25 The Nationality Requirement Case of Hungarian Notaries

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25.1 Introduction

Following a procedure pending for more than a decade the European Court of Justice delivered judgement on 1 February 2017 in case C-392/15 *European Commission v. Hungary*.[1] The Court declared that Hungary failed to fulfil its obligation under Article 49 TFEU on the freedom of establishment by imposing a nationality requirement for access to the notarial profession. Hungary was the last in the line of the Member States in respect of which the Court found the imposition of a nationality requirement for access to the notarial profession to be in violation of European law.

25.2 Legal Context

Article 49 TFEU stipulates the freedom of establishment within the European Union:

> "Article 49 (ex Article 43 TEC)
> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

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1 Judgment of 1 February 2017 in Case *C-392/15, European Commission v. Hungary*, ECLI:EU:C:2017:73 (hereinafter referred to as "judgment").

Subject to Article 51 TFEU, activities connected with the exercise of official authority are excluded from the freedom of establishment:

> "Article 51 (ex Article 45 TEC)
> The provisions of this Chapter shall not apply, 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.
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities."

In Hungary, the organisation of the notarial profession is governed by Act XLI of 1991 on civil law notaries (hereinafter referred to as "NA"). In the Hungarian legal system notaries carry out their activities as independent professionals. Notaries have the power to authenticate instruments in order to provide impartial legal services to the parties with a view to preventing disputes (NA § 1(1)). Notaries are to carry out official tasks relating to the application of the law forming part of the administration of justice, within the framework of the powers conferred upon them by law (NA § 1(4)). Notaries are only subject to the law in the course of their activities and may not receive instructions (NA § 2(1)). Notaries may carry out their activities either individually or as members of an office (NA § 31/A(1)). The setting up and operation of an office does not have an impact on the legal status of notaries, as set forth under the Notaries Act, in particular their obligation to exercise their duties individually, as well as their disciplinary and financial liability (NA § 31/E). Notarial fees are fixed by the Tariff Regulation No 14/1991. (XI.26.) determined by the Minister of Justice.

Apart from drawing up notarial acts and authenticating instruments notaries in Hungary also conduct various non-adversarial procedures. A major part of notarial activities consists of the order for payment procedure regulated by separate legislation,[2] and the order of enforcement[3] of such orders for payment, as well as succession proceedings.[4]

With respect to the conditions for access to the position of notary, NA § 17(1)(a) provides that only a Hungarian national may be appointed as a notary.

25.3 The Procedure Preceding the Judgement

The procedure commenced on 18 October 2006 when the Commission sent a letter of formal notice to Hungary requesting it to submit its observations within two months on

2 Act L of 2009 on order for payment.
3 Regulated by Act LIII of 1994 on judicial enforcement.
4 Regulated by Act XXXVIII of 2010 on succession procedure (hereinafter referred to as Hetv.).

the compatibility of the nationality requirement for access to the notarial profession with Articles 49 and 51 TFEU. Unpersuaded by the arguments put forward by Hungary, the Commission sent a reasoned opinion, to which Hungary replied within the prescribed time limit.

Subsequently, the Court delivered judgement against six Member States in a procedure to establish the failure of a Member State to fulfil obligations on 24 May 2011. (Judgements C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08). The Court held that the nationality requirement applied, respectively, in the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Republic of Austria, the Federal Republic of Germany and the Hellenic Republic for access to the notarial profession constituted discrimination on the ground of nationality prohibited under Article 49 TFEU. Hungary intervened before the Court in support of the first five Member States mentioned above.

By a letter dated 9 November 2011, the Commission drew Hungary's attention to these judgments and asked it to specify what measures it had taken or intended to take on the basis of those judgments in order to align its legislation with EU law. Hungary replied to that letter by stating that the functions performed by notaries in the Hungarian legal system also covered activities other than those examined by the Court in the cases which gave rise to the judgments and that those functions differed in nature from those at issue in those cases.[5]

In turn, the Commission sent a supplementary reasoned opinion to Hungary. Following a reply the Commission examined the amendments Hungary had in the meantime made to its legislation relating to notarial activities, and concluded that the infringement persisted and therefore sent a further supplementary reasoned opinion to Hungary. Hungary responded to that opinion, setting out the reasons for its view that the position adopted by the Commission was unfounded.[6]

Following such antecedents the Commission decided to bring an action for failure to fulfil an obligation subject to Article 258 TFEU on 20 July 2015. Following the written procedure a hearing was held on 29 September 2016. The judgement was delivered on 1 February 2017 by a panel of judges composed of R. Silva de Lapuerta (Spain), President of the Chamber, E. Regan (Ireland), J.-C Bonichot (France), A. Arabadjiev (Bulgaria, Rapporteur) and S. Rodin (Croatia).

Based on the above, it is clear that the procedure against Hungary had been gaining impetus for a very long time, more than a decade. Prior to the launch of proceedings communication on the pros and cons of the contested national legislation between the Commission and Hungary took place five times in some form. It is quite revealing that although the Court concluded cases of prohibited discrimination on the grounds of nationality in respect of the notary system of six Member States in 2011, it still took the

5 See para. 51 of the judgment.

6 See paras. 52-54 of the judgment.

Court nearly six years to reach a decision in respect of Hungary. As the lengthy process and laborious manner of delivering the judgement indicate, the Hungarian notary system differs from those of the other Member States. Activities pursued by Hungarian notaries also include tasks other than those examined by the Court in the cases which gave rise to the judgments, moreover the nature of the functions of Hungarian notaries differ from those of the other Member States at issue.

