).
[207] Art. 12 Lithuanian Law on the Notarial Profession.
[208] Art. 40 Lithuanian Law on the Notarial Profession.

implications of their actions. Notaries verify the identity, capacity and free will of signatories, ensure that documents comply with the law and conduct necessary checks to prevent fraud, money laundering and terrorism financing and corruption.[209]

Maltese notaries must act impartially andmaintain an equal distance between themselves and all the parties, in consideration of the varying degrees of expertise, experience and knowledge of the parties. This must be in accordance with the common interest and wishes of all the parties concerned. They are obliged to keep clients informed, explain relevant law clearly and ensure that all parties make a fully informed decision. Notaries must avoid conflicts of interest, withdraw from any matter where impartiality may be compromised and refrain from any collaboration or external influence that could affect their objectivity.[210]

In the Netherlands, notaries maintain an independent and impartial position, ensuring the best interests of all parties involved.[211] Civil law notaries must not be influenced by third parties. In addition, the civil law notary is bound by a duty of care and a ministerial duty. Notaries must perform their duties unless doing so would conflict with the law, public order or morality. They are required to explain the content and consequences of the instruments, inform parties in a timely manner and maintain strict confidentiality.

Polish law does not refer to concepts of independence or guarantees of fair trial when defining the notarial profession. However, some materially equivalent rules of conduct have been established. Notaries are prohibited from engaging in commercial, industrial or brokerage activities, as well as from providing business advice.[212] Notaries may not document acts that affect themselves, their close relatives or anyone with whom they have a close personal connection,[213] nor may they draw up authentic instruments for any unlawful act.[214] They must protect the legitimate interests of all parties and any third parties affected by the act[215] and are required to clearly explain the legal consequences of the transaction.[216] If there is any doubt about a party's legal capacity or understanding, due to factors such as illness, intoxication, age or limited education, the notary must refuse to act.[217]

In Portugal, notaries are empowered to act on their own initiative as impartial public officials entrusted with ensuring legality and protecting the public interest.[218] They must verify compliance with mandatory legal requirements, refuse to perform any void or unlawful act and report any evidence of crimes or irregularities, including those related to money laundering or terrorist financing. In certain proceedings, such as the inventory process, notaries also have the autonomy to conduct specific acts independently in order to uphold the integrity and legality of the proceeding.

In Romania, notaries function as independent public officials performing their duties on behalf of the State.[219] They operate within a self-managed professional system and are legally required to ensure the legality, validity and free will of the parties in every notarial act. Notaries must act impartially, free from any external influence, and refuse to perform acts that contravene the law, public order or the rights of

[209] Art. 1 Luxembourg Law on the Organisation of the Notarial Profession.
[210] See Maltese Notarial Code of Ethics.
[211] Art. 17 Dutch Civil Law Notaries Act (Wet op het notarisambt).
[212] Art. 19 § 2 Polish Law on Notaries.
[213] Art. 84 § 1 Polish Law on Notaries.
[214] Art. 81 Polish Law on Notaries.
[215] Art. 80 § 2 Polish Law on Notaries.
[216] Art. 80 § 3 Polish Law on Notaries.
[217] Art. 86 Polish Law on Notaries.
[218] Art. 1 Executive Law 26/2004.
[219] Romanian Law No. 36/1995 on Notaries Public and Notarial Activity.

the parties. Although notarial proceedings are not judicial, they observe key safeguards associated with the right to a fair trial.

In Slovakia, notaries are independent and can only be removed from their office if certain legally specified conditions are met. This includes loss of EU citizenship, of legal capacity, conviction of criminal offence and disciplinary measures. Notaries, whether acting as court commissioners or as notaries, must act impartially and independently and are bound by the Constitution.[220] If a notary as court commissioner is allegedly acting partially, the court can remove them from the case. This means that notaries acting as court commissioners are directly bound by fair trial guarantees (even though they are not considered a court in the Slovak Constitution), while they are indirectly bound through § 4 of the Slovak Notary Code (requiring independence and impartiality) in all other functions.

Slovenian notaries are independent and follow strict rules on impartiality. 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.[221]

In Spain, notaries are State-appointed public officials who provide citizens with legal certainty in extra-judicial matters while operating as legal professionals under competitive conditions. As appointed public officials, they are under a strict duty of impartiality and independence from the parties involved. Accordingly, the documents that they issue carry public faith and are presumed true and complete, with challenges allowed only through judicial review or, in some cases, reconsideration by the same notary.[222]

2.2 Provisions preventing a future transfer of competences to notaries

A final question which national rapporteurs were invited to answer was whether outsourcing additional tasks to notaries would meet legal and, in particular, constitutional obstacles.

The answers given to this question were fairly uniform. As far as tasks are concerned that can be described as 'type 2' (no specific relationship between court and notary), in most cases no specific legal obstacles were identified as long as these tasks can be described as non-contentious. In contrast to this, contentious matters were identified as being an exclusive court competence in several participating EU Member States, such as Germany (where the Constitutional Court has ruled that 'final and binding decisions on civil law matters' are to be regarded as an exercise of judicial power reserved to courts) or the Netherlands. In Poland, there are some discussions as to whether divorce, enforcement and registration of immovable property must remain with the courts. While the majority of doctrinal statements denies this, there are opposing statements from a minority of scholars and practitioners.[223]

In contrast to this, the transfer of tasks to notaries as 'courts' or 'court commissioners' – which can only be found in a small number of States covered by this project – would raise more legal, in particular constitutional, challenges. Certain limits have already been identified in JuWiLi I in this regard in Hungary[224] and, although rightly disputed by parts of legal doctrine, in Austria.[225]

Generally speaking, further transfer of tasks to notaries does not meet insurmountable obstacles across all EU Member States participating in this study. In some countries, in particular in Latvia, there is even a clear trend towards an ongoing outsourcing of tasks from the judiciary to notaries. Many national

[220] § 4 Slovak Notary Code.
[221] Art. 19 Slovenian Notarial Act.
[222] *Alguacil,* Spain in Code FS para. 14, 15.
[223] On this discussion, cf. JuWiLi I p. 32 and 33, including fn. 7 and 8.
[224] JuWiLi I, p. 36.
[225] JuWiLi I, p. 32 *et seq.*

rapporteurs also stated that notaries are particularly suitable as a profession for such transfers due to their strong commitment to independence and impartiality (see 2.1.2. above). In this context, it was rightly stated that any task that can be outsourced to any other legal profession than notary can also most easily be transferred to notaries. This is because there is no doubt that they , of all legal professions, offer the highest guarantee of impartiality towards all parties involved in proceedings before them.

3 Private Law

3.1 JuWiLi I and JuWiLi II

Whereas the predecessor EU project entitled JuWiLi (2020-2022) focused on the notion of 'court' in national and EU primary and secondary law and on the particular legal institution of 'court commissioner' in several central European countries (Austria, Slovenia, Czechia, Slovakia, Hungary and Croatia), the current EU project, entitled JuWiLi II (2024-2026), compares and covers a considerably larger spectrum of legal systems of 22 EU Member States. JuWiLi II is devoted to the more general question of the conditions, opportunities and challenges relating to the administration of justice (non-contentious cases) outside the courts *stricto sensu*, i.e. conducted by bodies which are not courts in the traditional sense of the word, with a particular focus on the notarial profession.

In the area of private law, this involves two levels: 1) the level of conflict of laws (consisting of the rules on choice of law = PIL = Private International Law; international jurisdiction; recognition, acceptance and enforcement of decisions and other legal instruments) and 2) the level of substantive private and procedural law.

On level 1 (conflict of laws), we are dealing with a field of law mostly unified by EU regulations. These uniform rules were originally designed for court activities and court decisions, not for non-judicial actors, but, over time, have been modified slightly and on an *ad hoc* basis, to meet the new challenges of non-judicial acts.

On level 2 (substantive and procedural private law), we are faced with the diverging legal systems of 22 EU Member States, which form the broad basis for the regime of EU regulations on conflicts of law (level 1) mediating between them in (the very frequent) cross-border cases. These national rules of substantive and procedural private law have certain traits in common and can be characterised by certain trends and categorisations, as was shown in our overview in part 1 of this study. On level 2, the basic legal conditions for the operation of the different national systems of extra-judicial administration of justice are set, which allows our project, JuWiLi II, to analyse, compare and evaluate them from legal, economic, behavioural economics, digitalisation and other perspectives. We have done this in order to develop policy recommendations for the national and European levels.

3.2 EU law in cross-border cases (conflict of laws)

3.2.1 Basic structures of EU regulations

Beyond the private law rules relevant for the EU's Internal Market, the EU legislator mostly lacks the competence to harmonise substantive rules. This applies in particular to matters of family and succession law, where non-contentious administration of justice is most common in EU Member States. However, the EU has set up a comprehensive regime of **EU regulations** unifying the **conflict of laws** rules for almost all areas of private law (including succession and family law) in order to simplify the handling of cross-border cases. Examples are the SR (Succession Regulation No. 650/2012), the Brussels II *ter* Regulation (No. 1111/2019) and the Rome III Regulation (No. 1259/2010) for divorces (and parental responsibility),

the Matrimonial Property Regulation (No. 1103/2016), the Property Regulation for Registered Partnerships (No. 1104/2016), the Maintenance Regulation/HMP (No. 4/2009), the Taking of Evidence Regulation (No. 1783/2020), the Service of (Judicial and Extra-Judicial) Documents Regulation (No. 1784/2020), the Enforcement Order Regulation (No. 805/2004) and the Payment Order Regulation (No. 1896/2006).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 EU 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, such as, for instance, the acceptance of 'authentic instruments'.

As pointed out in the JuWiLi I's Legal Study,[226] these regulations based on Art. 81 TFEU exhibit **different approaches** to the inclusion of authorities which are not courts *stricto sensu* and liberal legal professionals. Some of them take their court-like activities into account and define a dividing line between such activities in which they are acting as 'courts' in rendering 'decisions' – even in non-contentious contexts[227] – and other activities in which they are acting in the service of civil justice, but not as 'courts' *stricto sensu*. However, the line dividing between court and non-court activities does not seem to be the same in the EU regulations concerned, but rather differs from one instrument to the other, as is confirmed by CJEU judgements.[228] At the same time, the underlying national rules and tasks performed by traditional court and non-court actors in non-contentious proceedings differ as well and put the parties concerned in different situations with respect to cross-border recognition, acceptance and enforcement, in particular when seen from a 'people-centred perspective'.[229]

3.2.1.1 Explanation of the two-track system

With respect to the creation and handling of judicial and extra-judicial decisions and documents in civil proceedings, the historical starting point of the EU regulations on conflicts of law is a **two-track system**:

On track 1, we have the 'proper' court decisions where courts are bound by rules of international jurisdiction (including *lis pendens*) laid down in the regulation itself, and resulting decisions are recognised and enforced in all other Member States with only very narrow *ordre public* exceptions (and with no possibility to question the jurisdiction, law applied or content of the decision).

Track 2 are the 'authentic instruments' frequently drawn up by notaries, regularly not requiring compliance with rules of international jurisdiction and triggering a system of 'acceptance' and enforcement. This extends the particular evidentiary and enforcement effects of the instruments (they have under their respective law of origin) to all Member States, but does not hinder the review of its content under the respective applicable law.

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[226] JuWiLi I, p. 41, pp. 60-61.

[227] Thus, this notion of 'court' found in secondary EU law is obviously broader than the notion of primary EU law in this respect. See part 2 above.

[228] CJEU 09 March 2017 C-484/15, *Zulfikarpašić*, ECLI:EU:C:2017:199, para. 32-37; CJEU 09 March 2017 C-551/15, *Pula Parking*, ECLI:EU:C:2017:193, 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.

[229] OECD Framework and Good Practice Principles for People-Centred Justice (2021); OECD, Making Justice Systems More Effective and People-Centred. Advancing a Responsive Rule of Law (2025).

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; 17 June 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.

3.2.1.2 The many faces of the two-track system in the EU regulations on conflicts of law

However, **not** every notarial activity is **covered** by the above-mentioned two-track system of the **EU regulations**. For such instruments and documents no particular procedural cross-border effects are provided. The document is to be judged under the respective applicable law, such as the law of contracts or of unilateral declarations of will. Thus, the free cross-border circulation of these documents (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 EU Member States. There may be two reasons why notarial activities do not fall within the scope of the EU regulations: Either the area of law is not covered by an EU regulation at all (such as in the case of family status) or the respective document does not qualify as a document under either track 1 or track 2 of an existing EU regulation. This may have serious negative consequences for the parties concerned. Examples for such notarial acts under current EU law are: notaries receiving declarations of family status under national law (of maternity, paternity to a child), notaries dissolving registered partnerships (Brussels II *ter* and Rome III only apply to marriages). Where these areas of law (such as establishment of parenthood or dissolution of partnerships) are not covered by an EU regulation at all – even for acts of traditional courts, the decision not to regulate is not a question of allocation of competences to courts or notaries as alternatives. The decision not to regulate is thus a policy decision to leave the field open for EU Member States, for whatever reason that might be. Such policy decisions are outside the scope of this project and will therefore not be discussed here.

This means that, in principle, there are two **prerequisites** for the administration of justice by actors who are not courts in the traditional sense of the word to function smoothly[230] within the Internal Market:

(1) The national legislator providing the enabling rules for the notary or other public authority to become active within the national justice system of their place of residence;

(2) the EU legislator providing the enabling rules for the decisions and documents to become effective (or their evidentiary effect being extended) also in other EU Member States and to take part in the system of free circulation of public documents within the EU.

[230] In some cases referred to as 'non-judicial' actors in the meaning that those authorities are not courts in the narrow sense, but still part of the system of administration of justice. See *Bender* in *Bormann* (*ed.*), Judge Without Lawsuit, The Notary in Civil Law Countries, (2024) 7.

Within the realm of EU regulations covering the administration of justice activities of non-judicial actors, different systems have to be distinguished:

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 EU Member States. In the area of origin, the civil and commercial 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 (track 2) 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 fulfil the institutional and procedural guarantees for a fair trial (independence, impartiality, *audiatur et altera pars*) and to have the power to decide a dispute.

System 2: Later regulations, in particular those in succession and family matters, were faced 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 (2) SR and Art. 3 (2) Matrimonial/Partnership Property Regulations clearly and expressly open up the category of judicial activities to notaries and public authorities.[231] 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 circulation 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.

System 3: Brussels II *bis* was confronted with an increase in 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 played an important role. Considering the fact that public authorities and notaries (acting in the legal forms of authentic instruments and registrations) fulfilled exactly the same functions as courts in cases of consensual divorce, the new Brussels II *ter* Regulation carved out a completely new path. Not only notarial activities which meet the requirements for a court decision, but also those cast in other forms will benefit 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 court decisions of non-judicial actors and authentic instruments is currently very unclear.[232] While we await clarification from the CJEU, we also have to note that the line now is of little practical relevance as both categories have almost identical legal consequences.

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

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

[232] See CJEU 20 December 2017 C-372/16, *Sahyouni*, ECLI:EU:C:2017:988, with respect to the Rome III Regulation; CJEU 15 November 2022 C-646/2020, *Senatsverwaltung für Inneres und Sport/TB*, ECLI:EU:C:2022:879 with respect to Brussels II *bis* Regulation.

undisputed claims drawn up by notaries (as well as for court judgements). Where public documents (authentic instruments) are declared enforceable, they need not necessarily contain any content capable of 'recognition'. Rather, in such cases, the coercive powers of the State are, by way of exception, made available to the creditor on the basis of a legal transaction alone.[233] The 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 EU Member States to include notaries as the competent authorities for issuing European orders for payment (Art. 5 (3)). In the Taking of Evidence Regulation, notaries may be notified as 'courts' under the conditions of Art. 2 (1) and Art. 31 (3), afterwards enjoying the same rights as traditional courts do under the regulation.

