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# State Tasks of the Public Office of Notary — Belonging to the Domain of National or European Union Law?<sup>\*1</sup>

State tasks (*Staatsaufgaben*) are public tasks that, proceeding from the constitutional framework of the state and the political decisions of the legislator, have to be implemented by the state. Although the procedure for implementing state tasks in many fields is regulated also by the norms of European Union law, Member States may mainly decide independently on the organisational form of implementation of these functions. Systems of legal protection of Member States form one of the few fields wherein the influence of the European Union has been modest thus far. Therefore, there have been only a few connections between office of notary (*notariat*), which is part of the national system of legal protection, and European Union law.

In many Member States with a continental European legal system, the notary performs state tasks, at the same time standing organisationally apart from the state and holding state authority. The fact that the functions of civil law notaries are performed not by state officials but by independent office-holders has raised the question of whether freedom of establishment as provided by the EC Treaty should be applied to the activities of the notary. Recently, the European Commission initiated proceedings in the European Court of Justice that should provide an answer to the question of whether Article 45 of the EC Treaty can be applied to notaries' professional activities and would therefore preclude the extension of European Union law on the professional rights of notaries. Many thorough studies have been published on this question.<sup>\*2</sup>

The problem is examined from a slightly different point of view in the present article. The aim of this article is to determine the combined effect of national law and Article 45 of the EC Treaty on the public office and on the tasks performed within the framework of that kind of office.

The professional law pertaining to the Estonian notary provides a good opportunity for this examination. The article demonstrates that, although Estonia is among the small number of Member States wherein the requirement of citizenship for notaries has been replaced with a requirement for citizenship of the European Union, the Estonian notary participates in the exercise of state authority. Recent legislative amendments that extended the competence of the Estonian notary provide a strong reason for examining the nature of the tasks that can be suitably performed in the framework of the public office. The main argument of this article is that the notary's profession can remain in its present organisational form only if the competence of the notary does not in its essence cover entrepreneurship. At the same time, the article indicates that the application of Article 45 may in the long term lead to a situation wherein the state task is transformed into a public task whose performance is not within the competence of the state or other individuals belonging to a state organisation.

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<sup>2</sup> See Notes 38–40.

# 1. Public office

There are more organisational forms for fulfilling the state tasks today than there have ever been. Depending on the nature and importance of the task, the state has an opportunity to consider whether to perform the state tasks through its own organs, to create a legal person in public law for performing the tasks, to authorise legal persons in private law or natural persons to perform administrative duties independently under public law regulations, or to decide in favour of different forms of privatisation. One of the organisational forms for performing state tasks, which has been groundlessly overlooked in jurisprudence, is the public office.

As the state is a legal person, it needs natural persons who would exercise state authority on behalf of the state. The office is functionally the smallest entity of the state organisation that denotes a certain amount of state tasks which are given to a natural person for performance.<sup>3</sup> Only an individual, one who has been appointed by the state, can be the office-holder here. The office-holder who has received state authorisation through the appointment acts not as an individual but as a holder of state authority.<sup>4</sup> The office embodies the state tasks that the office-holder is obliged to perform and he himself cannot choose the tasks accompanying the office. Since the state has reserved the tasks to be performed within the framework of the office as its own, performance of these tasks takes place because of their nature outside the competition that is characteristic of the subjects of private law.

An office can be a part of either the direct or indirect state organisation. In the latter case, the office stands outside the hierarchy of state organs and is an independent organ of state authority. In the Estonian legal order, this office is called public office.<sup>5</sup> There can be several reasons for creating a public office. One of the most important factors is creation of sufficient distance between the state and the office-holder to assure the independence of the office-holder from the state.<sup>6</sup>

The holder of the public office is not a private individual who may be partly involved in performing certain particular tasks carried out by the state. It is true that in both cases the state has decided to withdraw from performing its tasks through state officials, but in the case of the public office, the office-holder is fully subordinate to the public regulation. The holder of public office is a part of state authority not only functionally but also institutionally. At the same time, creating the public office is not any form of privatisation, because performance of the tasks does not happen in a private form but fully in the framework of the state organisation.

## 2. Connections of the office of notary with European Union law

The influence of European Union law on performance of the state tasks and the state organisation is not limited to only those fields that are regulated by European Union law. Because of the wide scope of application of fundamental freedoms, the institutions of the European Union can have a say in the areas that belong to the competence of Member States.<sup>7</sup>

The office of notary is, both in Estonia and in many other Member States, an independent public office that is a part of the national system of legal protection. Steady increase in cross-border legal relations has led to several important developments in the field of recognition of notarial deeds between states, but notaries themselves have been active mainly on the basis of national legislation and within the territory of their country. The notaries' acts of most Member States prescribe that only a citizen of that Member State may be a notary. The extent of the influence of the European Union on the organisation of the office of notary will become obvious in the near future.

<sup>3</sup> On different meanings of the office ("Amt"), see R. Summer. Beiträge zum Beamtenrecht. Mohr Siebeck 2007, p. 48 ff.

<sup>4</sup> J. Isensee. Transformation von Macht in Recht – das Amt. – ZBR 2004, p. 3.

<sup>5</sup> Under the current law, the office holders for the public office are the notary, bailiff and sworn translator. More on their legal status in E. Andresen. State Liability without the Liability of State. Constitutional Problems related to Individual Professional Liability of Estonian Notaries, Bailiffs and Sworn Translators. – Juridica International 2006 (11), p. 147.

<sup>6</sup> The independence, however, is not a constitutive characteristic of the public office. See W. Leisner. Öffentliches Amt und Berufsfreiheit. – AöR 1968, p. 188 ff.

<sup>7</sup> On the critical analysis of these areas, see G. H. Roth, P. Hilpold (Hrsg.). Der EuGH und die Souveränität der Mitgliedstaaten. Bern: Stämpfli 2008.

## 2.1. The polemics over the application of freedom of establishment to the office of notary

Freedom of establishment is an important part of four freedoms of movement, the purpose of which is to guarantee the functioning of the internal market. According to Article 43 (1) of the EC Treaty, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited. At the same time, Article 45 also prescribes an exception according to which the provisions of freedom of establishment are not applied, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority in this Member State.