25.3.1 Arguments of the Commission

The Commission considers that the *activities carried out by notaries in the Hungarian legal system fall within the scope of Article 49 TFEU*.

According to the Commission's reasoning the Hungarian notaries pursue an *economic activity*, in so far as they are not employees of the State, but are engaged in independent professional practice, by which they provide services for remuneration, and as a part of which they are liable to pay taxes.[7] In fact, notaries are subject to the same tax and financial rules as an undertaking, furthermore the notary office is a legal person and is thus subject to the provisions of Hungarian law governing limited liability companies (Kft.). Moreover, notaries are exclusively liable for actions carried out in the course of their professional activity; i.e. those actions that do not entail State liability.

In the Commission's opinion notaries carry out a substantial part of their activities in a competitive framework within the limits of their respective territorial jurisdictions. That is the case in particular relating to the drafting of authentic instruments and the annulment of lost, stolen or destroyed securities and instruments.[8] In addition, applications for orders for payment made on paper and verbally[9] may also be submitted to any notary.[10] Therefore, in the view of the Commission the activities of the Hungarian notaries fall within the scope of Article 49 TFEU.

The Commission contends that activities carried out by notaries in the Hungarian legal system *do not constitute the exercise of official authority* within the meaning of the first paragraph of Article 51 TFEU as construed by the Court. The Commission argues that the fact that notaries act in the public interest does not necessarily imply that they take part in the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.

In that regard, the Commission argues that the first paragraph of Article 51 TFEU must be given an autonomous and uniform interpretation. In so far as it provides for an

7 See para. 57 of the judgment.

8 The Commission fails to note that such types of cases are very scarce, merely amounting to less than 0.05% of all cases.

9 The Commission also fails to indicate that only 4% of the applications for order for payment are paper-based or addressed verbally.

10 See para. 58 of the judgment.

exception to freedom of establishment for activities connected to the exercise of official authority, that provision should also be interpreted strictly and the exception should be restricted to activities which, of themselves, involve a direct and specific connection with the exercise of official authority. The concept of official authority implies the exercise of a decision-making power going beyond ordinary law and reflecting the ability to act independently of, or even contrary to, the will of other persons.

Pursuant to the Commission the functions exercised by the notary *do not involve the exercise of decision-making powers, powers of enforcement or coercive powers*. They are preventive in nature and are therefore *ancillary or preparatory* to the exercise of official authority. Factors such as the regulated nature of notarial activities, the fact that notaries are considered by Hungarian criminal law as exercising official authority, the territorial jurisdiction of notaries, their irremovability, the incompatibility of the notarial profession with the exercise of other functions and the fact that notaries may not refuse a client do not call that conclusion into question.[11]

According to the Commission a major part of the activities performed by notaries in the Hungarian legal system, namely issuing orders for payment, enforcing them and acting in succession matters, are ancillary or preparatory in nature, and therefore may not be deemed as having a direct and specific link to the exercise of official authority, or are activities which leave the discretionary and decision-making powers of the administrative or judicial authorities intact, and do not involve the exercise of decision-making powers, or powers of enforcement or coercion.

The Commission examined the *particular activities carried out by the Hungarian notaries*.

In the Commission's opinion the activity carried out by notaries in the *order for payment procedure* is of an ancillary nature with which they have been entrusted in order to alleviate the workload of the courts. Since that procedure concerns only pecuniary claims that are undisputed and outstanding, notaries have no decision-making power over the parties. Notaries' powers are thus limited to the completion of procedural formalities. They may not issue an order other than that for payment and are not competent to hear a challenge to a claim. Moreover, the order for payment issued by the notary becomes final and enforceable only if it remains undisputed by the debtor within the allotted time period. Finally, the fact that the order has significant legal effects is not sufficient to demonstrate direct and specific participation in the exercise of official authority.[12]

According to the Commission the same considerations apply in respect of the activities performed by notaries in the context of the *European order for payment procedure* set out in Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

11 See paras. 64-65 of the judgment.

12 See para. 66 of the judgment.

As regards *ordering the enforcement of orders for payment*, the Commission maintains that it does not involve the exercise of official authority as notaries have no related discretionary or decision-making powers. They do not settle disputes, hear parties or request any presentation of evidence, but merely render final and enforceable orders for payment provided that no statement of opposition was lodged. The enforceability of those orders does not confer a power of enforcement on notaries. Notaries merely render the claim indisputable until proven otherwise, without deciding on the merits of the challenge to the claim. The endorsement of the order for payment with a clause of enforcement is therefore an ancillary and preparatory activity in the Commission's view.[13]

As regards the *procedure relating to succession matters*, the Commission also observes that the notaries' activities are not directly and specifically connected with the exercise of official authority.

Namely, this is a non-adversarial civil procedure, during which it is possible for the parties to conclude an agreement which is approved by the notary in a formal decision. Nor does the notary's ruling regarding the estate issued with full effect entail the exercise of decision-making powers or powers of enforcement, since the notary's ruling presupposes prior consent or agreement between the parties. The fact that, under Hungarian law, the notary may only issue a ruling with provisional effect concerning an estate which is the subject of a succession dispute demonstrates that notaries are not empowered to settle a dispute during a succession procedure.[14]

Moreover, the notary's ruling concerning the estate cannot be regarded as final in so far as it may be challenged before the courts. As for the binding, preparatory or protective measures that notaries may adopt in order to ensure the proper conduct of the succession procedure, they do not affect the substance of the rights in question and are incidental to the principal task of the notary.