3.2.2 Problems and research questions

As illustrated supra (in part 1 of this Study), the large sample of 22 legal systems of EU Member States examined in our project provides for a wide variety of administration of justice activities of authorities which are not courts in the traditional sense of the word, in which the category of notaries acting as 'courts' or 'court commissioners' (see 1.1. supra) seems a minority solution, not applicable in many countries. This means that court commissioner systems will comply with the rather narrow notion of 'courts' under the SR and the Matrimonial and Partnership Regulations, but the large majority of extra-court judicial activities in the participating EU Member States will not. This sheds new light on the role that an expanded definition of 'court' under EU law will be able to play in future scenarios.[234]

The EU legislator was not acting systematically when expanding the concept of free circulation of 'judgements' or 'decisions', originally developed for 'traditional' courts under the judicial cooperation regime of Art. 81 TFEU, to the universe of non-contentious legal activities of other authorities and legal professionals. Therefore, we are confronted with a rather fragmentary and uneven regime of circulation of public legal acts (comprising decisions and other documents, in some cases [Brussels I *ter* Regulation] also registrations).

Unlike in prior regulations, the EU legislator sketched out a rather broad understanding of the notion of 'court' in Recital 14 of the Brussels II *ter* Regulation: Following CJEU case law (in particular C-646/2020 *Senatsverwaltung/TB*), "the term 'court' should be given a broad meaning so as to also cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility". Recital 14 also states that "any agreement approved by the 'court' following an examination of the substance in accordance with national law and procedure should be recognised or enforced as a 'decision'". However, this broad notion of 'court' is not clearly defined in the Regulation. It is, therefore, not obvious what Recital 14 means by "other agreements acquiring binding legal effect in the Member State of origin following the formal intervention of a public authority or other authority […] should be given effect in other Member States in accordance with the specific provisions on authentic instruments and agreements in this Regulation". However, "this Regulation should not allow free circulation of mere private agreements" provided they are "not registered by a public authority [including a notary] competent to do so".

Thus, the dividing line between different categories of administration of justice activities and their final outcomes as shaped by the EU regulations will be a key question of our Legal Study in JuWiLi II. Therefore, research question 1 is the following:

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[233] *Bender*, Die grenzüberschreitende Verwendung von Unternehmensdaten vor dem Hintergrund der Digitalisierungsrichtlinie II, NZG, 51 (51).

[234] See the recommendation of JuWiLi I with respect to amending the court definitions in all EU regulations: pp. 96 *et seq.*

- *What actually should be the dividing line between a 'court decision' proper and other acts of administration of justice in the EU regime on conflicts of law? Which different categories should be defined? What legal consequences should follow from these distinctions? What actually should be 'recognised' stricto sensu and what should not be and why?*

This project attempts to pave the way towards a more systematic and principled approach to court and court-like activities of national actors which are not courts *stricto sensu* (such as non-court authorities and liberal legal professionals) in non-contentious legal matters. It examines the additional following research questions in this context:

- *Do we need different approaches to the notion of 'court' and 'decision' and the other potential categories of administration of justice activities in the different areas of law (succession, family, divorce, execution, etc.)?*
- *How can the perspectives of the OECD approach of a people-centred justice system and a responsive rule of law best be integrated into the analysis?*

The analysis in part 3.2. (EU regulations on conflict of laws) will be based on the assumption that non-court bodies, notaries in particular, who have the competence for the respective task under national law, will provide legal services of comparative quality to traditional courts themselves. The important question of comparative quality of legal services – from economic, legal, psychological and other perspectives – will be dealt with in the other parts of this study. For private law, see in particular part 3.3., for constitutional law see part 2.

3.2.3 OECD people-centred justice approach at the core of JuWiLi II

In 2021 the Organisation for Economic Co-operation and Development (OECD) Public Governance Committee published its 'Framework on Good Practice Principles for People-Centred Justice', which aim to support countries in implementing their access to justice commitments under UN Sustainable Development Goal (SDG) 16 on Peace, Justice and Strong Institutions. This text was followed by the 2023 'OECD Recommendation on Access to Justice and People-Centred Justice Systems' and the 2025 report 'Making Justice Systems More Effective and People-Centred – Advancing a Responsive Rule of Law'. This substantial qualitative improvement of justice systems and the rule of law shall reinforce democracy and enhance trust in public institutions worldwide. Under the OECD concept of people-centred justice systems, individual rights and concerns and important public interests are inseparably intertwined. A 'responsive rule of law' requires a shift from institution-centred approaches – in politics as well as in academic research – to people-centered approaches which are founded on transparency, participation and the use of (scientific) data for trust-building, accountability and learning of (State) institutions. The rule of law, according to the OECD, has to become "more responsive to people's needs to meet the challenges posed by the rapid transformation of societies".[235] The gap between citizens and public service institutions has to be closed.[236] This "requires a fundamental transformation in how justice system services are designed and delivered".[237] It is not people who have to be advised, trained or forced to fit into institutional frames, but institutions which will have to learn from people what fair and participatory justice administration that meets their needs really means.

[235] OECD 2025, p. 8.
[236] OECD 2025, p. 9.
[237] OECD 2025, p. 9.

Academic comparative and transdisciplinary research can make a considerable contribution to modernising the administration of justice systems so that they are designed to adapt to the needs of different groups of people in certain societies and countries and, thus, to considerably improve the quality of these justice services. Therefore, the JuWiLi II project as a whole focuses on the policy objective of alleviating the workload of the judiciary of the EU Member States and thereby improving the quality of administration of justice from a people-centred perspective. Where outsourcing justice services from courts to other public institutions or legal professionals does *not* constitute an improvement in the services from the standpoint of the people concerned, it must be questioned and can certainly not be recommended. Where the transfer of public services from courts to other public authorities takes place, the manner of service provision which best serves the people's needs in a particular type of situation (e.g. divorce) has to be identified or developed after a comparative analysis of possible ways observed in the EU Member States participating in the project (best practice examples).

The people's needs comprise different rightful interests of citizens, which they will want to see in a high-quality justice service, such as, for instance: fairness, impartiality, foreseeability and certainty of rules and outcome, easy access, closeness, low investment in terms of cost and time, approachability and communication qualities, atmospheric qualities and trust. These different aspects of quality will be examined throughout our project: constitutional guarantees and rule of law; procedural, cross-border and substantive private law; economics and behavioural economics; and digitalisation of services.

3.2.4 Building on JuWiLi I with respect to EU regulations on conflict of laws

3.2.4.1 Notion of 'court' and of 'decision'

This notion of 'court' comprising also notaries in certain circumstances (in particular notaries acting as 'court commissioners') can be used as a starting point: Art. 3 (2) **EU Succession Regulation** (No. 650/2012)**;** Art. 3 (2) **Matrimonial Property Regulation** (No. 1103/2016) and **Partnership Property Regulation** (No. 1104/2016). They state: "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; matrimonial property regimes] 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."

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' = actors who are not courts in the traditional sense of the word, provided certain conditions are met. These conditions include the following:

- the non-court actors have competence in matters of succession (or matrimonial/partnership property) under national law;
- the non-court actors have 'judicial function';
- or judicial powers are *delegated* to them by the judicial authority or they act under the *control* of the judicial authority;
- they offer *guarantees* of their impartiality and of the rights of all parties to be heard;
- 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 (i.e. *res judicata* or similar *erga omnes* effect).

The requirement of 'judicial function' has to be interpreted narrowly in the light of EU primary law: see the decisions interpreting Art. 6 ECHR, Art. 47 EU-CFR and Art. 267 TFEU mentioned in part 2.1.1. (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 the EU Enforcement Order Regulation (CJEU 9 March 2017, C-484/15 *Zulfikarpašić*). In the *W.B.* judgement (CJEU 23 May 2019, C-658/17, para. 56) and the *E.E.* judgement (CJEU 16 July 2020, C-80/19, para. 51), the CJEU defines an 'authority exercising judicial functions' in the sense of Art. 3 (2) SR with reference to the *Oberle* judgement (CJEU 21 June 2018, C-20/17 *Oberle*, para. 44). In the *Oberle* case, the CJEU chose an abstract perspective: The German court issuing the certificate of succession (*Erbschein*) was *in abstracto* an institution "having jurisdiction to hear and determine disputes in matters of succession" even though the German court was *in concreto* issuing only a national certificate of succession (not having *res judicata* effect) in non-contentious proceedings.[238] Whereas the German court of first instance issuing a national certificate (*Erbschein*) is qualified as a court under the SR (Art. 3 (2)), a German court of first instance issuing a European Certificate of Succession (ECS) is not a court in the sense of Art. 267 TFEU because this provision, according to the CJEU, requires not only a court in the *abstract* perspective (an institution which could decide disputes) but also in a functional perspective. In the particular proceeding, the court has to exercise a judicial function, not an administrative one.[239]

As notaries, such as Lithuaninan notaries issuing national certificates of succession in the sense of the *Oberle* judgement, are not courts in the *abstract* sense and will regularly *not* 'exercise judicial functions' in this narrow sense, their activities as 'court commissioners' in central European countries (see 1.1. supra) will qualify under the alternative of 'delegation of powers' or 'control' by a judicial authority, requiring a specific link to a court. However, in the majority of participating EU Member States, the national law does not provide for such a link to the institutional court system (see the *W.B.* and the *E.E.* cases). This means that notaries – without the delegation or control linkage to a court – conducting succession and other non-contentious proceedings, and finally issuing a national certificate of succession, ECS, or other instrument will not qualify as 'courts' under Art. 3 (2) SR or the Matrimonial/Partnership Property Regulations.

Art. 2 of the **Taking of Evidence Regulation** has a similar basis and wording as Art. 3 (2) SR and Art. 3 (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. In such a case, notaries can be notified as 'courts' in the sense of Art. 2 and Art. 31 (3) Taking of Evidence Regulation to the EU Commission (as in the case of Hungary, other EU 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 9 March 2017, C-551/15) and *Parking and Interplastics* (CJEU 7 May 2020, joined cases C-267/19 and C-323/19). 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,

[238] Evidently, this decision has to be seen critically, because in principle traditional 'recognition' and 'enforcement' is, under the track 1/track 2-system, only available for decisions with *res judicata* or a similar final *erga omnes* effect. From the *Oberle* decision, it follows that Art. 4 SR on international jurisdiction applies to proceedings not leading to the adoption of a judicial decision (provided the issuing authority is a court in the traditional sense).
[239] CJEU 23 January 2025 C-187/23, *Albausy,* ECLI:EU:C:2025:34.

impartiality and *audiatur et altera pars* to be realised by an authority qualifying as 'court' under the regulation, but that the proceedings had to be conducted 'on an *inter partes* basis' (para. 58). And the CJEU expressly distinguished between the notions of court under Art. 3 (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 authorities which are not courts in the traditional sense, in general, under certain conditions (para. 48). The court also reaffirms that the notion of 'court' has to be interpreted in the light of the 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 other 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 (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 *Zulfikarpašić* case (CJEU 9 March 2017, C-484/15), a Croatian notary had issued a writ of execution based on an 'authentic instrument' (invoice issued by the creditor). With similar argumentation as in the *Pula Parking* decision, the CJEU held that the Croatian notary was not acting as a 'court' as they did not conduct *inter partes* proceedings.

This marks a sharp difference between the Brussels I *bis* Regulation and the European Enforcement Order Regulation, on the one hand, 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 (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 single-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, a single-track regulation as well: Such notaries can issue a European Enforcement Order, but only on the basis of a bilateral authentic instrument (Art. 3 (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 (even though authentic instruments do not have a content capable of 'recognition'). In the Taking of Evidence Regulation, the taking of evidence has an auxiliary function to several judicial tasks, such as, 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 according to a correct and broad interpretation).

Art. 5 (3) **European Payment Order Regulation** expressly speaks of 'any authority', which undoubtedly also includes notaries who have the respective competences under national law, as is the case in Hungary.

The **CJEU** decision in *Senatsverwaltung/TB*[240] and the **Brussels II *ter* Regulation** opened up a completely new chapter in the story book of non-judicial actors' instruments and their legal consequences in cross-border recognition scenarios, in the fields of divorce and parental responsibility. In case C-646/2020, the **CJEU** qualified an Italian divorce registration by a civil status officer, by which the Italian officer recorded

[240] CJEU 15 November 2022 C-646/20, *Senatsverwaltung/TB,* ECLI:EU:C:2022:879.

a divorce agreement concluded by the former spouses, as a 'court judgement' in the sense of the predecessor Regulation Brussels II*bis* (Art. 1 [1] a and 2 [1, 3, 4]), calling the final result a 'divorce decree' and the recording a 'confirmation'. The court argued that such a broad reading of the notion of 'court' under the Regulation was covered by its wording and necessitated by the objective pursued by the Regulation, namely the achievement of mutual trust and recognition of judicial and extra-judicial decisions in the EU Member States for the functioning of the EU's Internal Market (para. 46, 51). This interpretation still excludes 'private divorces' before religious courts because in such cases the divorce is not 'pronounced by, or under the supervision of, a public authority' or a court – i.e. not binding and final with *erga omnes* effect. (para. 53). The involvement of the State authority has to include an exercise of 'control' over the consensual divorce. This means that the public authority has to check the requirements for the divorce under national law and the "actual existence and validity of the spouses' consent to divorce" (para. 54).

Uniformity of interpretation throughout the EU regulations on conflicts of law: In an attempt to distinguish such 'control' by the public authority from a court settlement under Art. 25 Brussels Convention[241], which is not considered a 'judgement' by a court, the CJEU states that, in case of such a settlement, the court simply takes note of the parties' agreement "without carrying out any examination of the content of that settlement in the light of the legal provisions in force" (para. 57). This has the consequence that the public authority under Brussels II *bis* (issuing a 'judgement') has to exercise its 'control' by carrying out "an examination as to the substance of the matter" preceding the approval of the divorce agreement (para. 60). It is worth noting that, in *Senatsverwaltung/TB,* the CJEU wanted to design a uniform set of notions of 'court' and 'judgement' for the Brussels I and Brussels II regulations. The court could also have said: A contractual agreement between two parties, which constitutes a 'court settlement' and not a 'judgement' under Brussels I *bis* Regulation (Convention), has to be qualified differently (as a 'judgement') in a divorce or parental responsibility matter under the Brussels II *bis* or II *ter* regulations. This would not have been entirely surprising as the court frequently emphasises that each regulation has to be interpreted in line with its particular objectives. But perhaps it could be said that all EU regulations on conflicts of law passed under Art. 81 TFEU ultimately pursue the same objective, namely the free circulation of judicial and extra-judicial decisions and documents in the EU's Internal Market and therefore have to be interpreted in a uniform manner.

Art. 2. (2) **Brussels II *ter* Regulation** uses wording that is similar to 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'. In its court definition, Art. 2 (2) Brussels II *ter* gives no further guidance, unlike Art. 3 (2) SR or Matrimonial/-Partnership Property Regulation, as to what precisely characterises a non-judicial actor acting in court function or power. Brussels II *ter* also provides 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. 64 and 65 Brussels II *ter* provides that Art. 30-41 Brussels II *ter* (for court decisions) apply to authentic instruments and registered agreements issued by non-judicial authorities as well,[242] when these

[241] CJEU 02 June 1994 C-414/92, *Solo Kleinmotoren*, ECLI:EU:C:2004:551.