The question of whether the freedom of establishment should be extended for professional activities of notaries has been topical for 20 years already.<sup>\*8</sup> The European Commission has expressed with varying activity the opinion that the professional activities of notaries should be subjected to the provisions of the Treaty. However, those Member States following the continental European legal tradition, where a civil law notary exists, consider the notary to exercise state authority and professional activities of notaries thus should be covered by the exception prescribed in the first paragraph of Article 45, the purpose of which is to defend the sovereignty of Member States.

The European Commission filed an action against six Member States — Austria, Belgium, France, Germany, Greece, and Luxembourg — with the European Court of Justice at the beginning of 2008.<sup>\*9</sup> In 2009, the Netherlands joined these Member States.<sup>\*10</sup> On the side of the seven Member States sued, all states that acceded to the EU in 2004 and 2007 with exception of Cyprus and Malta have become party to the legal proceedings as the European Commission had initiated an infringement proceeding also against them.<sup>\*11</sup> The European Commission is going to file an action also against Portugal, because, although the requirement for citizenship for a notary was abolished there in 1997, under the prevailing interpretation of the Portuguese constitution the office of notary can be held only by citizens of Portugal.<sup>\*12</sup> The polemics over the application of Article 45 of the Treaty affect 18 Member States directly, because, despite the differences in the competence of notaries and the organisation of their office, all these Member States have Latin notaries, who are considered to be exercisers of state authority. Only the Scandinavian countries and those Member States with an Anglo-American legal system, where the office of notary has a different form, do not face this problem. At the same time, lawyers in the United Kingdom in particular have expressed their desire to the European Commission to extend their practice to continental Europe.<sup>\*13</sup>

In its actions, the Commission takes issue with only the fact that the Member States in question have a requirement of citizenship for notaries and that, with respect to notaries, the Member States have not adopted the directive on the recognition of professional qualifications.<sup>\*14</sup> In its press release announcing the proceedings against the old Member States, the Commission noted that abolishing the requirement for citizenship would not involve changes in the legal status of the notary, especially in relation to the activities assigned to the notary. The infringement proceedings are claimed not to affect the powers of the Member States to regulate the office of notary, especially in terms of laying down the measures to ensure the quality of notarial acts —

<sup>8</sup> The European Commission's answer of 19 May 1989 to the Written Question by Mr. Willy Kuijpers No. 2199/88. — OJ 1989 C270, 28. The same question was briefly discussed also when compiling the Treaty of the European Community. On the origin of Article 45, see U. Karpenstein, I. Liebach. *Das deutsche Notariat vor dem Europäischen Gerichtshof*. — EuZW 2009, p. 164.

<sup>9</sup> Case C-53/08 *Commission v. Austria*. — OJ C 107, 26.04.2008, pp. 15–16; Case C-47/08 *Commission v. Belgium*. — OJ C 128, 24.05.2008, p. 18; Case C-50/08 *Commission v. France*. — OJ C 128, 24.05.2008, pp. 18–19; Case C-54/08 *Commission v. Germany*. — OJ C 107, 26.04.2008, pp. 16–17; Case C-61/08 *Commission v. Greece*. — OJ C 92, 12.04.2008, pp. 20–21; Case C-51/08 *Commission v. Luxembourg*. — OJ C 128, 24.05.2008, p. 19.

<sup>10</sup> During the infringement proceedings, the Netherlands had notified the European Commission about the draft that prescribed abolishing the requirement for citizenship in 2007. As the parliament of the Netherlands had not adopted the law by February 2009, the European Commission filed an action also against the Netherlands. See the Press Release of 29 January 2009 of the European Commission “Nationality requirements for notaries: Commission takes the Netherlands before the Court of Justice to ensure compliance with non-discrimination principle” (IP/09/152). Available at [europa.eu/rapid/pressReleasesAction.do?reference=IP/09/152&type=HTML&aged=0&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/152&type=HTML&aged=0&language=EN&guiLanguage=en).

<sup>11</sup> The Press Release of 12 October 2006 of the European Commission “Nationality requirements for notaries: Commission acts to ensure correct implementation of EU law in 16 Member States” (IP/06/1385). Available at [europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1385&type=HTML&aged=0&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1385&type=HTML&aged=0&language=EN&guiLanguage=en).

<sup>12</sup> The Press Release of 19 February 2009 of the European Commission “Nationality requirements for notaries: the Commission takes new steps to ensure compliance with the principle of non-discrimination in Portugal” (IP/09/280). Available at [europa.eu/rapid/pressReleasesAction.do?reference=IP/09/280&format=HTML&aged=0&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/280&format=HTML&aged=0&language=EN&guiLanguage=en).

<sup>13</sup> The United Kingdom is on the side of the European Commission in the joint action. See for example the regulation of 16 September 2008 of the European Court of Justice in regard with lawsuit C-54/08 *Commission v. Germany*.

<sup>14</sup> In the actions of the Commission, both Directive 89/48/EC and 2005/36/EC are referred to.

for example, arrangement of exams.<sup>\*15</sup> At the same time, it is known that the European Commission wishes to apply the provisions of competition law to restrictions in notarial profession.<sup>\*16</sup>

The foregoing shows that the question concerns not only the fact of whether citizens of the state should perform certain tasks of the state. The polemics are even more fundamental. When the European Court of Justice takes the view that the main tasks of notaries do not involve exercising official authority, this does not mean only that the Member States have to abolish the requirement of citizenship for their notaries. In this case, despite the circumstances of the arrangement of the notaries' professional activities falling within the competence of Member States, the fundamental freedoms guaranteed by the Treaty should be honoured. All of the measures that prohibit or hinder the exercise of fundamental freedoms or make doing so less attractive are considered to be restrictions on the fundamental freedoms.<sup>\*17</sup> Additionally, the question of applying the provisions of competition law should be considered.<sup>\*18</sup> Under this scenario, undoubtedly not only would the office of notary change fundamentally, but, in the longer perspective, there could arise hindrance to performance of the functions of other state institutions — such as registers — that are oriented to preventing legal disputes.<sup>\*19</sup> Therefore, the answer of the European Court of Justice to the question of whether Article 45 is applicable to notaries' professional activities is of great importance to the future of systems of legal protection in many Member States.