According to the Commission notaries play only a passive role in the *procedure relating to the depositing of monies* with a notary. They do not assess objections. The procedure relating to the depositing of monies with a notary does not, therefore, entail the exercise of any discretionary, decision-making powers or coercive powers.[15]

With respect to the *drawing up of notarial acts*, the Commission contends that the significance of the legal effects of these acts is not sufficient to support that such activity is part of the exercise of official authority. The probative value of notarial acts does not unconditionally bind courts in their assessment of evidence. In addition, it may be possible to adduce evidence to the contrary. The enforceability of these acts admittedly allows the creditor to continue enforcing the debt without having to bring an action before the courts. However, the role of notaries in that regard is restricted to verifying compliance with conditions required under the law for endorsing the act with authority to en-

13 See para. 68 of the judgment.
14 See paras. 69-70 of the judgment.
15 See para. 71 of the judgment.

force. According to the Commission notaries therefore have no decision-making powers or powers of enforcement.[16]

As regards the procedure for *preliminary evidence* before the notary, the Commission observes that the main purpose of this procedure is the prior securing of evidence in order to arrive at a positive outcome in subsequent criminal or civil proceedings, therefore it is apparently of an ancillary or preparatory nature.

The Commission considers that the *procedure for appointing a judicial expert* is closely linked to other procedures pending before notaries, such as the procedure for issuing an order for payment or the procedure relating to succession, which are not part of the exercise of official authority.

The Commission argues that notaries' powers in respect of the *annulment of lost, stolen or destroyed securities and instruments* do not relate to the legal status of those documents, but only to the possibility of replacing them. Such notarial activity is therefore not part of the exercise of official authority.

The Commission contends that with regard to the *dissolution of registered partnerships* notaries are only entitled to verify whether the legal conditions applicable to dissolution by mutual consent of registered partners are met. Accordingly, they have no real discretionary or decision-making power in that regard.

As regards the *maintenance of the Register of Declarations of Cohabitation, and the National Register of Marriage and Partnership Contracts*, the Commission contends that registration of acts in those registers by notaries produces effects only as a result of the contracts or other acts which the parties have freely entered into. The notary's involvement thus presupposes the prior existence of an agreement or a consensus between the parties.

As regards the determination of a legal successor in the event of the death of natural persons or of the dissolution of legal persons that entered filing statements in the *security interest register*, the Commission argues maintaining such register is excluded from the scope of the exercise of official authority as it relates only to non-adversarial procedures.

Finally, the Commission contends that the *notarial custody of instruments, monies, valuables and securities* are complementary and passive activities which do not involve the exercise of decision-making powers, powers of enforcement or coercion, or the examination of possible challenges thereto.[17]

25.3.2 Arguments Brought forward by Hungary

Hungary contends that the activities carried out by notaries in the Hungarian legal system *do not fall within the scope of Article 49 TFEU*, as notaries are *not engaged in economic activities* and their activities *may not be regarded as those of undertakings*.

16 See para. 72 of the judgment.

17 See paras. 73-79 of the judgment.

According to Hungary it must be examined whether after clarifying the meaning of the concepts of 'economic activity' and 'undertaking' it may be established that the activities of Hungarian notaries are distinct from these interpretations and thus do not fall within the scope of Article 49 TFEU. On the basis of the Court's practice the concept of undertaking is understood from a pragmatic and functional perspective, so essentially every subject at law who carries out economic activities may be deemed as an undertaking. The particular activities of a subject at law must be examined separately from the aspect of their economic nature, thus it may occur that the same subject at law is qualified as an undertaking while in respect of some other activities it is not.

Hungary examined how the Court interpreted and narrowed down the *notion of undertaking* through two cases.

The Court in Case C-364/92 *Eurocontrol*[18] examined whether the activities of an international organisation, namely the control and supervision of air space, and the levy of route charges constitute economic activities, and thus qualify as undertakings. The Court was of the position that Eurocontrol *exercises official authority as its service constitutes a public interest* which is carried out in view of providing safety both for those using air space as well as for those affected by it. Therefore it does not pursue an economic activity. As regards the collection of route charges, it is carried out on behalf of the Contracting States, as such charges are merely the consideration for providing air navigation control services by the States concerned. The subject at law acts on behalf of the Contracting States without exerting actual influence on the amount of the route charges. The Court held that in so far as an organisation mainly *exercises powers of an official nature, it does not perform an economic activity, thus it is not deemed as an undertaking*.

In Case C-343/95 *Calì & Figli*[19] a company carried out environmental tasks for consideration. The company concerned was responsible for the surveillance of tankers in a port in order to identify any risk of pollution, and in cases of pollution immediately report the incident to the authorities and take the appropriate safeguard measures. The Court ruled that such an activity is connected by its nature, objective and the rules to which it is subject to with the exercise of powers relating to the protection of the environment which are typically those of an *official authority*, so *regardless of the way such activity is financed*, it *shall not be regarded as an economic activity*.

According to Hungary it may therefore be established on the basis of cited practice of the Court that the pursuing of an activity shall not be considered as an undertaking if the person or organisation performing such activity is *not in the position of determining the framework of its activity*, and if the task carried out is *connected with that of an official*

18 Judgment of 19 January 1994 in Case *C-364/92, SAT Fluggesellschaft mbH v. Eurocontrol (Eurocontrol)*, ECLI:EU:C:1994:7.

19 Judgment of 18 March 1997 in Case C-343/95, *Diego Cali & Figli Srl v. Servizi ecologici porto di Genova SpA (Calí & Figli)*, ECLI:EU:C:1997:160.

authority, in such a case the activity at issue shall not be regarded as an undertaking *even if the costs incurred have to be paid by those participating in the official procedure*.