[242] 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 recognised foreign prior decision). The prohibition of review of jurisdiction of the court of origin (Art. 69 Brussels II

authorities act pursuant to the provisions of international jurisdiction in Art. 3 *et seq.* Brussels II *ter*. Thus, notaries or other authorities assuming or claiming jurisdiction beyond the rules of Art. 3 *et seq*. will produce legal instruments which can only have the cross-border effects of authentic instruments (acceptance, enforcement along the lines of their national effects). A recognition proper or a *lis pendens* (as foreseen for court decisions) are not possible. These other authentic instruments, issued by notaries not complying with international jurisdiction rules, follow **track 2** (see part 3.2.1. supra). Their evidentiary function is extended. However, their content is only 'recognised' on the basis of a substantive (not a procedural) recognition. This means that a court may revise the content (substance) of the authenitc instrument and will materially recognise (confirm) it only where the court achieves the same substantive result on the basis of the applicable law.

This means that, under Brussels II *ter,* administrative authorities registering divorces as in Italy (see CJEU C-646/2020) or notaries granting a divorce (see part 1.3 supra) can produce the same legal consequences as **court decisions** (track 1) by the judiciary on one of two tracks: On **track 1A,** they are acting as 'courts' themselves (CJEU C-646/2020) without any further requirements as in Brussels I *bis* (deciding an *inter partes* dispute) or in Art. 3 (2) SR/Property Regulations (court delegation or control), on **track 1B,** they are issuing an authentic instrument or effecting a registration under national law, thereby complying with the rules of international jurisdiction and *lis pendens* of the Regulation.

Track 1A – notaries and other public authorities acting as 'courts' under Brussels II *ter* (CJEU C-646/2020):

Art. 2 (1) Brussels II *ter* provides a definition of a 'decision', which is issued by a 'court' of an EU 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')[243] 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: Decrees, orders, judgements and the like, which are declaratory or have a 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 broad notion of court blurs the dividing line between court decisions, authentic instruments and other acts of public authorities (like registrations).[244]

In JuWiLi I, we reached the conclusion that – following the CJEU decisions – the requirement for a constitutive decision by a court or other authority having jurisdiction does not exist under Brussels II *ter*.[245] This leaves Art. 64 *et seq*. Brussels II *ter* almost no scope of application or, to say it in other words: Extra-judicial non-contentious proceedings by notaries and other public authorities would be **merged into track 1** provided the rules on international jurisdiction had been complied with and their decisions have *res judicata* or similar *erga omnes* effects. Other authors think that Art. 2 Brussels II *ter* proclaims a rather narrow notion of 'court':[246] This can be supported by a look into the drafting history of the recast

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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*). The *lis pendens* rule of Art. 20 Brussels II *ter* also applies.

[243] In the *Sahyouni* case, the CJEU 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 (1) Brussels II ter in the definition of a 'decision' (CJEU 20 December 2017 C-372/16, *Sahyouni,* ECLI:EU:C:2017:988).

[244] *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.

[245] JuWiLi 2022, p. 57 *et seq.* See also *Sonnentag/Haselbeck*, IPRax 2022, 23 (27 *et seq.)* with further references.

[246] *Dutta*, FamRZ 2020, 1428, with further references.

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)* divorces. It leaves us with the unanswered and difficult question of where to draw a dividing line between those out-of-court marriages involving other authorities (such as 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 I *ter*) equally struggle with the dissimilarity of the notions of court under Art. 3 (2) SR/Property Regulations and under Brussels I *bis*.

This leads to the conclusion that, in the *lex lata* perspective, **a coherent interpretation of the notions of 'court' and 'decision'** and the legal consequences they imply between the different approaches in older regulations like Brussels I *bis*, medium old regulations like SR and Matrimonial/Partnership Property Regulations, and the recent developments surrounding Brussels II *ter*, **is not possible**.

3.2.4.2 Consequences of the two-track system and new possible paths

In a two-track system like the one in the SR, parallel proceedings and certificates in two EU Member States for the same succession case are the consequence, with the notarial proceeding not complying with Art. 3 Nr. 2 SR (track 2) being subordinated to the track 1 court proceeding. This is against the goal of SR of concentration of succession proceedings in one EU Member State only. This situation results in two different – most certainly contradictory – certificates or decisions (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.

From the point of view of the parties concerned (i.e. the people-centred approach), this subordination of extra-judicial proceedings and the differentiation between notaries acting as 'courts' (Art. 3 (2) SR) and others acting as mere notaries (track 2) seems to create legal uncertainty and problematic institutional constraints – depending on diverging national legal frameworks – that the parties cannot or cannot easily escape. From the citizen's standpoint, being confronted with a notary working in close co-operation with a court (Art. 3 (2) SR) or a notary acting on their own is a mere coincidence of national law. Both notaries are mostly exercising the same function under the respective legal system. However, in case of any cross-border aspect of the case, huge legal differences will come into play. In a system like Brussels II *ter*, where the extra-judicial track (see the consensual divorces in front of notaries and administrative authorities) is almost indistinctively merged into track 1 – without requiring a specific link between the notary/authority and a court (unlike Art. 3 (2) SR) – this problem is solved in the interests of the parties concerned. They benefit from the recognition (and enforcement) of the extra-judicial act in all other EU Member States, in the same way as a court decision.

In the *Oberle* case, the CJEU qualified a German court issuing a national certificate of succession which did not have the effect of *res judicata* of a court decision, issued in a proceeding without any dispute or *inter partes* argument, as 'court' in the sense of the SR. 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 (1) SR).[247] As mentioned earlier, this CJEU decision can be understood as extending procedural 'recognition' and enforcement to instruments (*Erbschein*) which do not have the content and effect of a proper court decision, because they are not final and conclusive. And the *Oberle* decision also implies (read together with the *E.E.* and *W.B*. decisions) an unjustified unequal treatment of notarial and court certificates.

Same function: When this very task is – according to the respective national law – performed *not* by a court, but by the notarial profession, there are compelling reasons to give similar cross-border effect and recognition to the certificate of the notary. In the Brussels II *ter* regime, as interpreted by JuWiLi I (see supra), all judicial and extra-judicial documents (instruments, decisions) leading to a divorce under national law have the same legal consequences on a cross-border level (recognition in all EU Member States).

Is is notable, however, 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 (2) SR, not even any legal guidance and advice. The mere registration of the divorce agreement suffices. In JuWiLi I, we argued that this might be a weakness of this approach. However, the direction was welcomed. As a consequence, the JuWiLi I team formulated the following guideline – '**same function + same quality = same consequences**' for an amended two track model with a larger track 1, also comprising acts of notaries acting independently under certain circumstances:

This means that the team recommended that all final acts of a particular non-contentious proceeding, regardless of their issuance by a notary or a court, were treated in the same way (track 1), namely in the way 'court decisions' are treated (with uniform rules of international jurisdiction be complied with, and uniform consequences of recognition and enforcement). Brussels II *ter* – for consensual divorces – goes in the right direction in this respect. However, Brussels II *ter* – and all (future) EU instruments following its approach – should be amended to require a higher standard of quality of the recognised divorce instruments by eliminating mere registrations and including procedural guarantees.

The quality standards required for track 1 can be summarised as follows:

- Basic requirement is the national law of the respective EU Member State entrusting the notary or other public authority with the power to conduct and conclude certain non-contentious proceedings.
- The respective notaries or other authority has to offer the guarantee of independence and impartiality and
- comply with the principle of all parties to be heard.
- Their decisions are subject to review by a judicial authority in the national justice system and
- their public acts (decisions, certificates, etc.) have the same force and effect as the respective acts of judges would have in such matter, i.e. *res judicata* or similar *erga omnes* effect.

Thus, the JuWiLI I team suggested amendments to the SR, Matrimonial/Partnership Property Regulations, Brussels II *ter* Regulation, Taking of Evidence Regulation, and Brussels I *bis* Regulation, following this template for an extended track 1:[248]

"*For the purposes of this Regulation the term 'court' means any authority with competence in matters falling within the scope of this Regulation provided that such authority offers guarantees with regard to*

[247] CJEU 21 June 2018 C-20/17, *Oberle,* ECLI:EU:C:2018:485, para. 54 and 55.
[248] JuWiLi I, p. 96.

independence and impartiality and the right of all parties to be heard and provided that their acts under the law of the Member State in which they operate:

(a) may be made the subject of an appeal or review by a judicial authority; and

(b) have a similar force and effect as an act of a judicial authority on the same matter would have."

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-established **track-2** regime of the EU regulations, as for instance laid down in Art. 59 *et seq.* SR. In this option to act alongside track 2, notaries will not have to comply with the respective regulation's rules of international jurisdiction and *lis pendens*, and can take up orders from parties with respect to whatever foreign case or country.

In JuWiLi I, the team argued that the free circulation of public acts within the EU in the sense of Art. 81 TFEU requires a coherent regime of EU rules on conflicts of law, which assures that, in cases

- in which a notary does what could *interchangeably* be done by a traditional court and
- certain *procedural quality standards* are met by this notary, 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.'

This recommendation was not formulated with the aim of serving the interests of the profession of notaries or the interests of the judiciary but mainly as serving the best interests of the people concerned: With respect to cross-border scenarios, they are interested in easy access to justice services of high quality which are recognised in all other EU Member States, irrespective of which national institution they had to or chose to address.

3.2.5 Traditional and alternative concepts of 'recognition' in private law

As demonstrated in the JuWiLi I project, the core problem in cross-border cases subjected to the rules of conflict of laws (international jurisdiction, private international law, recognition, acceptance and enforcement of foreign acts) is '**recognition**' (in a broader sense). The EU regulations, which were primarily drafted to ensure the recognition of court decisions proper, are not sufficiently adapted to guiding the cross-border 'recognition' (in a broader sense) of a wide variety of instruments and documents concluding extra-judicial proceedings in many areas of private law. Burdensome complexity, uncertainty and contradictory outcomes are the result.

3.2.5.1 The traditional concept of 'recognition'

The leading opinion in literature on conflict of laws distinguishes between different forms of 'recognition', which are placed in a hierarchical order:[249]

- **Procedural law recognition**: Court decisions and other qualified decisions and instruments (see Art. 3 Brussels I *bis*; Art. 64, 65 Brussels II *ter* and CJEU *Senatsverwaltung/TB*; Art. 3 (2) SR) have to be recognised on a formal level: The content of a decision, the law applied and the international jurisdiction of the court cannot be questioned upon recognition (only a narrow *ordre public* exception applies). The *res judicata* effect of the decision is extended to other EU Member States.

[249] *Mansel*, Anerkennung als Grundprinzip des europäischen Rechtsraums, RabelsZ 2006, pp. 651 *et seq.* with further references; *Hübner*, Die Integration der primärrechtlichen Anerkennungsmethode in das IPR, RabelsZ 2020, pp. 106 *et seq.*; *Lurger/Melcher*, Handbuch Internationales Privatrecht, 2nd ed. (2021) p. 44 (para. 1/98), p. 125 (para. 2/150 *et seq.*); *Lurger*, Anerkennungsprinzip und EU-(Privat-)Recht, Europarecht Beiheft 1, 2024, pp. 123 *et seq.*

- **Substantive law recognition**: Where a procedural law recognition does not take place (for instance, where there is no 'decision', but simply an 'authentic instrument' or other document, such as a written contract or personal identity or family status document), the EU Member State of destination applies the PIL in force and determines the applicable substantive law, on which basis the right or legal relationship in question is examined. If the result of the substantive evaluation is a valid right or legal relationship (for instance a contract, a family status, the right of universal succession), this right or relationship is recognised by the EU Member State of destination as to its substance.
- **Recognition by block reference**: Where a right or legal relationship, validly created in the EU Member State of origin, will not be recognised by the EU Member State of destination under 1) (procedurally) or 2) (substantively), but has to be recognised, nevertheless, due to a rule of primary EU or national or constitutional or international law demanding recognition (such as Art. 8 ECHR, Art. 21 TFEU), the right or legal relationship has to be recognised on the basis of these provisions. Examples are the recognition of surnames of children[250] and of family status in case of same sex marriages or partnerships[251] and surrogate motherhood.[252]

As explained above, this traditional system of 'recognition' (in a broader sense) can incorporate the idea of an authentic instrument being 'accepted' (Art. 59 SR)[253] but not 'recognised' in the sense of a court decision because an acceptance extends the effects of that instrument, which are merely evidentiary (not *res judicata*) to the other EU Member State. But the system is being challenged by other new solutions such as the proper 'recognition' of an authentic instrument or a registration (track 1, procedural law recognition, like in Brussels II *ter* for example)[254] and by new procedural instruments of EU law like the ECS.[255]

3.2.5.2 The Commission's proposal on Parenthood

The **proposal** of the EU Commission for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in **matters of parenthood** and on the creation of a European Certificate of Parenthood (COM/2022/695 final) of 7 December 2022 sets out a three-category system: in addition to track 1 (procedural law recognition), there will be two types of 'authentic instruments' – with and without 'binding legal effect'. Those instruments with binding effect shall mainly be treated like court decisions, the other ones can only extend their evidentiary effects to other EU Member States (like 'acceptance' in Art. 59 SR). However, the proposal does not explain what this

[250] CJEU 02 October 2003 C-148/02, *Garcia Avello,* ECLI:EU:C:2003:539; CJEU 14 October 2008 C-353/06, *Grunkin Paul,* ECLI:EU:C:2008:559.

[251] CJEU 05 June 2018 C-673/16, *Coman*, ECLI:EU:C:2018:385; CJEU 25 November 2025 C-713/23, *Trojan*, ECLI:EU:C:2025.917; ECtHR 21 July 2015, no. 18766/11 and 36030/11, *Oliari and otheres v. Italy*; ECtHR 14 December 2017, no. 26431/12, *Orlandi and others v. Italy*; ECtHR 17 January 2023, no. 40792/10, *Fedotova and Others v. Russia*; ECtHR 23 May 2023, no. 20081/19, *Buhuceanu and Others v. Romania*.

[252] ECtHR 26 June 2024, no. 65192/11, *Mennesson v. France*; ECtHR 26 June 2014, no. 65941/11, *Labassee v. France*; ECtHR 10 April 2019, Advisory Opinion P16-2018-001 (Requested by the French Court of Cassation); ECtHR 16 July 2020, no. 11288/18, *D. v. France*; ECtHR 31 August 2023, no. 47196/21, *C. v. Italy*; ECtHR 06 December 2022, no. 25212/21, *K.K. and Others v. Denmark*; ECtHR 22 November 2022, nos. 58817/15 and 58252/15. D.*B. and Others v. Switzerland*.

[253] See also CJEU 23 May 2019, C-658/17, *W.B*, ECLI:EU:C:2019:444; CJEU 16 July 2020, C-80/19, *E. E*., ECLI:EU:C:2020:569.

[254] See 3.2.6.2. infra.

[255] The issuance of an ECS is not a judicial function according to the CJEU decision of 23 January 2025, C-187/23, *Albausy,* ECLI:EU:C:2025:34.