## 2.2. The practice of implementation of Article 45 of the EC Treaty

Although most of the Member States hold the opinion that regulating notaries' professional activities is the sovereign right of the national legislator and that the European Union does not have competence in this field, the established case law of the European Court of Justice shows that, on this question, the outlines of sovereignty of Member States are to be decided according to the criteria developed by the European Court of Justice.

To ensure common implementation practice for European law, the European Court of Justice has secured for itself hermeneutical monopoly on elucidating Article 45.<sup>\*20</sup> Thereby, the criterion 'exercise of official authority', which has a functional content, is of central importance. Unfortunately, the established case law of the European Court of Justice has not clarified this concept very clearly but has confined itself only to case-based opinions.<sup>\*21</sup> However, Advocate-General Mayras described the exercise of official authority in the *Reyners* case as follows: "Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens."<sup>\*22</sup>

As Article 45 is a norm prescribing an exception, the court has interpreted Article 45 in a manner which limits its scope to what is strictly necessary to safeguard the interests that are allowed to protect by Member States through this exception.<sup>\*23</sup> Therefore, when one is applying the norm in the first place, it is important to consider the reasons for which this exception was created. The European Court of Justice has found that Article 45 has to enable Member States to prevent a non-citizen from performing the functions connected to

<sup>15</sup> The Press Release of 27 June 2007 of the European Commission "Nationality requirements for notaries: Commission takes seven Member States to Court of Justice to ensure compliance the principle of non-discrimination" (IP/07/915). Available at [europa.eu/rapid/pressReleasesAction.do?reference=IP/07/915&format=HTML&aged=0&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/915&format=HTML&aged=0&language=EN&guiLanguage=en).

<sup>16</sup> See, e.g., Commission Staff Working Document. Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services. COM(2005) 405 final. 5.09.2005. SEC(2005) 1064 at paragraph 71 ff. The organisation *Conférence des Notariats de l'Union Européenne* (CNUÉ), which associates the civil law notaries of the Member States, holds a different opinion. See Position der europäischen Notare zum Wettbewerbsrecht. 3. Juni 2005. Available at [www.cnué-nouvelles.be/pdf/pdf\\_de\\_20050609090224-2.pdf](http://www.cnué-nouvelles.be/pdf/pdf_de_20050609090224-2.pdf).

<sup>17</sup> In that case, every national restriction — for example, the specified number of positions and districts — has to be analysed to determine whether the restriction is discriminating against the citizens of the other Member States; is creating of such restrictions justified by the overriding public interest — be it then defending the interests of the individuals participating in the legal relationship or the proper functioning of the justice system; are the restrictions suitable for achieving the objective which they pursue and do not go beyond what is necessary to attain the purpose. Case C-55/94 *Gebhard*. – ECR 1995, p. I-4165 at paragraph 37.

<sup>18</sup> About the applicability of the provisions of competition law on the public activities, see E.-J. Mestmäcker, H. Schweitzer. Art. 86 Abs. 1, Rn. 15 ff. – U. Immenga, E.-J. Mestmäcker. Wettbewerbsrecht. Kommentar zum Europäischen Kartellrecht. Band I. 4. Aufl. 2007.

<sup>19</sup> About the possible influence of applying the provisions of the freedom of establishment, see J. Fleischhauer. Europäisches Gemeinschaftsrecht und notarielles Berufsrecht. – DNotZ 2002, p. 349 (the practices of the notary would qualify under the legal services that are similar to the lawyer's legal aid). U. Karpenstein, I. Liebich. Das deutsche Notariat vor dem Europäischen Gerichtshof. – EuZW 2009, p. 162 ("erosion of the system of preventive legal protection").

<sup>20</sup> F. Mancini. Democracy and Constitutionalism in the European Union. 2000, p. 134.

<sup>21</sup> Critically, it has been called also an apodictic view, see M. Henssler, M. Kilian. Die Ausübung hoheitlicher Gewalt im Sinne des Art. 45 EG. – EuR 2005, p. 195.

<sup>22</sup> The opinion of Advocate-General Mayras in *Reyners*, case 2/74. – ECR 1974, pp. 631, 665.

<sup>23</sup> Case 147/86 *Commission v. Hellenic Republic*. – ECR 1988, p. 1637 at paragraph 7; C-404/05 *Commission v. Germany*. – ECR 2007, p. I-10195 at paragraph 37.

the exercise of official authority.<sup>\*24</sup> In accordance with the court's assessment, the objective is fully achievable when Article 45 covers only those activities which "constitute a direct and specific connexion with the exercise of official authority".<sup>\*25</sup>

From the case law of the court, it can be claimed that the concept of exercise of official authority includes certainly the activities connected to coercion.<sup>\*26</sup> At the same time, this is not a decisive criterion.<sup>\*27</sup> When rendering its assessment, the court proceeds from the question of whether the decisions of a person or entity carrying out an activity are binding.<sup>\*28</sup> Also the public real acts (*Realakte*) are not excluded *per se*.<sup>\*29</sup> Rather the fact that the scope of application of Article 45 does not cover actions that are complementary or additional to the exercise of official authority or actions that are only of a technical nature is decisive.<sup>\*30</sup>

So far, the European Court of Justice has not considered any disputed activity belonging to the exception provided by Article 45. The court has denied that the activities of advocates, private security firms, teachers in private schools, traffic accident experts, auditors acknowledged by insurance undertakings, data processing systems developers (and corresponding programmers and operators), and services connected to arranging games of chance, tax assistance and consulting services of tax consulting centres, as well as activities of private inspection bodies for organic agricultural production are exercise of official authority.<sup>\*31</sup>