In Hungary by law the appointment of notaries is contingent upon the successful completion of a competition, and they *operate in a specific territory*. They may only perform their duties in the seat specified in their appointment, and within a specific territorial jurisdiction as opposed to market operators, who may decide freely where they wish to operate and their numbers are not fixed in relation to the number of jurisdictional territories.[20] Notaries carry out *tasks specified by law*, and *may not define the framework of their activities* similarly to the company concerned in the *Eurocontrol* case. Additionally, they have an *obligation to provide services* which may only be dismissed in specific cases stipulated by law. Such a circumstance is not a feature of competition. Notaries carry out their tasks as fully independent professionals, and within the scope of their activities as determined by law *they exercise jurisdictional authority as part of the administration of justice of the State* and therefore – according to Hungary – *official authority*. Hungarian legislation confers powers of authenticity on notaries to provide impartial legal services to prevent disputes within the scope of their jurisdictional activities.[21] The vast majority of the services offered by notaries may neither be construed as an undertaking nor an economic activity. The mere fact that the costs of procedures are to be borne by the parties from which notaries shall cover the expenses of their operation does not render notaries' activities an economic activity or undertaking. This is further supported by the fact that *notarial fees are not set by the notaries themselves*, are not freely negotiated but determined by law.[22, 23]

Hungary also stressed that the *nature of the functions* of Hungarian notaries differs from that of the notaries operating in those Member States against whom judgement was previously passed. The drawing up of notarial acts and authentications are currently no longer in the foreground, the substantial part of notarial activities constitute *non-adversarial procedures*. The vast majority of their activities encompass issuing orders for payment, ordering their enforcement and succession matters. According to Hungary regarding these three types of procedures notaries are not in competition, nor may they freely

20 The number of notarial seats is restricted in Hungary, there are 316 notaries at present.

21 The Hungarian Constitutional Court also confirmed this interpretation in its Decision No 944/B/1994. AB, in which it held that: "the activities of notaries are State activities, which are carried out by economically independent notaries. The notarial profession is part of the State's system of the administration of justice. The notary's official public status is also demonstrated by the fact that certain of its decisions delivered within its sphere of activities may establish rights."

22 Ministerial Regulation No 14/1991. (XI.26.) IM on notarial tariffs.

23 In relation to this Decision No 944/B/1994. AB of the Hungarian Constitutional Court established the following: "notarial activities, albeit having some economic relevance also affecting other areas of law (the fees paid for the services make notaries a subject of tax law, notaries are insured pursuant to social security law) are gainful activities, but are not economic activities, their income related economic aspect are not connected with the substantive activities of notaries."

determine the scope of 'services' they offer. Hence, a market as such is non-existent in terms of such activities.

In accordance with the system of the Hungarian Chamber of Civil law Notaries (MOKK) *order for payment procedure applications* for the issuance of orders for payment submitted electronically are *allocated automatically and in equal numbers* amongst notarial offices. As enterprises and other legal persons, as well as parties represented by legal representatives may solely submit their applications initiating the procedure by electronic means, in the vast majority (approximately 96%) of the cases this method of allocation prevails, that is, parties may not select the proceeding notary. *Ordering enforcement on the basis of an order for payment* may only be conducted by the notary who issued the order for payment at issue in the first place, therefore cases are allocated automatically and evenly. Consequently, parties usually have no choice as to which notary should act in their case when it comes to enforcement. As regards *succession matters*, these are also exempt from competition as *parties may not select freely* which notary should conduct the procedure. Specific legislation lays down the rules for case allocation even within a given territorial jurisdiction.[24]

Furthermore, Hungary noted that notaries may not leave and proceed outside their area of jurisdiction when drawing up instruments or providing authentications: they may only carry out their activities in the geographical area corresponding to the territory of the relevant district court, and no other notary may proceed in such territory. In other non-adversarial procedures the jurisdiction of the notary is typically established subject to the applicant's domicile, therefore even in such cases parties may not resort freely to a notary of their choice.

Pursuant to the arguments put forward by Hungary it is apparent that statistically speaking 2/3 of the activities of notaries, and over 90% in terms of actual workload and time spent, that is the *vast majority, are typically State related activities where competition is not allowed*. As a result, *we may not speak of a market or competition* in this respect either.

According to Hungary, the fact that notaries in terms of tax obligations and other financial factors behave as undertakings does not mean that they actually pursue such activity. This circumstance derives merely from the fact that the legislator decided not to create special rules governing those elements of the notarial practice which are similar to undertakings. Instead, it opted to apply the same provisions as those governing undertakings, because notaries may pursue their activities individually or in the form of a notary office. The notary's office, however, is simply a framework for operation to cover expenses, process the turnover of notarial activities and undertake duties related to taxation. Meanwhile, notarial functions per se are not carried out by the offices but performed individually by the notaries themselves.

24 Ministerial Decree No 15/1991. (XI. 26.) IM on the number of notarial vacancies and notarial seats.

In conclusion of the above, in Hungary's opinion the *activities of Hungarian notaries do not fall within the scope of Article 49 TFEU*, as notaries do not carry out economic activities, and their services may not be regarded as undertakings.

However, should the activities of Hungarian notaries fall within the scope of Article 49, the restrictive nationality requirement objected to by the Commission would still prevail according to the argumentation of Hungary. This is because Hungarian notaries *carry out activities which are connected with the exercise of official authority within the meaning of Article 51 TFEU*.

In the course of examining the particular notarial activities their official authority nature may be duly demonstrated.