'binding legal effect' – which has to exist in the EU Member State of origin – really is: Is it a *res judicata* effect? Is an evidentiary effect also a 'binding effect'? What exactly does the instrument have to do beyond the usual authentication of the parties' declarations of will and their signatures? 'Authentic instruments with binding legal effect' are not 'decisions' in the sense of the proposal and they are not 'authentic instruments' in the sense of existing EU law, but a new category of instruments which will create considerable legal uncertainty in its interpretation and application by the EU Member States. This leaves, at least, two questions open: What are those instruments (do they exist at all)? And do we need this new category, in parenthood or elsewhere?[256]

3.2.5.3 The findings and recommendations of the Code-FS Project

The EU JUST project (2023-2025) entitled 'The Concept and Role of 'Court' in the Age of De-Judicialization. Reinforcing EU Family and Succession Law' (Code-FS) was conducted by the University of Pisa (Elena Bargelli) and the University of Munich (Anatol Dutta) in co-operation with François Trémosa and the European Law Institute (ELI). The final results of the project were published in *Bargelli/Dutta/Trémosa* (eds) Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters (2025). Code-FS is based on the same observation as the JuWiLi projects: The augmenting trend of moving tasks in the administration of justice from courts to non-judicial authorities and liberal legal professions is not satisfactorily covered by the EU regulations on conflicts of law (originally drafted for court activities only), which – in all cross-border situations – leads to problems for the free circulation of extra-judicial decisions and documents in the EU's Internal Market. The goals of the Code-FS project are to identify needs for reform in the EU regulations that have been mentioned and to make policy recommendations for their change. Its scope, however, is limited to matters of family and succession law.[257]

The Code-FS team recommends that EU Member States should consider shifting competences from courts to non-judicial actors called 'authorities' in family and succession matters where legal consequences depend on the 'will of the parties'.[258] The term 'authorities other than courts' includes legal professionals (notaries, lawyers) and 'public and administrative authorities' and 'other entities, acting in an official capacity and authorised under EU Member State law to participate in an act'.[259] These other authorities are supposed to comply with 'minimum standards', which means, in particular, that EU Member States shall ensure that parties directly affected will be heard in the proceeding, that the act can be made subject to judicial review, that adequate mechanisms will ensure the 'genuine will' of the parties and that their interests are fairly balanced and that only authorities 'qualified to receive and record party declarations' will participate in the act.[260] Just as courts, 'other authorities' should be principally bound by the rules on international jurisdictions of the respective regulation.[261] Equally to court decisions (in the narrow sense), all legal effects of an act (with *res judicata* or similar effect) of an authority other than a court that it has in the legal system of the EU Member State of origin are supposed to be extended / recognised in all other EU Member States. However, the EU Member State of destination has the possibility to refuse the extension where the EU Member State of origin did not have international

[256] For a very critical analysis of the proposal, see *Budzikiewicz/Duden/Dutta/Helms/C. Mayer*, The European Commission's Parenthood Proposal, IPRax 2023, 425 *et seq.*

[257] The 16 legal systems compared in Code-FS are those of: Austria, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden.

[258] *Bargelli/Chiricallo/Dutta/Patreider/Stracqualursi/Trémosa*, The Extra-Judicial Adminstration of Justice in Cross-Border Family and Succession Matters – Policy Recommendations, in Code FS, p. 1050 (principle 2).

[259] *Bargelli et al*., Code FS, pp. 1049, 1050 (principle 1, para. 6) :

[260] *Bargelli et al.*, Code FS, p. 1052 (principle 3).

[261] *Bargelli et al*., Code FS, p. 1061 (principle 4).

jurisdiction.[262] This exception leads to a 'discrimination' of instruments issued by 'other authorities', as the recognition and enforcement of a court decision (in the narrow sense) can never be refused on the ground of lack of jurisdiction.[263] The discrimination is justified by the project team using convincing arguments:[264] The system of concentration of jurisdiction and the *lis pendens* rule aim at avoiding contradictory outcomes in several EU Member States and forum shopping. In line with the traditions of the EU Member States, notaries and other non-judicial actors are not used to taking into account any constraints of international jurisdiction and therefore might refuse or forget to do so also in future practice. In such cases, decisions and acts rendered by the courts and other authorities of the EU Member States having international jurisdiction will have to be prioritised.

Furthermore, the Code-FS team recommends that the narrow notion of 'court or tribunal' in Art. 267 TFEU should be extended to comprise 'other authorities' in family and succession matters,[265] diagnosing a need for extending the preliminary references to such authorities and the compatibility of the extension with the goals of Art. 267 TFEU.[266]

In their final recommendation (principle 7),[267] the Code-FS authors address three different legal issues: In their first point, they observe that, in extra-judicial proceedings such as divorce in notarial or administrative offices, EU Member States often do not clarify the legal consequences of irregularities in the proceedings. In particular, EU Member States should determine whether substantive remedies (like contract law remedies with respect to a party agreement) or procedural remedies will apply. In point 2, addressed to the EU legislator, the Code-FS team demands a more comprehensive European regime of uniform private international law rules which cover all acts in family and succession matters.[268] Point 3 correctly states that the lines between the legal 'recognition' consequences of different types of national and EU instruments and certificates have become blurred over time. The consequences of authentic instruments, while still relatively clear under Brussels I *bis* and the SR (two-track system, acceptance of evidentiary effects only), were changed under the Brussels II *ter* Regulation, with a full recognition like a court decision (proper) possible, provided the respective EU Member State of origin had international jurisdiction. A new category of national instruments, the registration of an agreement, was introduced. The ECS (European Certificate of Succession), a new European instrument, does not fall in either of the traditional two tracks. It is neither a court decision nor an authentic instrument. The project team calls upon the EU legislator to reduce and simplify this complexity in 'recognition' matters in the EU.

3.2.5.4 The concept of 'quasi-procedural recognition' of particular agreements

It is clear from the above deliberations that, in recent developments of EU law, the line between (a) a mere private legal transaction like a unilateral, bi- or multilateral declaration of will by the parties in written form, maybe drawn up by a notarial 'authentic instrument' and (b) a 'decision' by a non-court actor (like again a notary, or an administrative body) becomes blurred. Under which conditions is a private legal transaction more than that and will have similar or identical effects in cross-border cases as

[262] *Bargelli et al*., Code FS, p. 1069 (principle 5).
[263] *Bargelli et al*., Code FS, p. 1068.
[264] *Bargelli et al*., Code FS, p. 1068.
[265] *Bargelli et al*., Code FS, p. 1073 (principle 6).
[266] *Bargelli et al*., Code FS, pp. 1078, 1080 (para. 93, 96 et seq.).
[267] *Bargelli et al*., Code FS, pp. 1082 *et seq.*
[268] Currently, Rome III is not applicable to 'private' divorces (see the *Sahyouni* case C-372/16) and to matters of family status (parenthood, marriage, registered partnership).

a ‘court decision’ (track 1, procedural law recognition)? In the SR, authentic instruments (Art. 59) will never enter track 1[269] while, in Brussels II *ter*, many of them will.

Urs Peter Gruber analyses under which conditions, under EU law, private legal transactions can form the basis of a proper ‘recognition’ in the sense of track 1 (procedural): meaning that their substantive validity and law applied cannot be challenged in the EU Member State of destination.[270] On the traditional basis of the ‘extension-of-effects theory’ (‘*Wirkungserstreckungslehre*’), he distinguishes between the direct application of track-1 rules (as in the CJEU case C-646/20 *Senatsverwaltung/TB*) and their indirect application by reference (as in Art. 64, 65 Brussels II *ter*; Art. 48 Maintenance Regulation (MainReg); Art. 35-39 Proposal on Parenthood).

Under Art. 48 MainReg, maintenance obligations resulting from ‘court settlements’ or ‘authentic instruments’ shall be recognised like court decisions. However, under the ‘extension-of-effects theory’, national provisions limiting the effects of such settlements or authenticated agreements to mere evidentiary effects (no *res judicata* effect) would have to be extended to the Member State of destination and would thus undermine Art. 48 MainReg: Following this theory, the EU Member State of destination could question the substantive validity of the underlying agreement on the basis of the applicable law (substantive law recognition only). In such cases, the author suggests transforming the rule of Art. 48 MainReg into a rule of distribution of competences: The courts and authorities of the EU Member State of destination have to recognise the settlement or instrument as to its substance (and law applied) in accordance with Art. 48 MainReg, whereas the courts or authorities in the EU Member State of origin can conduct a substantive review of the underlying agreement. The author calls this model ‘quasi-procedural law recognition’ and proposes to extend it to other contracts, such as the contract of marriage or the foundation of a corporation and to ‘court settlements’ and ‘authentic instruments’ beyond maintenance law, as in succession. In the latter case, Art. 59 SR would have to be rephrased.

3.2.6 Conclusions of the JuWiLi II project (conflict of laws)

3.2.6.1 Coherent System - Uniformity in the regulations: from Brussels I *bis* to Brussels II *ter:*

Considering prior research projects (JuWiLi I, Code-FS) and literature, the question of whether the system of jurisdiction, recognition and enforcement of public instruments and its core notions, ‘court’ and ‘judgement’, should be uniform across all EU regulations and fields of private law has to be clearly answered in the affirmative. The CJEU stated in numerous judgements that – in the absence of a reference to national law – the EU has to be given an autonomous uniform interpretation, taking into account the context of the particular provision and the objectives pursued by the EU legal instrument in which it is included.[271] In earlier judgements, the court states that the notions of ‘court’ and ‘judgement’ can differ between EU regulations:[272] This observation obviously applies to the notion of ‘court’ in Art. 3 (2) SR being wider than the notion in earlier EU regulations such as Brussels I *bis* or the European Enforcement Order Regulation. In the divorce case C-646/20 (*Senatsverwaltung/TB*)[273], the court argues that an Italian registration officer does more examination as to the substance of the divorce agreement than a court with respect to a ‘court settlement’ by the parties of a former litigation, and thus proves that the notions of ‘court’ and ‘judgement’ under Brussels I bis (Brussels Convention) and Brussels II *bis* and II

[269] See CJEU 23 May 2019 C-658/17, *W.B*, ECLI:EU:C:2019:444; CJEU 16 July 2020, C-80/19, *E. E.*, ECLI:EU:C:2020:569.
[270] Urs Peter Gruber, Ein europäisches „Full Faith and Credit“ für Rechtsgeschäfte, RabelsZ 89 (2025) pp. 195 et seq.
[271] CJEU 09 March 2017 C-484/15, *Zulfikarpašić*, ECLI:EU:C:2017:199, para. 32 with further references.
[272] CJEU 09 March 2017 C-484/15, *Zulfikarpašić*, ECLI:EU:C:2017:199, para. 35, 37; CJEU 09 March 2017 C-551/15, *Pula Parking*, ECLI:EU:C:2017:193, para. 48, 49.
[273] CJEU 15 November 2022 C-646/2020, *Senatsverwaltung/TB,* ECLI:EU:C:2022:879, para. 55 *et seq.*

ter can be brought to congruence. This recent approach by the CJEU obviously implies that these notions are in fact, or should be, uniform under most EU regulations on conflicts of law based on Art. 81 TFEU.

This means that, in our view, the free circulation of judicial and extra-judicial documents under Art. 81 TFEU, building a system of mutual trust and easy recognition among the EU Member States, has to be based on coherent structures that apply to all relevant EU regulations: from civil and commercial law, to maintenance, succession, divorce, taking of evidence and others. Looking at these instruments in their present shape and interpretation by the CJEU, the preceding parts of this study make clear that this coherence and uniformity does not exist at the moment and should therefore be promoted by future legislative amendments.

A uniform approach across regulations and a coherent and transparent system that is easily accessible for citizens, irrespective of the public authority that they have to or choose to approach for a civil proceeding, is a matter of the principle of equality and of a people-centred justice system. Access to justice cannot depend on the area of law in question. This means, for example, that cross border recognition should not be more difficult in the area of succession than in the area of divorce or family status. And access to justice should also not depend on the national legal system entrusting certain non-contentious tasks to courts rather than to notaries or *vice versa*. A uniform system also contributes to its simplification, which is also a contribution to people's easier access to the justice system.

3.2.6.2 The cornerstones of a coherent system of recognition for extra-judicial actors

a. Extra-judicial administration of justice with mixed actors in the EU

The focus of our study has been on areas of private law where relevant non-contentious proceedings are conducted by courts exclusively in some EU Member States whereas they are conducted exclusively by notaries and other non-judicial actors in other EU Member States or conducted by both court and non-court actors in a third group of EU Member States. These constellations apply, in particular, in succession and divorce matters.

In these and other areas of private law, as in civil and commercial matters (Brussels I *bis*) or maintenance law, disputes can always be terminated by either a 'court decision' or a 'court settlement' or an 'authentic instrument' (normally also based on an agreement of the parties).

These alternatives of non-contentious proceedings and acts raise the question of whether the type of actor – court or non-court – and/or the type of final document should make a difference in cross-border 'recognition' cases. Can all documents of all public actors have the same legal consequences, in particular with respect to 'recognition', or which differentiations are necessary and why? In which way do we have to amend or tear down the traditional two-track system (see 3.2.1.1. supra) and the traditional three-part system of 'recognition' in the EU with regard to the conflict of laws (see 3.2.5.1.)?

As summarised in 3.2.4.2. supra, the **JuWiLi I** project recommends the following template for a uniform definition of 'court' and 'judgement' for all EU regulations on conflicts of laws:

> **Art. 1*:* Broad notion of 'court' in the sense of the Regulation – comprising certain other public authorities**
>
> *"For the purposes of this Regulation, the term 'court' means any authority with competence in matters falling within the scope of this Regulation provided that such authority offers guarantees with regard to independence and impartiality and the right of all parties to be heard and provided that their acts under the law of the Member State in which they operate:*
>
> *(a) may be made the subject of an appeal or review by a judicial authority; and*
>
> *(b) have a similar force and effect as an act of a judicial authority on the same matter would have."*

This rule will be refined in the **JuWiLi II** project by the following additions:

***Art. 1* – Alternative formulation without extending the notion of 'court':**

"Under this Regulation, any authority with competence in matters falling within the scope of this Regulation ***will be considered to be in a 'court-like' position*** *provided that such authority offers guarantees […] see supra Art.1."*

Art. 2: International jurisdiction of extra-judicial actors in a 'court-like position'

"(1) The 'decisions' rendered by an 'authority' in the sense of Art. 1 will be recognised and enforced on the basis of the provisions of this Regulation for decisions of proper courts (in the sense of Art. 267 TFEU and EU-CFR) provided that the Member State of origin of the decision had international jurisdiction under the Regulation. In these cases, the rules of lis pendens will apply as well.

(2) 'Authorities' in the sense of Art. 1 and any other public authority providing administration of justice services are always free to act outside the rules of international jurisdiction."

Art. 3*: *Consequences of lack of international jurisdiction or lack of requirements of Art. 1

"Where an 'authority', in the sense of Art. 1 (meeting all requirements of Art. 1), is not domiciled in a Member State which has international jurisdiction under the Regulation, the provisions of this Regulation for recognition and decisions of proper courts and for lis pendens will not apply. Where applicable, the instrument will be 'accepted' and enforced in all other Member States in accordance with the rules for 'authentic instruments'.

The same applies to all instruments of 'authorities' which do not comply with all requirements of Art. 1."