If the exception provided in Article 45 is to apply, the test of restrictions' proportionality will not be used. Therefore, it is not important whether another restriction could replace the requirement for citizenship.<sup>\*32</sup> Generally, Article 45 is applicable only to specific activities. Expanding the exception to the whole profession can be possible only when a certain activity is connected to the profession in such a way that, because of freedom of establishment, the relevant Member State would be obliged to allow non-nationals — even occasionally — to exercise the functions appertaining to official authority.<sup>\*33</sup>

### 2.3. The applicability of Article 45 of the EC Treaty to the office of notary

In its case law, the European Court of Justice has highlighted that the applicability of Article 45 should be assessed separately in the case of every Member State, taking into consideration the national provisions regulating the activities and organisation of the profession.<sup>\*34</sup> Although the independent objective of this article is not to answer the question of whether the professional activities of Estonian notaries are covered by Article 45, it is important to stress that the Estonian notary does not perform notarial acts that would have a subsidiary or preparatory role in relation to some other institution and that his or her acts do not need state approval to have a conclusive force. Similarly, the notary does not perform notarial acts "under the active supervision" of some other institution, nor is any other institution responsible for the actions of the notary.<sup>\*35</sup>

<sup>24</sup> Case 2/74 *Reyners*. – ECR 1974, p. 631 at paragraph 44.

<sup>25</sup> Case 2/74 *Reyners*. – ECR 1974, 631 at paragraph 45; Case C-355/98 *Commission v. Belgium*. – ECR 2000, p. I-1221 at paragraph 25.

<sup>26</sup> Case C-114/97 *Commission v. Spain*. – ECR 1998, p. I-6717 at paragraph 37.

<sup>27</sup> This is, however, the argument in the action filed against Belgium by the Commission in the Case C-47/08: *Commission v. Belgium*. – OJ C 128, 24.05.2008, p. 18.

<sup>28</sup> Case 2/74 *Reyners*. – ECR 1974, p. 631 at paragraphs 52 to 53; Case C-42/92 *Thijssen*. – ECR 1993, p. I-4047 at paragraph 21, and Case C-306/89 *Commission v. Greece*. – ECR 1991, p. I-5863 at paragraph 7.

<sup>29</sup> A. Randelzhofer, U. Forsthoff. Art. 45 EGV, Rn. 8. – E. Grabitz, M. Hilf, M. Nettesheim (Hrsg.). Das Recht der Europäischen Union. Band II. Loseblatt, Stand May 2001.

<sup>30</sup> Case C-3/88 *Commission v. Italy*. – ECR 1989, p. 4035 at paragraph 13; Case C-42/92 *Thijssen*. – ECR 1993, p. I-4047, at paragraph 22; Case C-114/97 *Commission v. Spain*. – ECR 1998, p. I-6717 at paragraph 38.

<sup>31</sup> Advocates: Case 2/74 *Reyners*. – ECR 1974, p. 631; private security activities: C-283/99 *Commission v. Italy*. – ECR 2001, p. I-04363; C-355/98 *Commission v. Belgium*. – ECR 2000, p. I-1221; C-514/03 *Commission v. Spain*. – ECR 2006, p. I-963; teachers in private schools: 147/86 *Commission v. Greece*. – ECR 1988, p. 1637; traffic accident experts: C-306/89 *Commission v. Greece*. – ECR 1991, p. I-5863; auditors acknowledged by insurance undertakings: C-42/92 *Thijssen*. – ECR 1993, p. I-4047; data processing systems developers, programmers and operators: C-3/88 *Commission v. Italy*. – ECR 1989, p. I-4035; services necessary for computerization of lottery: C-272/91 *Commission v. Italy*. – ECR 1994, p. I-1409; tax assistance and consulting services by tax consulting centres: C-451/03 *Servizi Ausiliari Dottori Commercialisti*. – ECR 2006, p. I-2941; private inspection bodies of organic agriculture production: C-393/05 *Commission v. Austria*. – ECR 2007, p. I-10195 and C-404/05 *Commission v. Germany*. – ECR 2007, p. I-10239.

<sup>32</sup> A. Randelzhofer, U. Forsthoff. Art. 45 EGV, Rn. 9. – E. Grabitz, M. Hilf, M. Nettesheim (Hrsg.). Das Recht der Europäischen Union. Band II. Loseblatt, Stand Mai 2001. Still, the European Commission uses this argumentation in notaries' cases. See, e.g., case C-47/08: *Commission v. Belgium*. – OJ C 128, 24.05.2008, p. 18.

<sup>33</sup> Case 2/74 *Reyners*. – ECR 1974, p. 631 at paragraph 46.

<sup>34</sup> *Ibid.*, paragraph 49.

<sup>35</sup> Proceeding from these arguments, the European Court of Justice did not acknowledge the activities of private inspection bodies of organic agriculture production as the exercise of official authority within the meaning of Article 45. C-393/05 *Commission v. Austria*. – ECR 2007, p. I-10195 at paragraph 42 and C-404/05 *Commission v. Germany*. – ECR 2007, p. I-10239 at paragraphs 43 to 44.

Despite the fact that the European Commission does not consider Article 45 applicable to the office of notary, in European Union legislation several exceptions have been made for notaries as compared to other professions. For example, the Services Directive is not applicable to the professional activities of notaries.<sup>\*36</sup> Similarly, the European Parliament holds the viewpoint in its resolution adopted in 2006 that Article 45 has to be fully applied to the profession of a civil law notary.<sup>\*37</sup>

The literature in which this question has been analysed in depth has adopted mainly the viewpoint according to which Article 45 is applicable to the office of notary.<sup>\*38</sup> The office of notary is often the only profession the literature cites as a specific example belonging to Article 45.<sup>\*39</sup> However, there are also opposing views.<sup>\*40</sup>

These differing views refer to the fact that, because of the casuistic practice of the European Court of Justice, it is not possible to predict with sufficient certainty what kind of approach the court will adopt.<sup>\*41</sup>

At the same time, the office of notary is a good example based on which the influence of Article 45 on the public office as an organisational form of the exercise of official authority can be assessed. Since in the state organisation the legal status is determined on the basis of the legal nature of the functions to be performed, the starting point should be the national legislator's assessment of the tasks fulfilled in the framework of the public profession. The multifaceted competence of the Estonian notary offers suitable base material.