According to Hungary, notaries exercise official authority also in the *order for payment procedure*. They exercise discretionary powers when deciding whether an order for payment may be issued on the basis of an application, and whether or not to grant cost allowance to the claimant. In the event the defendant does not file a statement of opposition, the order for payment becomes binding and enforceable, by which the notary puts a *definitive end to a private legal relationship*. Therefore, the aim of the order for payment procedure is to relieve the courts from their workload in case of disputes where the defendant has no reason to contest the claim or fails to do so, and to place such burden on another subsystem of the administration of justice, namely the notaries. A final order for payment is not issued because the defendant grants their consent, but because the defendant is aware of their debt, and that the claim is justified. Thus, it is not in their interest to prolong the procedure and institute a litigious phase incurring further legal costs as the non-prevailing party. The interests of the parties are therefore not identical. The mere fact that the defendant fails to contest a claim does not mean that the activity involved is not directly and specifically connected with the exercise of official authority: it is laid down in statute that this is the first step in a procedure whereby the claimant may enforce their claim. In fact, the foregoing is also applicable to the *European order for payment* procedure pursuant to Regulation (EC) 1896/2006.

Ordering the enforcement of orders for payment is in Hungary's view directly connected with the exercise of official authority, as enforcement is such a coercive measure by which the assets of the debtor are seized to ensure satisfaction of debts. Hungarian notaries exercise discretionary powers when ordering enforcement where enforcement is justified, or where enforcement is to be ordered in derogation from the application (partially unfounded), or must be dismissed altogether (as fully unfounded). Such notarial functions *may not be deemed as preparatory or ancillary in nature*, as such procedures are fully conducted by the notaries; the courts may only be involved in case of an appeal against the notary's decision.

With regard to *succession procedures* Hungary argued that notaries do not merely carry out preparatory tasks in relation to the work of a court as in the case of Austrian notaries but *conduct the entire succession procedure* themselves and deliver the formal

decision (not the court) to enable the distribution of the estate. While notaries in the Austrian legal system do not act by virtue of their own power in succession proceedings but as commissioners of the court (Gerichtskommissär) and do not make any decisions at all, notaries in the Hungarian legal system act in succession procedures in their own power conferred upon them by statute and deliver every single decision themselves. Such a notarial procedure is equivalent in effect to that of a court of first instance, thus, it must be deemed in every respect as if it were conducted by a court proper. The decision of notaries is binding upon all parties not unlike a court decision, and it may only be reversed by a court decision on appeal. It is also possible to achieve a settlement within the procedure; a settlement approved by the ruling of a notary is identical in effect with a settlement approved by a court.

It should be emphasized that in a succession procedure the notary may *order protective measures*, which – according to Hungary – constitutes a *direct and specific participation in the exercise of official authority*. The ruling of the notary on the distribution of the estate must also be deemed as a direct and specific participation in the exercise of official authority. In court actions the subject at issue is not the distribution of the estate, only those issues are adjudicated which may not be decided in a succession procedure.

As regards the procedure relating to *notarial escrow*, Hungary observed that settling obligations through a notarial escrow has the same effect as settling obligations through a court deposit. The reason for this is because notaries enjoy public trust on account of the role they play in the administration of justice and because they are more easily accessible than the courts. After an application has been submitted notaries decide *at their discretion* whether to accept or dismiss the application, and refuse to take the deposit.

Hungary argued that all documents prepared by a notary in the course of a notarial procedure must be regarded as authentic instruments, since notary's activities, competences, procedures and formalities are all strictly regulated by the law. The Hungarian Supreme Court has held on several occasions that notaries when incorporating transactions into an authentic instrument act as an authority and not as a quasi attorney-at-law when exercising official authority.[25]

The official nature of the authentic instrument drawn up by a notary is further supported by the fact that in case all statutory requirements are met, the notary affixes a*n enforcement clause* to the authentic instrument.

On the basis of the enforcement clause the claim *may be enforced by coercive measures of the State* under the same conditions and in accordance with the same procedure as those applicable to the enforcement of court decisions. Thus, the notaries fulfil a judicial role in resolving and preventing disputes. Accordingly, they exercise the official authority of the State in the area of preventive justice just as judges do in the framework of court actions.[26]

25 See with special regard the Supreme Court Decision No BH 2000/453, Resolution No 42 of PK (Civil Division), and civil uniformity decision No 3/2004.

26 See para. 89 of the judgment.

As a matter of fact, the legislative bodies of the European Union take this for granted in the *European regulations* pertaining to the enforcement of court decisions in civil and commercial matters. With no exceptions the *same enforceability* is attached to commitments incorporated into an authentic instrument as to court judgements to be acted on in other Member States. In relation to the construction of the Brussels Conventions which preceded the abovementioned European regulations the Court stated in the *Unibank* case C-260/97 that this type of enforceability may only be attached to the official acts of an official authority, that is to instruments which are endowed with the character of authentic instruments pertaining not merely to their execution but also to their content, and which instruments are enforceable in the Member State of origin. In addition, in the recently *revised Brussels I regulation* which regulates jurisdiction, recognition and enforcement in civil and commercial matters the Hungarian notary who issues orders for payment expressly appears as *having the function of a judicial forum*.[27]

With regard to the enforceability of Hungarian notarial instruments and the ordering of their enforcement Hungary pointed out that the Austrian regulation examined by the Court in Case C-53/08 *Commission v. Austria* considerably *differs* from the Hungarian provisions. Whilst the enforceability of an Austrian notarial act under Austrian law is conditional upon the debtor's consent to submit to the enforcement of the act with no prior proceedings being brought, the enforceability of a notarial act under Hungarian law is *not rendered contingent upon any such prior submission* as detailed above. The fact that Hungarian notaries order the enforcement of a notarial instrument that they previously prepared is a further argument supporting the claim that the notary is in fact exercising *official authority*.