Requirements of Art. 1: Unlike the definition in Art. 3 (2) SR, no institutional link between the court and the notary (delegation of powers or control by the court) is required. Equally, the notary (or other public authority) need not exercise a 'judicial function' (Art. 3 (2) SR). This means that, in succession matters as in other areas of the law, principally, no distinction is made between 'court commissioners' and notaries not acting as 'courts' or 'court commissioners' in their home jurisdictions. As further explained in part 1 supra, not many EU Member States have the tradition of notaries acting as 'courts' or 'court commissioners' under their national legal systems. From the standpoint of EU citizens, it is a prescript of equality and fairness to give all notarial decisions equal weight in cross-border recognition cases, where notaries exercise the same function under the same quality standards (impartiality, right to be heard, formation etc.) in each EU Member State. This template provision also takes into account that tasks of the same function ('similar force and effect') may, in some jurisdictions, be performed by the courts themselves (mixed actors).

Constitutional guarantees and quality standards: The standards included in Principle 3 of the Code-FS recommendations have similar function and content as the standards of our court definition template. However, Principle 3 does not include the requirement that the public authority as such offers guarantees with respect to 'independence' and 'impartiality'. The Code-FS conception imposes no requirements on the non-judicial actors themselves, but merely procedural requirements, i.e. 'adequate mechanisms' to ensure the genuine will of the parties and a fair balance of interests. This seems a remarkable deficit in constitutional guarantees and quality standards, as it invites inclusion of lawyers and administrative authorities, both not trained and not obliged by statutory provisions to act independently and impartially in their public offices in the interests of all parties concerned.

Our definition has the following implications with respect to **international jurisdiction**: The national legal system of the EU Member State of origin may or may not provide the binding force of the rules of international jurisdiction (in the EU Regulation) for non-court actors, complying with the Art. 1-

requirements of our template. Where the EU Member State of origin has international jurisdiction under the respective regulation in a certain case, the 'decision' (no matter whether it is a notarial 'instrument', 'act', 'certificate', 'decree' or other document of a public authority) shall be recognised and enforced in the EU Member State of destination under the same conditions as a decision by a proper court (track 1 – see 3.2.1.1. supra). This implies that, where the country of origin of the non-court actor does *not* have international jurisdiction, no track-1 recognition will take place. In such cases, track 2 for 'authentic instruments' will apply (evidentiary function is extended).

Choice: This means that parties entrusting an extra-judicial authority to deal with their case will, principally, have the choice between the track-1 system (courts) and track 2 (authentic instruments), with the obvious restriction that track 1 will be only available under the conditions of Art. 1. In the spirit of a people-centred approach, it should be the legal obligation of the respective authority (like a notary) to give parties legal advice as to the 'recognition' consequences of their choices. The parties' right to choose the legal consequences also comprises choices that are additionally available within track 1: Several EU regulations give the parties the possibility to choose the court (or notary) which has international jurisdiction ('prorogation' of court): see, for instance, Art. 5 SR, Art. 25 Brussels I *bis*, Art. 3 Brussels II *ter* (give the applicant a unilaterial right to choose between several jurisdictions), Art. 4 MainReg, Art. 7 Matrimonial and Partnership Property Regulations.

'Similar force and effect as an act of a judicial authority on the same matter would have**':** This means that the decision, certificate, authentic instrument or other document determines the parties legal position with a final (subject to review) and conclusive effect. In other words, the instrument must have *res judicata* effect or a similar *erga omnes* effect.

This also implies that the limits of the '**extension of effects theory**' have to be taken into account (see 3.2.5.4 supra). Under this theory, a judicial or extra-judicial document should not have more effects in the EU Member State of destination than it has in the EU Member State of origin. Gruber[274] mentions the German example where 'court settlements' and 'authentic instruments' establishing maintenance obligations do not have the legal force (*res judicata*) of a 'judgement' under national German law, whereas Art. 48 MainReg orders a cross-border recognition under track 1. The application of the extension of effects theory under EU law is not self-evident, since in its *Oberle* judgement,[275] the CJEU qualifies the German '*Erbschein'*, a national certificate of succession, which has no *res judicata* effect in the national legal system of origin, as a 'court judgement': Its cross-border 'recognition' and enforcement in other EU Member States, could be understood as giving effects to the certificate in the EU Member State of destination that it does not have in the EU Member State of origin.

An 'authentic instrument' which, under national law, has the legal effect of terminating a marriage or regulating a succession, thus having a 'similar force and effect as a court decision', will, consequently, have the same 'recognition' effects as a court decision (track 1) in our template. In our view, it is not necessary that such a court decision is available under the *same* national system. As demonstrated above (see part 1.2.1. and 1.3. supra), in some national systems, court decrees for consensual divorces or successions are not available. This, however, should not make a difference in substance affecting the parties' justified interests in an equal, fair and smooth cross-border recognition system. In this case, national legal effects in the EU Member State of origin are simply extended to the EU Member State of destination (provided that the rules of international jurisdiction are complied with).

[274] *Urs Peter Gruber*, Ein europäisches „Full Faith and Credit" für Rechtsgeschäfte, RabelsZ 89 (2025) p. 195 (206).
[275] CJEU 21 June 2018 C-20/17, *Oberle,* ECLI:EU:C:2018:485.

In the scientific argument, this result could (with some reservation)[276] also be reached for succession proceedings conducted by notaries by (i) a reverse reading of the *Oberle* decision and (ii) by an analogous extension of Brussels II *ter* (and the *Senatsverwaltung/TB* judgement).

(i) If, in succession cases, it is a standard procedure to simply confirm (certify) the succession of certain heirs (which takes place *ex lege*), in the absence of a *res judicata* effect, by some certificate issued by a public authority, no difference should be made between a court and a notary. The same legal consequences should follow from a court certificate and from a non-court (notarial) certificate being the standard procedure in the respective EU Member State. This means, if what a probate court does under its national law is turned into a track 1 recognition (*Oberle*),[277] what the Polish notary does under Polish law should be equally recognisable under track 1 in the other EU Member State, where quality requirements (see Art. 1 of our template) are met.

(ii) The same follows under the Brussels II *ter* and CJEU regime (case C-646/20, *Senatsverwaltung/TB)*. Every intervention of a public authority, which is a requirement for the legal effect of termination of a marriage (by party agreement), having a 'similar force and effect as' a court divorce will, consequently, receive equal recognition under track 1. This rule could also be applied to notaries issuing national certificates of succession under the SR, by analogy.[278]

It has to be noted that the Brussels II *ter* solution does not require any **constitutional guarantees and quality standards** for the public authority as such (impartiality, independence, fair trial, right to be heard), as included in our template provision and in Art. 3 (2) SR. We therefore recommend adding these requirements to Art. 2 and Art. 64, 65 Brussels II *ter* Regulation.

'*Similar force and effect*' thus means a *res judicata* effect, but also other similar legal consequences with final character (subject to review) and *erga omnes* effect (see consensual divorces). Where the national legal system does not attribute such a function or 'force and effects' similar to a court decision in the particular area of law, as for instance no *res judicata,* to an extra-judicial activity, but evidently differentiates between 'decisions' of court and non-court actors in the regular proceeding and other extra-judicial services with only evidentiary effects, two solutions are possible: (a) Track-1 provisions for recognition and enforcement will nevertheless be applied. (b) Track-1 provisions will not apply. On the basis of our recommended JuWiLi template for track 1 (notion of court), not all requirements would be met.

a) Track-1 provisions for recognition and enforcement will nevertheless be applied: This alternative would violate the limitation of effects which is foreseen under the national law of the EU Member State of origin. The EU Member State of destination would not be able to review the 'decision' as to its substance or the law applied, whereas the EU Member State of origin would apply its own provisions (only evidentiary effects) and would be able to review the substance of the legal relationship in accordance with the local PIL rules. This is the solution described by Gruber (see 3.2.5.4) as 'quasi-procedural recognition'. The effects of track 1 (= procedural law recognition) would apply in other EU Member States but not in the EU Member State of origin (= substantive law recognition). The requirement for track 1 recognitions is, as always, the international jurisdiction of the EU Member State of origin. This makes an 'authentic instrument' or a 'court settlement', which is not intended to replace

[276] It has to be clarified whether the succession certificate issued by a court or notary has "the similar force and effect as a court act".

[277] With the reservation that the certificate has to have "similar force and effect as a court act" (Art. 3/2 SR and Art. 1 of our template), i.e. *res judicata* or similar *erga omnes* effect.

[278] Both arguments, however, imply a revision of the CJEU judgements in *W.B.* and *E.E.*, provided there is similar force and effect (see Art. 1 of our template).

a court decision in the EU Member State of origin but is supposed to have a different force and function, a *hybrid creature*: with effects of a 'court decision' in other EU Member States and more limited effects under the national jurisdiction of origin. Gruber suggests applying this concept also to marriages and the foundational contract of a corporation. This means that the concept could, in the eyes of Gruber, apply to *every contract* which is somehow *formalised* (by authentication through a notary or by an act or registration by an administrative authority) and where the need for simplified cross-border recognition and circulation is observed.

b) Track-1 provisions for recognition and enforcement will not apply: Where, under national law, the respective instrument is seen as clearly having a different function than concluding a non-contentious proceeding that could – *in abstract* – also have been concluded by a court, track 1 could be imagined not to apply at all. The solution would adhere to the 'extension of effects theory' and the traditional system of the three types of 'recognition' in the broad sense (procedural, substantive and by block reference).

Whereas alternative (a) completely revolutionises the traditional two-track system, by applying track-1 recognition and enforcement rules to all formalised contracts and all legal relationships which are thereby created,[279] alternative (b) preserves the two tracks, and supplements them with an additional option that parties will have when choosing the non-court service provider. Where rules of international jurisdiction are observed, the notary or other public authority complying with the specific constitutional guarantees and quality standards, the requirement of a court review and of similar force and effect as a court decision, the parties can obtain a document that will be recognised and enforced in the EU Member State of origin as well as in other EU Member States in the same way as a court decision. Parties, in that situation, are advised by the respective judicial or non-judicial actor and can also choose to entrust an extra-judicial service provider in EU Member States not having international jurisdiction. This will most often result in a track 2 'acceptance' and enforcement.

We recommend solution (b) as preferable because it supports parties' expectations and genuine choices which are normally closely linked to the jurisdiction in which they seek administration of justice services. Where local instruments (like authentic instruments of party agreements) are just given evidentiary effects, this implies a whole line of legal consequences (such as substantive review in a court litigation case, in the EU Member State of origin, but also in other EU Member States) which will normally be expected and intended by the parties and which will often provide a special additional control of fairness (good faith) and protection of the weaker party's interests in a contract. There seems to be no obvious justification for cutting off these legal consequences in all other EU Member States, except the EU Member State of origin, because this would go along with a considerable reduction of legal protection for the parties.

b. Extra-judicial administration of justice without any court actors in the EU

The only point which still requires further clarification in our recommended concept for the 'recognition' (track 1) or 'acceptance' (track 2) of non-court instruments is the following: There is a remaining grey zone with respect to the distinction between national instruments which "have a similar force and effect as an act of a judicial authority on the same matter would have" (see also Art. 3 (2) SR) and other instruments which have not). This means that the latter have merely evidentiary or administrative function and effect. This goes back to the old discussion around the notion of 'court' in Brussels II *bis* and II *ter* (see 3.2.4.1. supra): What does it mean to 'grant' a legal consequence like 'divorce'? What does a public registration or authentication of a divorce agreement do more than a 'court settlement' or the incorporation of a company?

[279] Thereby excluding the 'substantive law recognition' and the 'recognition by block reference': see 3.2.5.1. supra.

In our comparative study, we have identified areas of law (functions) in which courts are usually not active in any EU Member States: such as marriage, the incorporation of a company, the authentication of certain agreements. In these functions, the notaries or other public authorities nevertheless contribute to unburdening courts and contribute a preventive control of legality.[280] In the case of notaries, the contribution to the rule of law and to ensuring a high quality of the administration of justice in a particular EU Member State will higher than in case of other extra-judicial actors (see 3.3.3. infra). In such cases, however, the requirement of 'similar force and effect' in our template provision will not be met.

Struggling with the same issue, the Code-FS project formulated, in Principle 4, the requirement that the respective 'participation' in an 'act' in family and succession matters 'is in at least one Member State reserved to courts.' This requirement is line with our view that a certain activity by a non-court actor need not be – also – performed by a court in the very same EU Member State (of origin). This is particularly obvious in the areas of divorce and succession proceedings (see 1.2.1. and 1.3. supra). The requirement of 'similar force and effect' can be understood as demanding a similar court activity in at least one EU Member State. However, the activity need not constitute the 'exercise of a judicial function' because this notion is construed narrowly by the CJEU and not established as an obligatory (but only as an alternative) requirement in Art. 3 (2) SR (see 3.2.4.1. and 3.2.6.).

Thus, the requirement of 'similar force and effect' is part of EU law and will have to be interpreted autonomously. Whether or not this requirement is met depends on the underlying national law of the respective EU Member State. Beyond deciding disputes (litigation), the attribution of non-contentious tasks to different legal actors, courts and non-courts evolves historically and is undergoing constant change. In the last decades, a shift of competences from the judiciary to non-courts could be observed. The recommended template provision of JuWiLi – with its broad definition of 'court' and broad scope of track-1 recognitions (under certain circumstances) – is intended to cover, in particular, those areas of *traditionally* mixed competences among EU Member States as a totality, and those where recent shifts of competences towards non-court actors ('outsourcing', 'de-judicialisation') took place (see supra 3.2.6.2.a).

3.3 Substantive private law – Best practice examples

3.3.1 Fair balance of party interests and fundamental rights as guidelines

In the area of family law and divorce, Art. 8 ECHR, the right for respect for private and family life, plays a central role. In the EU-CFR, Art. 7 (private and family life) and Art. 8 (protection of personal data) play an important role. Art. 12 ECHR and Art. 9 EU-CFR protect the right to marry and found a family. The ECtHR determined that Art. 8 ECHR not only contains a ban on State interference into a citizen's private and family life, but also a duty of protection which is imposed on contracting States.[281] They have to provide a legal environment in which the right of sexual and private self-determination is encouraged and protected. Such legal protection of personal freedom and self-determination is particularly important for persons who are, for some reason or another, subjected to the influence, power or dominance of another in a private legal relationship, such as children, handicapped persons or one of the spouses. The same basic rule also applies to the contractual freedom of structurally 'weaker' parties on markets, such as

[280] See Art. 2: Amendments to Art. 10 EU Directive 2017/1132, and Recital 9 of EU Directive 2025/25, 19 December 2024, Digitalisation in Company Law, where a 'preventive administrative, judicial or notarial control' has to be established by the Member States: A notary or other public authority has to check whether the foundation of a corporation is without prejudice to national laws that, in accordance with Member States' legal systems, require that those documents be drawn up and certified in due legal form.

[281] ECtHR 23 January 2025, *H.W./France*, no. 13805/21.

workers and consumers. They have to be protected by the State (courts as well as legislator) against undue interference of the stronger part into their right of self-determination and freedom of decision-making.[282]

Three core principles: This makes the right of private **self-determination** and **protection of 'weaker' parties** in family relations one of the core principles of substantive family law in EU Member States. Both principles contribute to a **fair balance of interests** of the private parties as the result of a (non-contentious) civil law proceeding. Another important guiding principle is the principle of **de-escalation of conflicts** between the parties. Conflicts will always hurt the weakest person in a family the most (such as children or the 'weaker' spouse) and conflicts are most destructive for any family relation and protected sphere of privacy.

This means that, from the perspectives of the interests of the parties concerned and from the perspective of the European framework of human rights, substantive **family** law rules and procedural rules enforcing them should always be drafted in a way in which they

- best support the self-determination of the parties,
- protect 'weaker' parties where necessary, and
- de-escalate conflicts.