### 3. Organisation of the office of notary in Estonia

#### 3.1. Abolishment of the requirement for Estonian citizenship in the Notaries Act

Estonia was among the Member States against whom the European Commission initiated the infringement proceedings because of citizenship requirement for notaries. Of the new Member States, only Estonia decided to abolish this requirement.<sup>\*42</sup> According to the amendment of the Notaries Act that entered into force on 10 July 2008, a citizen of any member state of the European Union may be a notary in Estonia.<sup>\*43</sup>

The reason the Estonian legislator decided to replace the former requirement of Estonian citizenship for notaries with the requirement for the European Union citizenship is not given in the explanatory memorandum of the Act of Amendment of the Notaries Act. It is remarkable that the amendment of the requirement for citizenship is not justified explicitly by the action of the European Commission, and the explanatory memorandum does not even mention the address of the European Commission. It only briefly refers to the fact that the abolishment of the requirement for Estonian citizenship is in accordance with European Union law. At the same time, the explanatory memorandum stresses that abolishing the requirement for citizenship does not reduce state

<sup>36</sup> See Article 2 (2) 1) of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services on the internal market. – OJ L 376, 27.12.2006, p. 36. There is a separate provision prescribing that the directive is not applicable to the cases provided by Article 45 (Article 2 (2) i)).

<sup>37</sup> The resolution of the European Parliament of 23 March 2006 on legal professions and general interest in the functioning of legal systems, p. 17. – OJ C 292E, 1.12.2006, pp. 105–109.

<sup>38</sup> On the German notary with references to earlier research, see N. Preuß. Der Notar als Außenstelle der Justiz – Erfüllung staatlicher Rechtspflegeaufgaben durch externe Funktionsträger. – DnotZ 2008, pp. 258–277; U. Karpenstein, I. Liebach. Das deutsche Notariat vor dem Europäischen Gerichtshof. – EuZW 2009, pp. 161–167. On the Austrian notary, see G. Holley, B. Raschauer, S. Zleptnig. Niederlassungsfreiheit auch für öffentliche Ämter? – ÖJZ 2007, pp. 525–532.

<sup>39</sup> For example, A. Haratsch, C. Koenig, M. Pechstein. Europarecht, 5. Aufl. 2006, paragraph 813; U. Karpenstein, I. Liebach. Das deutsche Notariat vor dem Europäischen Gerichtshof. – EuZW 2009, p. 164 with references to the earlier literature.

<sup>40</sup> The viewpoints that the German notary does not exercise official authority as it is expressed in Article 45 with references to earlier research: S. Haeder. Das deutsche Notariat als Bereichsausnahme von der Niederlassungs- und Dienstleistungsfreiheit? – ZeuS 2007, pp. 117–150; S. Schill. Staatsangehörigkeitsvorbehalt für Notare und europäische Niederlassungsfreiheit – Der Anfang vom Ende eines Privilegs? – NJW 2007, pp. 2014–2018; G. Schiller. Freier Personenverkehr im Bereich der freiwilligen Gerichtsbarkeit? – EuR 2004, pp. 27–51. The viewpoint that the citizenship requirement for German notaries is in conflict with the Community law, see J. Bröhmer. Art. 45 EGV, at paragraph 3. – C. Calliess, M. Ruffert (Hrsg.). EUV/EGV. Kommentar. 3. Aufl. 2007.

<sup>41</sup> The same viewpoint: M. Henssler, M. Kilian. Die Ausübung hoheitlicher Gewalt im Sinne des Art. 45 EG. – EuR 2005, p. 197.

<sup>42</sup> On 4 June 2008, *Riigikogu*, the Estonian Parliament, adopted the Act to Amend Commercial Code, Non-profit Associations Act and Other Acts Related to Them (*äriseadustiku, mittetulundusühingute seaduse ja nendega seonduvate teiste seaduste muutmise seadus*) that amended § 6 (1) of the Notaries Act. Spain and Italy had abolished the citizenship requirement for notaries already earlier.

<sup>43</sup> The other requirements — the individual who wishes to become a notary has to complete candidate service, pass the notary exam, have a sound knowledge of oral and written Estonian, be honest and with high moral standards and meet educational qualifications suitable for a judge — remained the same. The citizens of the European Union may also become notary candidates and substitute notaries.

supervision over notaries and that the notary's oath of office and the requirement for language skills, candidate training, and passing of the notaries' exam will remain.<sup>\*44</sup>

Despite the laconic nature of the Estonian legislator here, it can be assumed that Estonia did not, however, agree with the viewpoint of the European Commission according to which freedom of establishment should be extended to the notary. Estonia's later activities demonstrate this. Estonia entered the proceedings to support Germany's requests in the case *Commission v. Germany*.<sup>\*45</sup> It seems that the decision of the Estonian legislator could have been caused by the consideration that if all other conditions for becoming a notary — especially Estonian language skills — were to remain the same, it is unlikely that abolishing the requirement for citizenship would have a major influence in practice.<sup>\*46</sup> Also, the approach described below demonstrates that the Estonian legislator considers the practice of the notary to be exercise of official authority.

### 3.2. The tasks of the Estonian notary

The competence and the legal status of the Estonian notary are regulated by the Notaries Act<sup>\*47</sup> (NotA). Pursuant to § 2 (1) of the NotA, the notary performs the tasks assigned by the state. The most important of these are acts of attestation, which are regulated by the Notarisation Act<sup>\*48</sup> (NA). The notary attests both transactions and declarations of intention (substantive attestations) and also attests to the authenticity of signatures and transcripts (authentication). The office of notary is, above all, designed for substantive attestations. A notary has to be turned to when individuals want to enter into a transaction with substantial legal consequences or a property, partnership, family, or succession transaction (e.g., the transactions to transfer and encumber an immovable, or marital property and succession contracts). These transactions become valid only after notarial substantive attestation.