According to Hungary the coercive power of the State is not only expressed during the implementation of enforcement, for without it being ordered, it may not be implemented. The exercise of the *coercive power of the State* was also acknowledged by the Court[28] as forming the basis for the exercise of official authority.

Preliminary evidence conducted by a notary is a special variant of non-adversarial judicial procedure serving the same purpose, namely, that in the event of a potential subsequent legal action pieces of evidence are available. Preliminary evidence may also be conducted before a notary, in case it may also be requested from the courts, or where the applicant has a legal interest in obtaining evidence – for the purpose of establishing an exceptionally relevant fact or other circumstance.

The notarial procedure for *appointing a judicial expert* is also a special variant of existing judicial procedures. In case an official expert is appointed, there is no direct

27 Article 3 a) of Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (HL L 351., 2012.12.20. 1-32 pp.).

28 See para. 87 of judgment 24 May 2011 in Case C-54/08 *European Commission v. Federal Republic of Germany (Germany)*, ECLI:EU:C:2011:339.

and specific connection with the exercise of official authority in the meaning of the Court's previous judgements related to notaries. Nevertheless, such a notarial activity, i.e. the appointment of a judicial expert, may still not be regarded as an economic activity, since appointment means that the expert is under an obligation to act, the appointment may not be declined, whereas in case of an engagement the expert may refuse it.

Lost, stolen or destroyed securities and instruments will be annulled by the notary, subject to which rights or obligations incorporated therein may no longer be exercised or enforced, respectively. The notary's final decree on the annulment of securities has the same effect as a binding court judgement. According to Hungary this constitutes a *direct and specific connection with the exercise of official authority*. Namely, as a result of the procedure and the notary's decree the rights incorporated into the instrument may no longer be exercised; the procedure affects the rights and obligations of third parties.

The notary *dissolves registered partnerships* on the basis of the mutual agreement of the parties in the context of a non-adversarial procedure. The notary proceeds upon application not unlike a court, and in case the procedure is justified the notary must make a binding decision on the dissolution of the registered partnership. The decree approving the settlement between the parties has the same effect as a court approved settlement, and the decree on the dissolution of the registered partnership has the same effect as a court judgement.

As regards *the administration of the Register of Declarations of Cohabitation*, the competent notary examines whether the requirements for the procedure are met. The binding decree on registration again has the same effect as a final court judgement, affecting the enforceability against third parties of acts concerned.

As far as the *administration of the National Register of Marriage and Partnership Contracts* is concerned notaries decide at their own discretion on the registration of marriage or partnership contracts incorporated into an authentic instrument by another notary or a private document countersigned by an attorney. The notary exercising discretionary powers must examine whether the contract at issue constitutes a marriage or partnership contract, whether it complies with formalities prescribed, and whether further requirements of registration are met. The jurisdiction of a notary is established by law. The binding decree on registration has the same effect as a final court judgement, and also affects enforceability against third parties of acts concerned.

As regards determining the legal successor of the obligee or obligor registered in the *security interest register* the notary establishes legal succession in a non-adversarial procedure in case of the death of the person or dissolution of legal persons who had filed statements, replacing the former filer with the successor in the Security Interest Register.

Hungary contended that *the custody of instruments, monies, valuables and securities* do not involve the exercise of official authority in the narrow sense of the word. However, such activities of the Hungarian notary may not be separated from the activities substantially connected with the exercise of official authority set forth above in detail.

In the Hungarian Government's view, even if the activities of Hungarian notaries fall within the scope of Article 49 TFEU, the exception set out in Article 51 TFEU still applies. This is because Hungarian notaries act independently in the various non-adversarial procedures and not as commissioners of the court or conducting preparatory functions; also they exercise discretionary powers in a number of cases and the notary's decision may entail coercive measures of the State. After surveying the tasks of Hungarian notaries it may be established that these extend beyond the tasks of the notaries of those Member States against which judgements had been previously rendered, and that such functions also differ in nature from the activities formerly examined by the Court.

25.4 The Judgement of the Court

The Court stated at the outset in its judgement of 1 February 2017 that neither the Commission's action, nor the judgement relate to the status and organisation of notaries in the Hungarian legal system, or to the conditions of access, other than that of nationality, to the notarial profession in that Member State.[29] The Court was only concerned with the compatibility of the nationality requirement for access to the notarial profession with the freedom of establishment pursuant to Articles 49 and 51 TFEU.

With respect to the arguments set forth by Hungary the Court had to examine first of all, whether the activities of Hungarian notaries fall within the scope of Article 49 TFEU. As set out in Article 49 TFEU the freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings. Therefore, if the notary carries out an economic activity pursuant to Article 49 TFEU, the notary's activity falls within its scope.

In that regard, the Court cited its judgement rendered in Case C-151/14 *Commission v. Latvia*,[30] in which it held that the freedom of establishment, as set out in Article 49 TFEU, is applicable to the notarial profession. Notaries practise as independent professionals providing various services as the main activity for remuneration. According to established case-law, provision of services for consideration must be regarded as an economic activity, provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary.[31] Since the contested national legislation reserves access to the notarial profession exclusively to Hungarian nationals, the Court

29 See para. 97 of the judgment.

30 Judgment of 10 September 2015 in Case C-151/14, *European Commission v. Republic of Latvia*, ECLI:EU:C:2015:577, para. 48.