It can be said that, *grosso modo*, the same applies also to legal relationships in **succession** matters, as well as to legal relations on commercial and other **markets**. The right of self-determination of the individual and holder of human rights in their family and private sphere as well as in their private and business transactions on markets is always at the centre. This human right also implies the State's duty to protect weaker parties (where applicable). And the de-escalation of conflicts between parties should be considered a procedural core principle in all civil proceedings dealing with conflicts in private law.

3.3.2 Additional people-centred aspects of best practices

From the perspective of citizens (in the sense of the OECD people-centred approach, see 3.2.3) legal rules of private substantive and procedural law should not only implement the three core principles (of self-determination, protection of weaker parties, de-escalation of conflicts) but should have additional justice 'service' qualities. Some of the most important aspects are: The service or proceeding should be easily accessible. It should support trust in the public institutions administering civil justice. It should be fast and it should be affordable.

Besides the OECD documents, a recent study by the European Committee on Legal Co-operation of the Council of Europe also underlined that the notarial profession makes a considerable contribution to legal certainty, the people's access to justice and their exercise of human rights, thus constituting an important component for the rule of law in Europe.[283]

Service is easily accessible: This comprises several different aspects. (i) Geographical accessibility means that the authority or service provider should be geographically close to the citizens requesting the service. (ii) Informational accessibility means that information as to how to access the service provider is easily available (in digital and other form). (iii) Psychological accessibility means that the service is offered

[282] See the landmark decision of BVerfG 19 October 1993, 1 BvR 567/89, BVerfGE 89, 214, which has received broad international acceptance.

[283] See Bureau of the European Committee on Legal Co-operation (CDCJ-BU) of the Council of Europe, Research Note: Case law of the European Court of Human Rights concerning the role of notaries for the effective administration of justice, CDCJ-BU (2026) 02, 20 March 2026.

in an inviting manner and atmosphere to minimise psychological barriers. (iv) Social and communicative accessibility means that the service provider should establish and keep up a good base for communication of any kind with the parties, reducing any formalities or other barriers in communication as much as possible.

Supporting trust in public institutions: This is also partly a psychological, communicative and political component. Citizens should have the impression of legal certainty and clarity. The legal rules should be made transparent and explained by the public authority. They should be easily understandable and acceptable for the parties. Where necessary, each party should have easy access to legal advice on how to best act in their own interest. Parties should have the impression that the authority is acting fairly and independently. For this purpose, the court or non-court actors should have to be trained lawyers, but should also have received training in other skills, which include communication and mediation skills (see also the principle of de-escalation of conflicts).

Fast and affordable services: Proceedings should be fast and without any complicated formalities. In particular in cases of conflict of interest between the parties, the duration of conflict before its de-escalation or termination is of essence. Services should be affordable, from a financial perspective, for every citizen of the EU. Where parties lack the financial means, appropriate public support has to be put in place.

3.3.3 Evaluation of notarial services in the administration of justice

The evidence from our comparative study of the legal development in 22 participating EU Member States demonstrates that, in many countries, legal systems have been a testing ground for offering the administration of justice services inside and outside the judiciary. In particular, in the areas of succession and divorce, a growing number of practitioners and citizens in many EU Member States seem to be satisfied with the advantages of legal proceedings conducted by non-court actors. In the majority of countries, these non-court actors are notaries. However, in the area of consensual divorce, administrative authorities are involved too, in some EU Member States.

Based on the evaluation criteria developed in our legal study (see parts 1-3 supra), we arrive at the following comparative analysis of institutions or authorities acting in the administration of justice:

The important **constitutional guarantees** of independence, impartiality, fair trial, the parties' right to be heard and the parties' access to a review in court (see part 2 supra) are the baseline for the notarial profession in the legal systems of all 22 participating EU Member States. These important legal quality standards support the rule of law in all EU Member States. They characterise the judiciary (sovereign State power) as well as the liberal legal profession of notaries (as service providers on the EU's Internal Market).[284] These standards are, however, not met by administrative authorities and lawyers. Administrative authorities are bound to act in the public interest and are therefore obviously entrusted with certain judiciary tasks, in particular with consensual divorce. Lawyers are trained to act in the interests of one party, they offer no guarantees of independence or impartiality and are therefore not the appropriate addressees for the impartial delivery of administration of justice services. The disadvantage of entrusting administrative bodies is obvious: Whereas they have some characteristics in common with the judiciary (sovereign State power, public interest), they fall short of the legal training and

[284] See Bureau of the European Committee on Legal Co-operation (CDCJ-BU) of the Council of Europe, Research Note: Case law of the European Court of Human Rights concerning the role of notaries for the effective administration of justice, CDCJ-BU (2026) 02, 20 March 2026.

constitutional guarantees present in courts. This gives them a considerable disadvantage when compared with the notarial profession. By conclusion, this means that notaries, as compared to administrative authorities and lawyers as court alternatives, receive a most positive evaluation when it comes to the constitutional guarantees provided by courts.

In contrast to the court system, notaries work as a liberal legal profession / public officials on partly or wholly **competitive markets** for the public services that they provide. This competition gives them certain advantages over the court system. Where citizens are able to compare and choose a legal service, legal service providers will come under pressure to **improve the quality of their services**. This rule applies to all qualities of the legal services discussed above: constitutional standards, self-determination, protection of the weaker, de-escalation, easy access, trust in institutions, fast and affordable services. This competition gives notaries a systemic advantage over the court system and administrative bodies. Due to competitive markets and the organisational structure as liberal profession, notaries are more flexible and better able to adapt to the needs of their clients.

In addition, thanks to their training and professional experience, the core abilities of notaries include the following: de-escalation of conflicts and achievement of consensual solutions for parties which contain fair and balanced legal frameworks for the future. These core abilities are valuable in family and succession matters as well as in market transactions. This also gives notaries an advantage over judges in court. Judges are trained to decide disputes between parties via traditional means, not on consensual paths in the first place. De-escalation is not one of their core competences, at least not in terms of their training. And judges have no experience in advising parties to conclude contracts which are frameworks for the future.

3.3.4 Best practice examples

3.3.4.1 Succession

General Suitability: Considering the broad experience of notaries in succession matters in all EU Member States and the evaluation criteria developed in 3.3.1. to 3.3.3. supra, notaries seem to be the ideal institutions for non-contentious succession proceedings. Notaries received the same legal education as judges and have similar institutional guarantees of impartiality, indpendence and compliance with fair trail rights. There seems to be ample empirical and theoretical proof that they are very well equipped to support courts and to reduce their workload in succession matters. Lawyers and administrative bodies are not the appropriate actors in that function.

'Liberal model' and 'court commissioner' model on an equal footing: In the area of non-contentious succession proceedings, both models involving the notarial profession which are present in the majority of EU Member States can be considered best practice examples: the model of 'court commissioners' (or 'courts' in Hungary) as established in Croatia, Czechia and the Slovak Republic, Hungary, Austria and the French region of Alsace-Moselle, as well as the regulation of succession matters by notaries that do not have a close link to the court system but act as liberal legal professionals, as in Belgium, the Netherlands, Luxembourg, Estonia, Latvia, Lithuania, France, Spain, Portugal, Poland and Romania.

Amendment of Art. 3 (2) SR necessary: However, it has to be noted that, under the present legal regime of EU regulations on conflicts of law, only 'court commissioners' are included in the notion of 'court' (Art. 3 (2) SR). This means that only 'court commisioners' are bound by the rules of international jurisdiction and will be able to offer 'decisions' which are fully recognised (Art. 39 *et seq.* SR) in other EU Member States. We therefore suggest improving this legal regime for cross-border cases to encompass other notarial proceedings (see supra) where the parties opt into track 1 (Art. 38 *et seq.* SR) and the EU Member

State of origin of the instrument has international jurisdiction (Art. 4 *et seq.* SR). Beyond the national limits of a 'court commissioner' system, the parties are always free to choose the notary. If parties agree so and are advised by the notary of the legal consequences of their choices, they can choose a notary in a Member State without international jurisdiction in the particular case (thereby avoiding track 1).

In Slovenia and Bulgaria, notaries play a comparatively minor role in succession proceedings. The role of notaries in neighbouring Croatia (which has a similar legal tradition to Slovenia) or of other EU Member States outside the 'court commissioner' tradition (see the list supra) could serve as an example here. Croatia and the other so-called 'Hexagonale States' (Austria, Czech Republic, Hungary, Slovak Republic, Slovenia) referred to in JuWiLi I deliver proof that notaries as 'court commissioners' can help to make proceedings quicker by relieving the court systems,)with notaries more easily accessible than courts for the population. There is a good example of this in Slovenia, in the context of family law reform, where notaries took over new tasks in divorce matters. Furthermore, a stronger role of notaries could also lead to the establishment of new notarial offices in rural areas, which would lead to the creation of high-quality jobs and high-quality judicial services in rural regions.

3.3.4.2 Out-of-court divorces

General suitability: Notaries are the ideal institutions for consensual out-of-court divorces. In this area, they clearly equal or outdo courts when it comes to several of the criteria for good people-centred justice services as developed above (3.3.1. to 3.3.3.): protection of self-determination in the private and family sphere, protection and advice to weaker parties, de-escalation of conflicts, support for consensual solutions, development of legal frameworks for future private life or commercial activity, easy access, trust in institutions, and fair, flexible, fast and affordable proceedings.

The comparison of the legal systems of the ten EU Member States in which consensual divorces are delivered outside the court system leads us to the following conclusions: **Brussels II *ter*** expressly supports the cross-border circulation of notarial divorces (and other forms involving registrations with administrative authorities) without imposing any restrictions, such as constitutional guarantees or other characteristics of quality, on the respective actors. The lack of quality seems to be a weakness of this provision (see 3.2.6.2. supra).

Scope of the required consent: In our view, the principles of self-determination of the parties involved, the protection of the weaker party and the goal of de-escation of conflict can best be realised by a notarial divorce not requiring consensus on every legal consequence of the divorce. This removes pressure from the spouses in a most delicate situation, where they have achieved a genuine consensus on the fact that they both want to be divorced. Every pressure deriving from other issues (division of property, maintenance obligations, parental responsibility) could endanger the right of self-determination of the spouses (most often to the detriment of the weaker spouse). In that respect, Estonia can be mentioned as the best practice example in Europe. It does not overburden the mutual decision of the spouses to terminate the marriage and leaves time and space for a peaceful regulation of all other issues in the same venue (notary) or a different venue (mediation, court).

Minor children: Whereas there seems to be a broad consensus in all respective EU Member States that only '**consensual'** (bilateral) divorces should be available for notarial compentences, whereas unilateral divorces are reserved for the courts, EU Member States gave different answers to the question of the existence of minor or otherwise dependent common **children** of the spouses. However, best practice examples in Estonia, France, Greece, Latvia and Romania convincingly show that the existence of common minor children need not stand in the way of an out-of-court divorce. Where deemed necessary,

the agreement over maintenance, access to children and parental responsibility can be additionally checked by a court.

Control of content: The core principles of self-determination and protection of weaker parties, which are based on the European framework of fundamental rights (see 3.3.1. supra), require a legal control of the balance of interests and fairness of an agreement on the legal consequences of divorce by the spouses. This control can be integrated into a notarial proceeding just as well as into a court proceeding, but cannot be performed by officers of an administrative authority, who are not sufficiently trained for that purpose. With respect to notarial divorce, Latvia, Lithuania, Spain and Romania can be seen as best practice examples, where such content control is already conducted successfully.

We therefore highly recommend the above mentioned notarial out-of-court divorces as best practice models.

3.3.4.3 Division of assets or property

Across all examined EU Member States, notaries play an important role in assisting parties in the division of an estate in succession proceedings (almost all participating EU Member States) in the division of assets following from a divorce (even where the divorce is not a notarial one: such as Germany, the Netherlands, Belgium, Latvia, Slovenia) or in the establishment and change of matrimonial and partnership property regimes (see 1.2.2 supra). Division procedures conducted by notaries can be qualified as one of the core competences of notaries where they de-escalate conflicts and unburden courts by helping to avoid lengthy litigation over property claims. The same applies to agreements over matrimonial and partnership property.

3.3.4.4 Execution of claims

Party agreements which are documented in a notarial authentic instrument and thereby rendered enforceable are present in almost all examined jurisdictions (see 1.2.3. supra). Even though they are normally not recognised and enforced in track 1 of the EU regulations (but in track 2), they constitute an important contribution from the notarial profession to the reduction of workload of courts and should be maintained as good practice.

We consider the examples of France, Hungary and Croatia (see 1.2.3. supra), which employ notaries in the conduct of certain execution proceedings of claims, as forerunners in this area. The European Enforcement Order Regulation and the European Order for Payment Regulation give notaries – having the respective competences under their national law – the possibility to participate in an EU cross-border enforcement regime with their enforcement decisions. This unburdens courts in that area of the justice system. Other EU Member States are free to make use of this possibility as well. The current narrow notion of court under the Brussels I *bis* Regulation gives EU Member States the opportunity to register their national notarial enforcement proceedings under Art. 3 (which has been done only by Hungary and Sweden so far) or to prescribe notarial proceedings that satisfy the requirements of the CJEU's *Pula Parking* judgement. An amended definition of 'court' could be adopted in Art. 3 Brussels I *bis* in accordance with our general recommendation in 3.2.6.2. supra.

3.3.4.5 Entry into public registries

Following the examples of Czechia (for the company registry) and Latvia (for the registration of civil partnerships in the person registry), we recommend the competence of notaries to make direct entries in public State-run registries, such as the person registry, the land or the company registry. The decision of entry could be part of non-contentious proceedings equipped with the respective procedural

guarantees (independence, fair trial etc.). This competence of entry should be accompanied by the competence to issue authenticated excerpts from the registry. Registries should be kept and operated electronically.

We also encourage the establishment of additional public registries kept by notarial chambers in a digital form, such as for wills and other testamentary dispositions, matrimonial property agreements, powers of attorney for healthcare and general matters, and living wills. Austria, Slovenia, Germany, Belgium, Greece and Latvia can be mentioned as best practice examples in that respect.

3.3.4.6 Recognition of maternity or paternity to a child

Following the examples of Austria, Italy, Lithuania, Luxembourg, Malta, Poland, Romania, Spain, Germany and Slovenia, we recommend that notaries are given the competence to receive declarations of recognition of paternity or maternity to a child in accordance with the applicable family law.

3.3.4.7 Taking of evidence and service of documents

We definitely recommend that all EU Member States entrusting notaries with non-contentious judicial proceedings formally notify them as entitled institutions under the Taking of Evidence Regulation (Art. 2 (1) and Art. 31 (3)) and the Service of Documents Regulation ('transmitting and receiving agency' Art. 2 (1 and 2)). These two EU regulations deal with activities, taking of evidence and service of documents, which are ancillary to the exercise of judicial functions by courts or notaries under national law. The notary's competence for the ancillary activity should, therefore, follow their main competence to conduct judicial proceedings (such as succession proceedings). The notification or designation by the respective EU Member States is of particular importance because it has a constitutive – not merely a declaratory – effect. And such a notification is of enormous help for notaries in carrying out their judicial tasks.