During the notarial substantive attestation, the notary has to clarify the intention of the parties to the transaction, to warn them against the risks arising from the transaction, and to explain impartially to the parties the possibilities for achieving the desired legal consequences (NA, § 18 (1)). The notary has to verify whether parties to a transaction have passive or active legal capacity and the capacity to exercise will; the notary also has to assess whether the objectives of the notarial act are legitimate. If they are not, the notary is required to refuse to perform the act of attestation and the parties cannot enter into the transaction (NA, § 4). If the notary has met all his or her obligations and there are no hindrances to the act of attestation, the notary attests the content of declaration of intention and verified circumstances and prepares the notarial deed.

The legal effects of the notarial deed are not restricted to giving transactions legal force. Although according to § 232 (2) of the Code of Civil Procedure<sup>\*49</sup> no evidence has predetermined force for the courts, § 1 (5) of the NA prescribes that the correctness of notarial deeds and notarial certifications that are prepared within the competence and in compliance with the formal requirements is assumed. Additionally, several important notarised agreements constitute execution documents<sup>\*50</sup> on which the bailiff can rely without verifying the substantial circumstances.<sup>\*51</sup>

The state has assigned also succession proceedings to the notary, and these result in the issuing of succession certificates.<sup>\*52</sup> When issuing a succession certificate, the notary decides who is a successor, who has the right of succession, and what size each successor's share of the estate will be.

<sup>44</sup> The Explanatory Memorandum of the Draft Act to Amend Commercial Code, Non-profit Associations Act and Other Acts Related to Them (Äriseadustiku, mittetulundusühingute seaduse ja nendega seonduvate teiste seaduste muutmise seaduse eelnõu seletuskiri). Available at [www.riigikogu.ee/?page=en\\_vaade&op=ems&eid=248053&u=20090329220643](http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=248053&u=20090329220643) (in Estonian).

<sup>45</sup> The regulation of the President of the European Court of Justice of 16 September 2008 in case C-54/08.

<sup>46</sup> Regrettably, it was not analysed whether abolishing the requirement of citizenship is in accordance with the Estonian Constitution. According to § 30 (1) of the Constitution the offices in state institutions and local municipalities are to be filled with Estonian citizens pursuant to law. These offices may, as an exception, be filled with foreign state citizens or stateless persons, in accordance with law. As Estonian notary is a holder of the public office this provision expands on the notary, too.

<sup>47</sup> Estonian Notaries Act (as at 25 December 2008) is available in English at [www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50001K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=notariaadiseadus](http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50001K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=notariaadiseadus).

<sup>48</sup> Estonian Notarisation Act (as at 1 January 2008) is available in English at [www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50058K3&keel=et&pg=1&ptyyp=RT&tyyp=X&query=t%F5estamisseadus](http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50058K3&keel=et&pg=1&ptyyp=RT&tyyp=X&query=t%F5estamisseadus).

<sup>49</sup> The Code of Civil Procedure as at 1 January 2006 is available at [www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtu](http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtu).

<sup>50</sup> The Code of Enforcement Procedure § 2 (1) 18-191. The code as at 1 May 2007 is available at [www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X80003K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=t%F4itemen](http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X80003K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=t%F4itemen).

<sup>51</sup> In Estonian execution proceeding, the principle of formalisation is valid. About the preceding, see Regulation 3-2-1-132-07 of the Civil Chamber of the Supreme Court of 16 January 2008, at paragraph 11. – RT III 2008, 5, 35 (in Estonian).

<sup>52</sup> As from 1 January 2009, the new Law of Succession Act has been in force in Estonia. Its §§ 165–175 regulate the succession proceeding. The Act as at 1 January 2009 is available at [www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXX0002&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F4rimis](http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXX0002&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F4rimis).

In addition to attestation and succession proceedings, the notary may perform several other notarial acts that can, but may not, be connected to attestation. For example, the notary deposits money, securities, and valuables.<sup>\*53</sup> For all notarial acts, the notary is required to prepare the necessary draft documents, verify the data related to the notarial act from the national records, provide legal consultation to the parties, and represent them in connection with the notarial act with the court and administrative authorities (NotA, §§ 30 and 31).

### 3.3. Extension of competency of the notary

In May 2009, the Estonian Parliament adopted amendments to the Notaries Act according to which the competency of the notary extends considerably.<sup>\*54</sup> The new notarial acts include issuing apostilles, the authentication of entry into a contract of marriage, and divorce, along with preparation of register entries for marriage and divorce.<sup>\*55</sup>

Previously, notaries performed only compulsory notarial acts; the new provisions added to the office of notary also the performance of notarial services. The notarial services include, among others, legal counselling outside the framework of acts of attestation, tax counselling and counselling on issues of foreign law both within and outside the framework of acts of attestation, mediation pursuant to the Mediation Act, and acting as an arbitrator through the mediation and arbitration tribunal of the Chamber of Notaries.<sup>\*56</sup> Also a small number of acts of attestation that earlier belonged among notarial acts are considered now to be notarial services: authentication of the results of auctions, voting, draws, and sortitions; authentication of testimony given under oath; and verification of the authenticity of the translation of a document (NotA, § 32).

A notary receives the fees prescribed by law for notarial acts, and departing from these stated fees is forbidden. However, the notary and applicant agree in writing on the fee for a notarial service before the service is provided. In a further distinction from notarial acts, the notary is not obliged to perform notarial services. The notary can decide which notarial services he or she will provide. At the same time, the notary may perform only those notarial services on which he or she has published data on the Web site of the Chamber of Notaries and that are covered under a valid liability insurance contract. State supervision of the notary, professional liability, and disciplinary liability cover both notarial acts and notarial services.<sup>\*57</sup> The obligation of impartiality on the part of the notary and other institutional professional obligations extend to the supply of notarial services.

In the explanatory memorandum to the draft law, the extension of competency of the notary was explained by the need to make the office of notary more flexible and attractive to both notaries and the public, to foster competition of legal practitioners, to create more accessible opportunities for people to attend to their business and solve their problems extra-judicially, and to subject heretofore unregulated activities of notaries to state supervision.<sup>\*58</sup> Therefore, it can be claimed that the main objectives for extending the competency of notaries are to expand the prevention of legal disputes and to ensure the viability of a self-supporting notaries' office.<sup>\*59</sup>

### 3.4. The legal status of the tasks of the notary

Classifying the professional activities of the notary into notarial acts and notarial services refers to the substantial differences of these tasks.