31 Judgment of 20 November 2001 in Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, para. 33; judgment of 11 April 2000 in Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)*, ECLI:EU:C:2000:199, paras. 53 and 54.

held that it constitutes a difference in treatment on grounds of nationality which is prohibited in principle by Article 49 TFEU.[32]

Subsequently, the Court examined whether the activities of Hungarian notaries are connected with the exercise of official authority. Since the provisions governing the freedom of establishment are not applicable in such cases subject to the first paragraph of Article 51 TFEU, the nationality requirement would be permissible.

The Court examined the competences of Hungarian notaries and found that they are not connected with the exercise of official authority within the meaning of Article 51 TFEU.

According to the Court a part of notarial competences presupposes the consent of the party or parties concerned. The order for payment and the European order for payment procedures are deemed as such as the order only becomes binding in the absence of a statement of opposition from the part of the defendant, which is a prerequisite to order enforcement.[33] The prior existence of an agreement or consensus between the parties is required for the drawing up of notarial instruments, which forms the basis for ordering the enforcement of such authentic instruments.[34] Parties' consent is also needed for the notary's decision in succession matters according to the Court, for in the absence of such agreement it is for the court to decide on the estate.[35] Finally the Court regards the dissolution of registered partnerships as falling under this category as it may only take place with the consent of the parties.[36]

Another category of notarial competences does not involve the exercise of the decision-making power: this is the procedure related to notarial escrow, the annulment of securities and instruments, and the administration of the Register of Declarations of Cohabitation, and the National Register of marriage and Partnership Contracts.[37]

The procedures related to preliminary evidence and the appointment of a judicial expert constitute activities of an ancillary or preparatory nature according to the Court.[38]

Namely, the procedure related to determining the legal successor of the obligee or obligor registered in the Security Interest Register, the custody of instruments and the fiduciary safekeeping of monies, valuables and securities, as well as the safekeeping of instruments in electronic archives are not considered to be activities which involve the exercise of official authority in any way.[39]

Since the Court did not deem any of the examined notarial activities to be connected with the exercise of official authority, it held that the exception within the meaning of

32 See para. 103 of the judgment.
33 See paras. 110 and 112 of the judgment.
34 See para. 125 of the judgment.
35 See paras. 115-116 of the judgment.
36 See paras. 134-135 of the judgment.
37 See paras. 118, 132, 136 of the judgment.
38 See paras. 130-131 of the judgment.
39 See paras. 137-138 of the judgment.

Article 51 TFEU is not applicable. Consequently, the nationality requirement constitutes discrimination on grounds of nationality prohibited by Article 49 TFEU.

25.5 Criticism of the Judgement

Despite the fact that the Court's judgement remains consistent in that it adheres to and applies principles to Hungary's notaries laid down in former judgements relating to Latin-type notaries, some issues of interpretation may nevertheless be raised.

The Court found in its previous judgements[40] that competition is not a characteristic feature of the exercise of official authority. *A contrario* it may be deducted from this that the exercise of State power where there is no competition may qualify as involvement in the exercise of official authority. Were we to endorse the above argument, the question arises why the Court ignored Hungary's arguments to this effect.

Hungary in its reply of 17 September 2014 to the supplementary reasoned opinion emphasized that statistically speaking in 2/3 of the activities of Hungarian notaries, and approximately 90% in terms of actual workload, that is in the vast majority of cases competition is not involved at all. Even though Hungarian notaries are in charge of 20 non-adversarial procedures, some have more relevance, such as the order for payment procedure, procedures related to ordering enforcement of orders for payment, notarial instruments, decisions, settlements, and the succession procedure.[41] They comprise 60% of all the notarial cases, but if we also consider the workload and time invested in each case, this ratio is closer to 90%. In fact, competition is not present in any of these procedures.

Notaries comply with strict rules as to territorial jurisdiction[42] when proceeding in succession matters. Heirs are not allowed to elect a notary, and the notary is not allowed to select succession cases, or to compete for a more lucrative case. Although no strict rules of territorial jurisdiction apply to the order for payment procedure (notaries have nationwide jurisdiction[43]), the allocation of cases is automatic and with even distribution[44] in

40 Judgment of 24 May 2011 in Case C-47/08, *European Commission v. Kingdom of Belgium*, ECLI:EU:C:2011:334, para. 117; judgment of 24 May 2011 in Case C-53/08, *European Commission v. Republic of Austria*, ECLI:EU:C:2011:338, para. 112; judgment of 24 May 2011 in Case C-51/08, *European Commission v. Grand Duchy of Luxemburg*, ECLI:EU:C:2011:336, para. 116; judgment of 24 May 2011 in Case C-50/08, *European Commission v. French Republic*, ECLI:EU:C:2011:335, para. 99; judgment of 24 May 2011 in Case C-54/08, *European Commission v. Federal Republic of Germany*, ECLI:EU:C:2011:339, para. 110.

41 In 2015 from a total number of 1,596, 204 notarial cases, 463, 650 were orders for payment, 365,927 were orders of enforcement of orders for payment, 10,722 orders of enforcement of other cases, 134,825 were succession cases; in 2016 from a total number of 1,691,682 notarial cases, 526, 020 were orders for payment, 414, 760 were orders of enforcement of orders for payment, 13, 207orders of enforcement of other cases, 124, 227 were succession cases (statistical data of the MOKK).

42 Hetv. § 4 (1).

43 Act on the order for payment procedure Section 8 (1).

44 Act on the order for payment procedure Section 9 (1).

case of electronic applications which constitute 97-98% of the cases.[45] Thus, practically speaking no competition is involved amongst the notaries in the order for payment procedure. It must also be noted that the notary issuing the given order, drawing up the notarial act, making the decision or approving the settlement has exclusive jurisdiction in procedures related to ordering the enforcement of such orders for payment, notarial instruments, decisions, settlements.[46] That is, competition is absolutely excluded in the foregoing procedures.