The notion of 'court' in Art. 2 (1) Taking of Evidence Regulation is similar to Art. 3 (2) SR in that it requires that notaries "act pursuant to a delegation of power by a judicial authority or under the control of a judicial authority". As we have shown, this is the case for 'court commissioners' in Austria, Czechia, Croatia and Slovakia, as well as for notaries acting as 'courts' in Hungary. In Hungary, notaries are already competent to apply directly to the courts of other EU Member States for the purpose of taking evidence, in particular in succession proceedings. Notaries are particularly suitable for this task as they are, as has been shown above, bound and protected by very strict requirements of independence and impartiality. In that respect, their professional status is different from that of other legal professions. However, in general, no difference between notaries acting as 'court commissioners' and notaries performing the same task in the same quality without the delegation- or control-link to a court should be made (see 3.2.4. and 3.2.6.2. supra).

In this context, the question arises as to whether the taking of evidence by a notary could be regarded as 'exercise of official authority' under Art. 51 (in conjunction with Art. 62) TFEU. In principle, the CJEU has been very hesitant to qualify court commissioners as exercising official authority.[285] This also applies to *Hungary*.[286] With respect to the taking of evidence *prior* to a proceeding, the CJEU expressed the following opinion in para. 130 of its *Commission vs. Hungary* judgement[287]:

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285 E.g., concerning Austrian notaries as court commissioners, CJEU 24 May 2011 C-53/08, *European Commission vs. Republic of Austria*, ECLI:EU:C:2011:338, para 108.

286 CJEU 01 February 2017, C-392/15, *European Commission vs. Hungary*, ECLI:EU:C:2005:683, para. 107 *et seq.*

287 CJEU 01 February 2017, C 392/15, *European Commission vs. Hungary*, ECLI:EU:C:2005:683, para. 130.

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

It is clear from this statement that taking of evidence by a notary *before* contentious proceedings are initiated in front of a traditional court (not the notary) does *not* constitute the exercise of official authority under Art. 51 TFEU. However, it can be asked whether the opposite, namely Art. 51 TFEU, applies if the notary (who takes evidence) is acting as in a court-like position or as 'court' in the sense of the respective regulation (SR or Brussels II *ter*) during pending non-contentious proceedings conducted by the notary themself. Even if Art. 51 TFEU was not applicable in this latter case, a specific role of notaries in the taking of evidence as compared to other legal professions, under national and EU law, seems well justified by the specific requirements of their impartiality and independence. The specific contribution of notaries to the functioning of the national justice system has also been recognised by the CJEU, e.g. concerning Austrian notaries in the *Piringer* case.[288]

3.3.4.8 Company law

The involvement of notaries in the foundation and other important acts with respect to companies and corporations is certainly a current cornerstone of the preventive control of lawfulness and of legal certainty in all participating EU Member States. It is, therefore, a classical best practice model for future developments of the legal systems under EU law. For a recent example, see Recital 9 and Art. 2 Directive 2025/25 on Digitalisation in Company law, underlining the importance of a preventive control of company foundations and of the reliability of company documents and information in cross-border situations.[289]

4 Summary of recommendations (Legal Study)

4.1 Public law

1. We suggest differentiating between two models of unburdening courts through notarial action: Under *type 1*, notaries act as courts or exercise certain court functions, pursuant to a delegation of power or under the control of a court. Under *type 2*, notaries reduce the workload of courts by taking over functions that were or are usually performed by courts without any specific relationship between the notary and the court. We found that there is a wide variety of such tasks (*type 1* or *2*) with considerable differences between the participating countries.
2. We recommend that national legislators use the wide range of diverse examples of co-operation between courts and notaries in the individual Member States as an opportunity to consider new

[288] CJEU 09 March 2017 C-342/15, *Piringer*, ECLI:EU:C:2017:196, para. 57 *et seq.* (in the context of the land registry system).

[289] According to Art. 2: Amendments to Art. 10 EU Directive 2027/1132, and Recital 9 of EU Directive 2025/25, 19 December 2024, Digitalisation in Company Law, a 'preventive administrative, judicial or notarial control' has to be established by EU Member States.

ways in which the notarial profession can help alleviate the workload on their courts, drawing on examples from other EU Member States (see also Private law, recommendation 8.).

3. From the perspective of constitutional law, further transfer of tasks to notaries does not meet insurmountable obstacles across all EU Member States participating in this study. For the national legislator transferring administration of justice services to notaries, we recommend a choice between the model of either *type 1* or *type 2* in view of the structures and traditions already existing in the respective jurisdiction. This recommendation is based on our conclusion that, while the model described as *type 1* is more complex from a constitutional perspective than *type 2*, both could serve as recommendable examples for unburdening courts through notarial action and can be implemented in accordance with the specific features of the national legal system and the EU regulations on conflicts of laws for cross-border cases (after amendment: see Private law, recommendations 1-4).

4. We also found that notaries enjoy the guarantees of 'independence and impartiality', which can be regarded as a cornerstone of the rule of law, in their respective countries. This is a distinctive feature that sets them apart from other legal professions. We therefore recommend that the European legislator takes this feature into account when proposing secondary legislation in which courts can be unburdened through the action of other legal professions (see also Private law, recommendation 8.) and also acknowledge that the role of notaries in non-contentious procedures and its potential to unburden courts was already addressed in the Commission's 2024 EU Justice Scoreboard. We recommend, in particular, strengthening the role of notaries in consensual divorces. In this respect, many best practice cases can already be found in individual EU Member States (see also Private law, recommendation 8.).

4.2 Private law

For the EU regulations on conflict of laws (see points 1-4), we recommend new rules which provide a uniform basis for the non-contentious adminstration of justice in EU Member States by courts and certain non-court authorities (like notaries) alike, under the same conditions. These recommended rules can be inserted into each and every EU regulation and provide the inclusion of notarial practice on an equal footing. They would make the system much clearer, less contradictory and more easily accessible for all. They would give parties a better orientation and avoid unequal treatment that cannot be reasonably justified.

1. We recommend a uniform broad notion of 'court' or of 'actors in a court-like position' for all EU regulations dealing with conflict of laws – requiring quality standards for the respective actors, but not an institutional link to a court: the Brussels I *bis* Regulation, the Succession Regulation (No. 650/2012), the Brussels II *ter* Regulation (No. 1111/2019), the Matrimonial and Partnership Property regulations (Nos. 1103/2016 and 1104/2016), the Maintenance Regulation/HMP (No. 4/2009), the Taking of Evidence Regulation (No. 1783/2020), the Service of Documents Regulation (No. 1784/2020), the Enforcement Order Regulation (No. 805/2004) and the Payment Order Regulation (No. 1896/2006).

   Art. 1*:* **Broad notion of 'court' in the sense of the Regulation – comprising certain other public authorities**

   "Under this Regulation, any authority with competence in matters falling within the scope of this Regulation, ***will be considered to be in a 'court-like' position (****alternative****: 'court')****, provided that such authority offers guarantees with regard to independence and impartiality and the right of all parties to be heard and provided that their acts under the law of the Member State in which they operate:*

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

2. We recommend that actors in a 'court-like' position shall have the choice to follow the rules of international jurisdiction. The national jurisdictions of origin may or may not provide the binding force of these rules upon non-court actors. Where there is international jurisdiction of the EU Member State of origin in a certain case, their 'decisions' and final acts will be recognised and enforced under the rules for proper court judgements.

   Art. 2: International jurisdiction of extra-judicial actors in a 'court-like' position

   "(1) The 'decisions' rendered by an 'authority' in the sense of Art. 1 will be recognised and enforced on the basis of the provisions of this Regulation for decisions of proper courts (in the sense of Art. 267 TFEU and EU-CFR) provided that the Member State of origin of the decision had international jurisdiction under the Regulation. In these cases, the rules of lis pendens will apply as well.

   (2) 'Authorities' in the sense of Art. 1 and any other public authority providing administration of justice services are always free to act outside the rules of international jurisdiction."

   Art. 3: **Consequences of lack of international jurisdiction or lack of requirements of Art. 1**

   "(1) Where an 'authority' in the sense of Art. 1 (meeting all requirements of Art. 1) is <u>not</u> domiciled in a Member State which has international jurisdiction under the Regulation, the provisions of this Regulation for recognition and decisions of proper courts and for lis pendens will not apply. Where applicable, the instrument will be 'accepted' and enforced in all other Member States in accordance with the rules for 'authentic instruments.'

   (2) The same applies to all instruments of 'authorities' which do not comply with all requirements of Art. 1."

3. We recommend continuing to follow the broadly accepted 'extension of effects theory' when it comes to 'recognition' (in a broader sense) of decisions and documents of non-court and court actors. This means that the rules of 'recognition' in a regulation will not change the limited effect that a legal instrument has in its jurisdiction of origin in the EU Member State of destination. Only effects that an instrument has in the EU Member State of origin will be extended to the other EU Member States.

4. We recommend limiting the coverage of the new broadened recognition regime for non-court actors to activities which are conducted (also) by traditional courts in some EU Member States. Activities which are traditionally only performed by non-courts, such as drawing up public documents (authentic instruments) and other tasks in company law, are not covered by the above recommendations 1 and 2.

5. We recommend evaluating the underlying rules of administration of justice services in the EU in accordance with the following core principles: Self-determination of citizens in their private and family lives, and their economic activities; protection of a fair balance of interests of the parties and of the interests of weaker parties; de-escalation of conflicts. The guidelines for these principles are provided by the EU's human rights' framework.

6. We recommend evaluating the underlying rules of administration of justice services on the basis of the guarantees of independence, impartiality and fair trial (see Public law, recommendation 4).

7. We recommend following the OECD approach of people-centred justice and the work of the Council of Europe by taking into account the following additional evaluation criteria: easy access

to the justice service, encouraging trust in justice institutions and the State, fast and affordable services, services flexibly adapting to people's needs.

8. Following these criteria (points 5-7 supra), we recommend supporting and extending the involvement of the notarial profession in the following non-contentious private law proceedings, with the goals of reducing the workload of courts and ensuring a high quality of services: succession matters, consensual divorce, division of assets, execution of claims, registration in public registries recognition of paternity/maternity to a child, taking of evidence, service of documents abroad and company law.

5 Executive summary (Legal Study)

Part 1 (Overview of country reports): Based on 22 country reports provided by notaries from 22 participating EU Member States, we were able to compare the diverse legal frameworks provided by jurisdictions for the administration of justice by authorities which are not courts in the traditional sense, with a focus on notarial actors. Some of the tasks have been outsourced from the courts rather recently while others have a longer tradition of extra-judicial practice. In all cases, the non-judicial authorities unburden the national court systems. Broadly speaking, two models of notarial action can be identified: Under type 1, notaries act as 'courts' or 'court commissioners' under national law, pursuant to a delegation of power or under the control of a court ('court commissioner model'). Under type 2, notaries reduce the workload of courts by taking over functions that were or are usually performed by courts without any specific relationship between the notary and the court. We found that there is a wide variety of such tasks (type 1 or 2), with considerable differences between the participating countries.

Notarial administration of justice in non-contentious proceedings is very common in matters of succession, family law (with consensual divorce having been subjected to separate analysis), enforcement of debt, in the context of public registries and in company law. National provisions can serve as examples for other EU Member States considering an extension of notarial tasks by which the court system is unburdened. This applies, in particular, to the field of consensual divorce. This instrument can be found in 20 of the participating EU Member States, ten of which have – only recently – partially or completely outsourced these proceedings either to notaries or, in a minority of cases, to public administrative authorities. In six countries (Estonia, France, Lithuania, Romania, Slovenia and Spain), notaries have a shared competence with either courts, civil registrars or both, while, in two countries (Greece and Latvia), notaries are exclusively competent for consensual divorce.

Part 2 (**Public law**) examines the country reports with respect to the independence and impartiality of notaries. This part confirms the results from JuWiLi I – then for six countries – for the much larger number of 22 participating EU Member States. In all these countries, notaries (while not 'courts' in the meaning of Art. 6 ECHR due to the absence of disputes to be settled before them) enjoy the guarantees of impartiality and independence as defined by Art. 6 ECHR. This is important insofar as this makes the notarial profession particularly suitable to exercise tasks that could otherwise be handled by courts. National and EU legislators should take this into account when preparing proposals concerning a transfer of tasks from courts to non-judicial actors. In this context, we also found that the future transfer of additional tasks to notaries would not meet insurmountable constitutional obstacles across all participating EU Member States. Both models, *type 1* ('court commissioner') and *type 2* ('no special relationship') can therefore serve as recommendable examples for unburdening courts through non-judicial actors, ensuring a high quality of service with respect to constitutional guarantees (fair trial,

independence, impartiality). These justice services can be implemented in accordance with the specific features of the respective national legal system.

Part 3 (Private law) of the legal study analyses two levels of private law: **(3.2.) conflict of laws** and (3.3) substantive private and procedural law. (3.2.) We conclude that, in the *lex lata* perspective, a coherent interpretation of the notions of 'court' and 'decision' and the legal consequences that they imply for 'older' EU regulations such as Brussels I *bis*, 'medium old' regulations such as the Succession Regulation and Matrimonial/Partnership Property Regulations, and the recent developments surrounding Brussels II *ter*, is not possible. In the *lege ferenda* perspective, considering prior EU research projects (JuWiLi I, Code-FS) and literature, as well as the OECD approach of 'people-centred justice', we found an urgent need for a more uniform approach in the area of non-contentious proceedings in the EU. It is necessary to overcome the unjustifiably unequal treatment of citizens from different EU Member States in cross-border enforcement situations, depending on the field of law and life concerned (different EU regulations) and depending on the particularities of an EU Member State's legal system where access to justice is sought (*type 1* system with 'court commissioner' or *type 2* system with 'no special relationship' to a court).

We suggest a uniform architecture across EU regulations as well as divergent EU Member States' systems, based on the formula: 'same function + same quality = same legal consequences' in cross-border enforcement of private law claims (resulting from non-contentious proceedings). This includes a broad notion of 'court' = (alternatively) 'actors in a court-like position' for all EU regulations dealing with conflict of laws – requiring quality standards for the respective actors, but <u>*not*</u> an institutional link to a court.

Art. 1*:* **Broad notion of 'court' in the sense of the Regulation – comprising certain other public authorities**

> *"Under this Regulation, any authority with competence in matters falling within the scope of this Regulation,* ***will be considered to be in a 'court-like' position (****alternative****: 'court')****, provided that such authority offers guarantees with regard to independence and impartiality and the right of all parties to be heard and provided that their acts under the law of the Member State in which they operate:*
>
> *(c) may be made the subject of an appeal or review by a judicial authority; and*
>
> *(d) have a similar force and effect as an act of a judicial authority on the same matter would have."*

Art. 2: International jurisdiction of extra-judicial actors in a 'court-like' position

> *"(1) The 'decisions' rendered by an 'authority' in the sense of Art. 1 will be recognised and enforced on the basis of the provisions of this Regulation for decisions of proper courts (in the sense of Art. 267 TFEU and EU-CFR) provided that the Member State of origin of the decision had international jurisdiction under the Regulation. In these cases, the rules of lis pendens will apply as well.*
>
> *(2) 'Authorities' in the sense of Art. 1 and any other public authority providing administration of justice services are always free to act outside the rules of international jurisdiction."*

Art. 3: **Consequences of lack of international jurisdiction or lack of requirements of Art. 1**

> *"(1) Where an 'authority' in the sense of Art. 1 (meeting all requirements of Art. 1) is <u>not</u> domiciled in a Member State which has international jurisdiction under the Regulation, the provisions of this Regulation for recognition and decisions of proper courts and for lis pendens will not apply. Where applicable, the instrument will be 'accepted' and enforced in all other Member States in accordance with the rules for 'authentic instruments'.*
>
> *(2) The same applies to all instruments of 'authorities' which do not comply with all requirements of Art. 1."*

The broadly accepted 'extension of effects theory' shall apply to 'recognition' (in the broader sense) of decisions and documents of non-court and court actors. This means that the rules of 'recognition' in a regulation will not change the limits of the effects that a legal instrument has in its jurisdiction of origin. Only effects that an instrument has in the EU Member State of origin will be extended to the other EU Member States.