When performing substantive attestations, the notary prepares a notarial deed by which he or she attests that the transaction is in compliance with the law, confirms that the declarations of intention of the parties correspond to the parties' actual intentions, and states that he or she has verified that the parties' identities and the

<sup>53</sup> The exhaustive list of notarial acts is given in § 29 of NotA.

<sup>54</sup> The Act to Amend the Notaries Act and the Acts Related to It. – RT I 2009, 27, 164 (in Estonian).

<sup>55</sup> Notaries start performing these new notarial acts respectively from 1 January 2010 and 1 July 2010.

<sup>56</sup> The draft of the Mediation Act that is being proceeded in the *Riigikogu* provides the time of entering into force 1 January 2010.

<sup>57</sup> As an exception, the provisions of disciplinary liability are not applied in case the notary is acting as an arbiter, except for the notary who has committed an indecent act (§ 2 (2) of the Notaries Disciplinary Action Act). About the notaries' liability, see E. Andresen. State Liability without the Liability of State. Constitutional Problems related to Individual Professional Liability of Estonian Notaries, Bailiffs and Sworn Translators. – *Juridica International* 2006 (11), pp. 146–157.

<sup>58</sup> The Draft Act to Amend the Notaries Act and the Acts Related to It, at paragraph 2. Available at [www.riigikogu.ee/?page=en\\_vaade&op=e\\_ms&eid=515598&u=20090402140049](http://www.riigikogu.ee/?page=en_vaade&op=e_ms&eid=515598&u=20090402140049) (in Estonian).

<sup>59</sup> Undoubtedly, the state has to safeguard that the notary's office were able to fulfil the tasks imposed on it in a proper and modern way. The notary's office is not funded by the state budget but the notary's office manages itself independently by using the means returned from the fees for deeds. The Estonian Chamber of Notaries not only deals with the self-government questions of the notary's office, the candidate training and advanced training, but has contributed to the development of the notary's office by using the membership fees of notaries. For example, the Chamber of Notaries ordered an electronic information system of notaries called *e-notar* that enables digital data exchange between state-operated databases and which facilitates significantly everyday work of notaries.



data concerning the transaction are accurate. This control over the legal relationships, being in the majority of cases compulsory, can be performed only with state empowerment. By appointing the notary, the state has granted him or her authority that other state officials and representatives of other professions do not have. Although, according to § 2 (3) of the NotA, the notary holds office on his or her own behalf, his or her professional activities in relation to acts of attestation are attributed to the state. Therefore, the notary adds the impression of a seal with the image of the national coat of arms and the first page of the notarial deed bears the image of the national coat of arms.<sup>60</sup> The documents prepared during the notarial act belong to the state (NotA, § 16 (1)). As the notarial act is an act of official authority, its performance is allowed only in Estonian territory (NotA, § 36 (6)).

Similarly to performing notarial acts, the acts of issuing succession certificates, authenticating entry into a contract of marriage or divorce, and issuing apostilles are tasks the performance of which requires state authority. The notary can perform these acts only because the state has provided him or her by law with the right to make binding decisions on behalf of the state. All of these notarial acts are state tasks.

However, several tasks among notarial services — legal counselling not related to acts of attestation, mediation, and acting as an arbitrator — do not require state authority. Additionally, two important characteristics of public office are missing in the case of notarial services: the notary is not required to perform these tasks, and the fee for the services is negotiable. Therefore, the state does not require that these tasks be performed and has left both the supply and the price to competition. The simple circumstances that the notary has to be impartial and apply confidentiality also when providing notarial services and that the state has subjected notarial services to as rigid state supervision and responsibility requirement as it has done by performance of notarial acts do not change the nature of these services. The nature of the notarial services is very similar to that of legal services supplied in the framework of entrepreneurship. For example, the advocate acting as an arbitrator has to be as impartial and independent for the parties as the notary does. Despite the fact that, according to § 2 (1) of the NotA, the notary is an independent official to whom the state has delegated the function of ensuring safety of legal relationships and prevention of legal disputes, all the notarial services, whose objective is to prevent court action and guarantee safety of legal relationships, cannot be regarded as state tasks, i.e., tasks that should be fulfilled by the state. These are merely public tasks in which society has a public interest. The aims of the extension of competency of the notary are undoubtedly legitimate and enable people to arrange their legal relationships even better, but that kind of limitation to freedom of profession is not necessary.

### 3.5. Compatibility between the legal status of the notary and the notary's tasks

Although since 1993, when the model of the Latin notaries' office was restored in Estonia, different terminology has been used in the law at various points in time to describe the legal status of the notary, the latter has remained unchanged.<sup>61</sup> According to the new Notaries Act, which entered into force in 2002, the notary is a holder of a public office.

The constitutional position of each profession and limitations to it are dependent on the tasks that are being fulfilled in the framework of that profession. State intervention in relation to professional freedom is allowed only so far as it can be justified by functions of those tasks. Also, the legal status of the notary depends on his or her tasks.

The creation of the public office demonstrates the importance to the state of the tasks being fulfilled within the framework of the profession. When introducing the public profession of notary, the state proceeded from the act of attestation as the main task of the notary. Besides the procedural professional obligations, institutional professional obligations such as impartiality, independence, and confidentiality are required to perform the functions of acts of attestation. Owing to performance of acts of attestation and other state tasks, the obligation to perform notarial acts, the prescribed office district, state supervision, and the provisions of disciplinary and professional liability are justified.

However, the public office is not a suitable organisational form for providing notarial services. Although notarial services that are not acts of attestation are not state tasks by their nature, the same rigorous regulation of the public office applies to them as applies to acts of attestation. At the same time, notarial services are not tasks that the state would reserve to itself because of their importance. Notarial services that are not acts of

<sup>60</sup> The right to use the image of the national coats of arms is prescribed in § 4 of the NotA and the procedure is specified by § 8 (2) and § 15 (5) of the regulations for the notaries' office approved by regulation No. 5 of Minister of Justice of 25 January 2002. – RTL 2002, 19, 245; 2008, 64, 910 (in Estonian).