In addition, neither is there price competition when it comes to notarial services, as the fees of the notary are not freely negotiated but specified by law.[47]

In consideration of the above, the question arises in case regarding 2/3 of all notarial activities competition is precluded, how may the activities of the notary nevertheless be deemed as an undertaking? Since the latter notion has so far been primarily interpreted from the aspect of competition law in the established case-law of the Court, a functional approach may be adopted in interpreting the notion of an undertaking.

It must also be noted that in this respect the Court held that if an organisation has powers of an official nature rather than pursuing activities of an economic nature, this organisation is not considered as an undertaking.[48] Furthermore, the exercise of powers typically of an official nature – irrespective of how such activity is financed – is not an economic activity, and therefore an organisation carrying out such functions is not an undertaking.[49]

It would be hard to dispute that notaries carry out an activity of an official nature in the order for payment procedure, when ordering enforcement and in succession procedure, even though the Court considered that the consent of the parties concerned is required for carrying out such official activity. The official nature of these activities is further supported by the fact that all these procedures are designated as non-adversarial civil procedures by law, and that these powers have been conferred upon the notaries by the legislator's intent in view of relieving courts of their workload.

It would be interesting to see whether the Court would have reached the same conclusion, namely that notarial procedures are not connected with the exercise of official authority, if these procedures had still been in the competence of the courts. In the event the answer to the latter question is affirmative, this means that the nationality requirement may also be removed in respect of some judges. This applies with special force with regard to judges of district courts, since there is a possibility of challenging their decisions

45 In 2015, from the 463.650 application for issuing an order for payment 451.905 (97,4%) were submitted electronically; in 2016, from the 526.020 application for issuing an order for payment 515.563 (98%) were submitted electronically. (statistics by MOKK).

46 Act on the order for payment procedure § 52 (2).; Act on judicial enforcement § 16 a).

47 Notaries Act § 6, Act on the order for payment procedure § 42 (1), § 45 (1), § 55 (1), Act on judicial enforcement § 31/E (3), Ministerial Decree No 14/1991. (XI. 26.) IM.

48 See judgment in *Eurocontrol*, paras. 27-31.

49 See judgment in *Cali & Figli*, paras. 16-17, 22-23.

(similarly to the notary's ruling). The latter, according to the Court's argument constitutes a factor supporting that an activity may not be deemed as having a nature of official authority.[50]

However, should the answer to the above question be in the negative (that is, the procedures currently conducted by notaries would be deemed activities connected with the exercise of official authority in case these powers were located within judicial competence), then further inquiry should be made as to what differentiates judges from notaries. Furthermore, what is the underlying distinction, where a particular procedure conducted by a notary is not deemed to be connected with the exercise of official authority, while the same procedure when conducted by a judge, is considered to be the exercise of official authority. The outcome of such a scrutiny would be that the only difference between the two legal professions is that while notaries cover their expenses from their own income, judges are financed from public funds, and eventually the State is liable for damages caused by the courts. In such a case, however, an activity would not be considered as connected with the exercise of official authority by reference to the nature of the relevant activity itself, and would therefore be contradictory to the reasoning of the Court in Section 139 of the judgement.

It must also be noted that if the Court's argument, namely that in order to fall within the scope of Article 49 TFEU it suffices that a service is provided for remuneration by the provider of such service, were to be accepted, then independent court bailiffs practising a liberal profession would also fall within the scope of Article 49 TFEU on the freedom of establishment, and the same would apply for land registries as well.

Though in the case of independent court bailiffs it may be said that due to their power of coercion they are directly involved in exercising official authority (and thus the exception under Article 51 TFEU applies), in the case of an authority maintaining a land register neither coercive powers nor actual discretionary or decision-making powers are involved.[51] Moreover, the fee in exchange for conducting the procedure constitutes the income for the authority maintaining the land register.[52] Therefore, subject to the above grounds the question whether Article 49 TFEU should also be applicable in relation to an authority maintaining a land register arises.

Finally, it should be noted that not long after the Court delivered the judgement in Case C-392/15, the Court interpreted certain provisions of Austrian law governing notaries from a different perspective. The Court held in the *Piringer* case that maintaining a land register constitutes an essential component of the preventive administration of jus-

50 See paras. 111, 115-116 of the judgment.

51 Act on the land register § 51 (1): the application for registration may be dismissed if the instrument subject to which the registration is requested has some deficiencies in content or formality which apparently render it invalid.

52 Act LXXXV of 1996, § 32/A (1) For first instance procedures the fee shall be 6600.- Ft per real property affected by change unless this Act provides otherwise. § 32/A (10) The fee paid for the registration in the land register shall constitute the metropolitan and county government offices' own income.

tice in the sense that it seeks to ensure proper application of the law and legal certainty of documents concluded between individuals, which are matters coming within the scope of the tasks and responsibilities of the State. Furthermore, the act of reserving activities relating to the authentication of instruments for creating or transferring rights to property to a particular category of professionals in which there is public trust and over which the Member State concerned exercises particular control constitutes an appropriate measure for attaining the objectives of proper functioning of the land register system and for ensuring the legality and legal certainty of documents concluded between individuals, and thus in accordance with the case-law of the Court, constitutes an overriding reason in the public interest.[53]

Therefore, in consideration of the above, it is well demonstrated that the judgement raises a number of issues which should have been addressed by the Court, and will, most probably be done so in further proceedings.

53 Judgment of 9 March 2017 in Case C-342/15, *Leopoldine Gertraud Piringer*, ECLI:EU:C:2017:196, paras. 58, 59 and 65.