In **3.3.** (**substantive private and procedural law**), general guidelines for the evaluation of rules of substantive private and procedural law with respect to the practice of extra-judicial actors in the civil justice system are developed. The following core principles should be taken into account: Self-determination of citizens in their private and family lives, and their economic activities; protection of a fair balance of interests of the parties and of the interests of weaker parties; and de-escalation of conflicts. The blueprint for these principles is provided by the EU's human rights' framework. In line with the OECD approach of people-centred justice and the Council of Europe's work, the following evaluation criteria should be added: easy access to the justice service, encouraging trust in justice institutions and the State, fast and affordable services, services flexibly adapting to people's needs.

On the basis of these criteria, the legal systems of EU Member States are advised to improve and extend the involvement of the notarial profession in the following non-contentious private law proceedings, with the goals of reducing the workload of courts and ensuring a high quality of services: succession matters, consensual divorce, division of assets, execution of claims, registration in public registries, recognition of paternity/maternity to a child, taking of evidence, service of documents and company law. Best practice examples are presented in succession, out-of-court-divorce (consensual divorce), division of assets or property, execution of claims, public registries, recognition of parenthood and taking of evidence, service of documents, and company law.

Part 4 summarises the **policy recommendations** as important results of the Legal Study.

6 Consortium recommendations of JuWiLi II

6.1 Consortium recommendations – National level

Based on the previous findings of the JuWiLi II project, the project consortium recommends the following adaptations for each participating EU Member State.

These recommendations were developed as a result of deliberations by the entire project consortium under the leadership of the project management and the scientific team. They do not necessarily reflect the positions of individual chambers of notaries.

Country	Recommendations
Austria	1. For Austria, we recommend introducing consensual divorce by a notary as an optional, out-of-court alternative to the judicial system. 2. Notaries, as court commissioners, should be able to issue the certificate of inheritance directly. 3. The court commissioner should be integrated directly into non-contentious proceedings (e.g. for taking evidence) to support the courts and accelerate proceedings.
Belgium	1. For Belgium, we propose further pursuing the progress on divorce without a judge. In the course of those national proceedings, a consensual divorce would no longer require the homologation by the court of the agreement between spouses, on the condition that either the notary drafts the agreement in the form of an authentic instrument or that it has been registered by the competent authority in case of a private agreement.

	2. Furthermore, we recommend facilitating and further encouraging the digitalisation of notarial tasks in Belgium and elsewhere. Specific funding on behalf of the EU would seem a sensible option (see also the recommendations for Malta).
Bulgaria	1. For Bulgaria, we encourage the introduction of consensual divorce as a notarial competence. This can be inspired by a variety of models that are working well in other participating EU Member States. To ensure protection of minors, appearance before a notary is mandatory combined with representation by an attorney. Furthermore, the notary must not formalise the agreement if it is against the child's best interests. 2. Furthermore, we recommend that issuing the ECS is a notarial competence. 3. In addition, we recommend the introduction of a unified notarial competence within succession proceedings. When no dispute is pending, the procedure can be closed by a declaratory authentic instrument establishing the heir's rights.
Croatia	1. In Croatia, we recommend the introduction of consensual divorce as a notarial competence. This can be inspired by the Slovenian model in particular. 2. Secondly, a competence which would be suitable to further unburden the Croatian courts is for notaries to issue the apostille.
Czechia	1. For Czechia, we recommend the introduction of consensual divorce as a notarial competence. Notaries may be limited to cases when no minor children are involved. 2. Notaries in Czechia are already entitled to make direct entries in the company registry. We recommend direct registration of authentic instruments also in the real estate registry. The current mandatory waiting period of 20 days when registration is carried out by the court would then become obsolete, as notaries can adequately protect the interests of both parties.
Estonia	Notaries take over many functions in a variety of different fields. This works very well and is highly digitalised. This can serve as an example for many other EU Member States.
France	1. Notaries should be given the competence to grant permission (without confirmation by a judge) for the acceptance of inheritance (with inventory) by the legal representatives of a minor. 2. Notaries should be given the competence to directly authorise the selling of property for minors and incapacitated persons. 3. The future protection mandate should be signed mandatorily and recorded by notaries. The establishment of a European registry or for registries to be linked, as proposed by the Commission, would be very useful and is welcomed. 4. The future protection mandate could be made effective by notarial declaration after the notary has been presented with a document from a specialised doctor. The intervention of a judge would no longer be required.
Germany	German notaries, with their specific and well-defined competences, are integrated into a balanced legal system alongside attorneys and courts. This finely tuned interplay exemplifies an efficient system of justice that balances prevention, advocacy and adjudication.

	However, if future policy initiatives were to move towards centralised contact points or one-stop-shop solutions for citizens and businesses, it would appear reasonable to entrust notaries with certain additional procedural tasks. In particular, this could concern the issuance of succession certificates, the recording of consensual divorces, and a further deepening of the notarial involvement in company registry procedures. Such a step would not modify the institutional balance but would build upon existing structures, ensuring reliability, efficiency and legal certainty. It would also be in line with developments in several EU Member States where comparable responsibilities have already been entrusted to notaries.
Greece	1. As Greek notaries have just taken over the registry of wills, we recommend the creation of a new registry: the registry for powers of attorney, following the example of registry of wills. This registry should provide information about the validity and the content and scope of the power of attorney. The registry can be administered by the Chamber of Notaries. 2. In addition, a good and feasible thing for notaries would be to focus on the setting up of registry of authentic instruments in general, which do not appear in other registries such as the land registry or the commercial registry. An example is the mentioned power of attorney registry or a registry of prenuptial agreements and inheritance agreements (yet to be legislated in Greece), as these authentic instruments have an effect on property matters. These registries can be operated by the Chamber of Notaries of each country and also be interconnected.
Hungary	For Hungary, we recommend the introduction of consensual divorce as a notarial competence. This procedure can be inspired by the role of the Hungarian civil law notary in dissolving a registered partnership.
Italy	1. The incorporation of companies by Italian notaries has proven to guarantee legal certainty while being a fast and inexpensive procedure. This also includes an online option (only for Limited Liabilities Companies – in Italian SRL) the more frequent use of which should be encouraged. This should be accompanied by an improved digital workflow, especially with reference to electronic signing platforms 2. Currently apostilles are issued by the Office of the Public Prosecutor. This task could be transferred to the provincial Chamber of Notaries to unburden the former. 3. Concerning the assisted negotiation procedure for non-contentious divorce, final confirmation by the public prosecutor is required. This task could optionally, upon request of the divorcees, be handed over to notaries to unburden the former.
Latvia	Latvian notaries already administer a number of tasks in a variety of non-contentious proceedings, which can serve as model for other participating EU Member States. This includes the administration of registries and direct entries in the registry of natural persons. We would further encourage notaries taking over certain entries in the land registry that are based on authentic instruments or certificates issued by a notary. For example, this could include entries provided for by law on the basis of marriage contracts or succession agreements, the registration of rights based on notarised transactions or certificates issued in succession cases.

	Since the land registry divisions were incorporated into district (municipal) courts on 1 June 2019, the handling of land registry matters became part of the court system. Therefore, handing over certain activities to notaries would help to unburden the courts.
Lithuania	1. A unique factor in Lithuania is the requirement to prove that the spouses have not lived together for one year to obtain consensual divorce. This is not the case in Lithuanian courts or in other EU Member States with notarial involvement in divorce proceedings. This requirement may be abolished to further unburden courts. 2. Furthermore, in most other countries divorce without a judge can also be granted when minor children are involved. We also recommend allowing for notarial divorce when minor children are involved.
Luxembourg	We recommend political support in order to pursue the digitalisation of the notarial profession. This includes, most notably, further developments of the already existing notarial platform, such as its interconnection with the Luxembourg Business Registry and with courts, as well as the development of a registry of general powers of attorney.
Malta	1. For Malta, we recommend the introduction of consensual divorce as a coordinated framework between courts, attorneys and notaries. attorneys represent the parties, establish a contract and present it to the court. Once the divorce agreement is authorised by the court, notaries can collect the draft and publish it – the divorce agreement would be an authentic instrument. Notaries ensure that the agreement reflects the parties' wishes. If this model – inspired by the French one – proves successful, it can be expanded to further unburden the courts. Legislative action by the EU ensuring notaries' tasks in divorce proceedings can serve as 'motivation' for the national legislator to adopt national measures. 2. Funding on a European level for digitalisation can further enable digitalisation for notarial networks and interconnectivity.
Netherlands	1. For the Netherlands, we recommend the introduction of a notarial competence for consensual divorces. The dissolution of registered partnerships without any minor children involved is already a notarial competence. This can be expanded to consensual divorces.
Poland	1. It is noteworthy that, at the moment, Poland is one of the two countries in this project which does not currently provide for consensual extrajudicial divorce. Therefore, we recommend the introduction of consensual extrajudicial divorce as a notarial competence, drawing inspiration from other established models in participating EU Member States. 2. In order to unburden the courts, we recommend expanding the competences of notaries in cases that are currently decided by courts and in which the court only assesses the legality of an act and where there is no dispute between the parties concerned, in particular in matters that can actually be resolved by way of concluding a relevant agreement, e.g. property settlement, division of the estate or dissolution of co-ownership. 3. Notarial activities can be further innovated. Notarial activities should continue to develop in the digital sphere. On the one hand, this will allow for better integration with the evolving digital public services and public administration. On the other hand, it will

	meet clients' expectations. Notaries should develop their own digital tools to ensure their reliability and security. 4. Given the shift from legal incapacitation as a means of protecting adults to protective and supportive measures, we recommend the use of so called preventive powers of attorney, which are issued in the event of future incapacity. We recommend involving a notary in these procedures, as a legal professional endowed with public trust, with whom the individuals concerned come into direct contact and whose involvement guarantees impartiality and the absence of conflicts of interest.
Portugal	1. We recommend expanding services provided by the notarial office network, particularly in the context of marriage and divorce by mutual consent. Notaries should have these competences, ensuring greater proximity and faster processing for citizens, similar to practices in other participating EU Member States. This implies a legislative change. 2. We recommend that, in Death and Divorce Inventory Proceedings, a simplified regime is created for cases where the parties do not contest heirs or assets, but only their valuation, considering the possibility of appointing an expert to assess the assets and carry out subsequent acts.
Romania	1. Drawing on the positive experiences in the past, we propose entrusting notaries with an exclusive competence on consensual divorce. In case of parties being absent during the divorce, a legislative modification is required to allow parties to be represented. The parties may be represented by means of an authenticated power of attorney not only by an attorney but also by any other representative, which is currently possible only at the stage of filing the application, and not at the hearing and final appointment for the completion of the divorce proceedings. 2. Furthermore, we suggest granting public notaries the competence to issue enforceable titles for claims or low-value monetary amounts, following the model existing in other European countries, such as Hungary. 3. Also, the public notary should appoint a special guardian without prior court authorisation in certain non-contentious situations where representation of a minor is required, particularly in matters concerning the acquisition of immovable property by minors through inheritance (including, for example, the signing of an act of estate liquidation), donations, or similar authentic acts, where the transaction is clearly beneficial from a patrimonial perspective and does not involve any dispute.
Slovakia	1. For Slovakia, we suggest a connection to court information system in succession cases, alongside an improvement of electronic files. 2. For company formations and real estate transactions, an authentic instrument is not mandatory at the moment. We recommend a mandatory authentic instrument in those cases to improve legal security. 3. Furthermore, we recommend a notarial competence to make direct entries in the real estate registry, as is currently the case for the business registry. 4. In addition, notaries can play an important role in anti-money-laundering initiatives.

Slovenia	1. In the participating EU Member States, notaries administer a number of tasks in succession proceedings. Following the findings of JuWiLi I, we suggest involving notaries in succession proceedings in the function of a court commissioner as in other central-European countries. 2. The Notarial Chamber of Slovenia has been successfully managing the Registry of wills and the Registry of marriage contracts. Following the example of Registries of wills and marriage contracts, we recommend the creation of possible new registries: - the Registry of Powers of Attorney: This registry could provide information about the validity, content and scope of such a power of attorney. - Registry of Agreements on Renunciation of Future Inheritance: As those agreements have to be drawn up in a form of an authentic instrument, this registry could provide relevant information for all future inheritance procedures. Those registries can be managed by the Chamber of Notaries. 3. We recommend further support for digitalisation of the notarial profession by developing a platform for remote access to a notary, as the legal predispositions have already been set for taking on this task.
Spain	We recommend extending Spanish notaries‘ competence on divorce to those cases where minors or people under guardianship are involved. This may include protection measures, such as additional authorisations.

6.2 Consortium recommendations – EU Level

We recommend amendments to the following EU regulations: Brussels I *bis* Regulation (No.1215/2012), Succession Regulation (No. 650/2012), Brussels II *ter* Regulation (No. 1111/2019), the Matrimonial and Partnership Property regulations (Nos. 1103/2016 and 1104/2016), Maintenance Regulation/HMP (No. 4/2009), Taking of Evidence Regulation (No. 1783/2020), Service of (Documents Regulation (No. 1784/2020), Enforcement Order Regulation (No. 805/2004) and Payment Order Regulation (No. 1896-/2006).

1. For these regulations, we recommend introducing a uniform notion of ‘court’ or of ‘actors in a court-like position’, which includes authorities which are not courts *stricto sensu*, but also issue decisions with *res judicata* or similar *erga omnes* effect, and comprises quality requirements for the respective actors and proceedings, such as independence, impartiality and a fair trial, but does not require an institutional link to a court (unlike Art. 3 [2] SR): In our legal study, we provide a draft text (template) for such a provision and surrounding provisions.

2. We recommend that actors in a ‘court’ position within the broader sense of the word shall have the possibility to follow the rules of international jurisdiction or not, depending on whether they are acting as ‘courts’ or not. The national jurisdictions of origin may or may not provide the binding force of these rules upon non-court actors. Only where the respective non-judicial actor acts as a ‘court’ and has international jurisdiction will their decisions and final acts be ‘recognised’ and enforced under the rules for proper court judgements in all other EU Member States.

3. We recommend continuing to follow the broadly accepted ‘extension of effects theory’ when it comes to ‘recognition’ (in a broader sense) of decisions and documents of non-court and court actors. This

means that the rules of 'recognition' in a regulation will not change that the limited effect a legal instrument has in its jurisdiction of origin in the EU Member State of destination. Only (*res judicata*, evidentiary or other) effects that an instrument has in the EU Member State of origin will be extended to the other EU Member States. Thus, the differentiation between 'recognition' (in a narrow sense) of decisions (with *res judicata* or similar *erga omnes* effect) and 'acceptance' of authentic instruments (with evidentiary effect) will be maintained.

4. We recommend limiting the coverage of the suggested recognition regime for non-court actors to activities which are conducted (also) by courts in some EU Member States. Activities which are traditionally only performed by authorities other than traditional courts, such as drawing up public documents and other tasks in company law, are not covered by the above recommendations 1 and 2.

5. Finally, we recommend, in accordance with the recommendation by the European Parliament, that the contribution of notaries to rule of law standards should be addressed in relevant country chapters of the EU rule of law report on a regular basis.