<sup>61</sup> On terminology used to describe the legal status of the notary, see E. Andresen. Status and Role of Notary in Legal System of Estonia. – 10<sup>th</sup> Anniversary of the Estonian Chamber of Notaries. Tallinn 2003, p. 54.

attestation can be performed also by other professions, and thereby on less limited conditions. The notary has to compete with other professions and at the same time comply with significantly more rigorous regulations.

Although the office of notary belongs to the state organisation, the discussion above demonstrated that, during extension of competency of the notary, there has appeared mixing of the spheres of the state and society. Despite the legal status of the notary, the professional activities of the notary can be considered exercise of official authority only in part.

## 4. The influence of the EU law on the public office, taking the office of notary as an example

European Union law does not prescribe to Member States the legal form in which the state tasks within their area of competence should be performed. Therefore, European Union legislation and the established case law of the European Court of Justice have not paid much attention to the public office.

The influence of European Union law on the public office is shown through the tasks performed in the framework of the office. The continuation of the office is dependent on the meaning assigned to these tasks by the European Court of Justice. As the practice in implementation of Article 45 of the EC Treaty shows, the application of freedom of establishment would not be precluded only because the performance of the tasks takes place in the framework of the public office or because the public-office-holder performs the tasks that are considered exercise of official authority according to national law. When the activities within the framework of the public office are not in compliance with the criteria for the exercise of official authority that have been elucidated by the European Court of Justice, exercise of the exception to freedom of establishment is not possible under Article 45. In this case, the necessity of limitations to the professional activities is to be assessed in view of the objectives of European Union law, result of which may not coincide with the earlier opinions of national courts on the legitimacy of the same limitations. This revision may cause a situation wherein the state has no possibilities for achieving the public objectives and thus is forced to abandon the performance of the state task. In this way, state task would be transformed into public task that belong to the public sphere. This, in turn, would mean disappearance of the public office.

Also the future of the public office of notary is dependent on the assessment of the European Court of Justice on professional duties of the notary.<sup>62</sup> Despite the fact that the current cases of the European Court of Justice will not decide the status of the Estonian notaries' office, the court's approach will have a future influence on it.

Estonia did away with the requirement for citizenship when the office of notary included mostly only tasks connected to the exercise of official authority. With the extension of notaries' competency, several tasks were added, the performance of which pursuant to European Union law cannot be reserved only to nationals of a given Member State. The fundamental freedoms of European Community law need to be safeguarded in performing these tasks. As the office-holder cannot be split in two for performing the two sets of tasks, only those requirements can be imposed on the notary that are required for holding the office as a whole. Therefore, solely from the citizenship standpoint and in view of the later amendments to the law, the legislator could not have retained the requirement for citizenship that was applied to the Estonian notary.

Despite the fact that the Estonian notary has to perform not only state tasks but also other public tasks, the unitary office of notary has been retained and a unitary set of rules is applied to holding of this office. As Article 45 is not applicable to some of these tasks, the fundamental freedoms of the European Community cover these tasks and Member States cannot groundlessly hold back exercise of the freedoms. Therefore, one must acknowledge that there are two distinct groups of tasks: those corresponding to the criteria in Article 45 and thus, can be regulated by the norms of national law; and the rest of the tasks falling under the requirements of the European law.

In principle, this differentiation corresponds to the logic of Article 45, according to which it is specific activities that have to be set apart. However, in the case of the office of notary is this double-regulation at the national level is not acceptable. Estonian national law does not support performing both state tasks and public tasks in the same office. The reason for this is that the state cannot from the national level perform the tasks that can be performed in same manner at the public level. Limitations to the professional activities in the framework of the public office are in most cases unnecessary for performance of merely public tasks and are therefore disproportionate. Furthermore, applying the norms of state supervision, public disciplinary liability and of state liability, is not justified in these cases.<sup>63</sup> However, deregulation of the public office would not make it possible to realise the state tasks that are assigned to the public office by the state.

<sup>62</sup> About the influences, see subsection 2.1 of this article.

<sup>63</sup> It has also been noted before: W. Baumann, § 5, Rn. 6. – H. Eylmann, H.-D. Vaasen (Hrsg.), Bundesnotarordnung. Beurkundungsgesetz. Kommentar. 2. Aufl. 2004.

The above shows that the continued existence of the public office is guaranteed only if the state tasks are assigned to the public office and when these tasks constitute the exercise of official authority in the sense of Article 45 of the EC Treaty.

## 5. Conclusions

Similarly to many Member States, also the Estonian legislator has trusted the notary with tasks that the state considers to be its own. A public office has been created for the notary, through which these tasks are performed. Recently, several new tasks were added to the competency of the Estonian notary. These new tasks are called notarial services. Unlike with notarial acts, the notary can decide whether to perform these or not and the fee for the services is negotiable. Notarial services are public tasks, and there is a public interest in them, but they are not inherently state tasks. Provision of notarial services belongs to the public sphere, and they do not require strict public regulation. Therefore, holding a public office and a private profession cannot be connected in the framework of the office of notary, and the legislator will have to decide in favour of one or the other. However, the notary could provide public services outside the framework of the office of notary on equal bases with other individuals offering similar services.

However, in considering the question of the applicability of European Union law, it is not important whether the office-holder performs state tasks. The national legislator can leave performing state tasks, which are trusted to the public office, to its nationals and to the sphere of influence of national law only if the competence of the notary is determined by only these activities that constitute exercise of official authority as explained in Article 45 of the EC Treaty.

The office of notary, which has remarkably long traditions, has an important place in systems of legal protection in most Member States. The Estonian notary too has served the state down through history. In the last 16 years, the notary has been an independent holder of state authority and the office of notary has grown into a strong and trustworthy institution that is valued highly by parties to legal relationships and the state. Still, the office of notary can continue to exist only if the notarial acts of civil law notaries are valued also at the level of the European Union.