

KRISTÓF SZÉCSÉNYI-NAGY *

New Functions of Hungarian Civil Law Notaries

Abstract. In Hungary the codification of the civil law is just now progressing; the National Assembly is currently debating the Proposition for the new Civil Code replacing the Code of 1959. The Bill also affects the Hungarian notariat, which proudly looks back to a past of 700 years, and is conferring several new powers on the organisation.

In the medieval Hungary the activities requiring public authenticity were performed by two types of institutions, the *locus authenticus* operated by the Church and the secular civil law notary. The *loci authenticici* were succeeded by the Latin type of notariat in 1875. Following the 1948 Communist takeover, the Latin type of notariat fell victim to the transformation of the justice system after the Soviet model. It was not until after 1991 that the private type of notariat in harmony with the Hungarian traditions could resume its operation in the end.

At present two main groups of cases fall within the competence of the civil law notaries: conducting certain non-litigious proceedings, and preparing notarial deeds. The new Civil Code would refer several new non-litigious proceedings to the competence of the civil law notaries, for example keeping the register of the matrimonial and conjugal property contracts, conducting divorce upon the agreed request of the parties, as well as the dissolution of common law marriage upon the agreed request of the parties. In conclusion the codification enlarges the sphere of tasks of the notariat in the territory of non-litigious proceedings, thus wishing to strengthen the Hungarian Notariat's official character.

Keywords: civil law notary, notary public, civil law codification, Civil Code, civil procedure law, register, payment order, non-litigious proceeding, deed

Introduction

The idea of the codification of private law in Hungary was first raised at the time of the 1848 Revolution. After the suppression of the war of independence (1849), however, there was no opportunity for carrying out such a large-scale legislative work for a long time. The first comprehensive Draft-Code was completed in 1900, but the Motion for the Act on the Code of Private Law (hereinafter: ACPL) was tabled to the National Assembly only after World

* Junior Research Fellow, Institute for Legal Studies, Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.
E-mail: szecsenyi@jog.mta.hu

War I, in 1928, which mostly adopted the solutions of the German, the Austrian, and partly, the Swiss Codes. Although, the standard of ACPL was highly reputed, it was not adopted for political reasons.

It is interesting to note that it took place right in the darkest era of communist dictatorship (between 1953 and 1959) that the codification of Hungarian private law was resumed and successfully completed: effective until this day, Act 4 of 1959 on the Civil Code (hereinafter: CC) relying on ACPL and according to the limitations set by the socialist economic system aspired to comply with professional expectations to the greatest possible extent. By reason of taking account of the changes in the economic structure, CC was amended several times in the years of socialism; among these the most remarkable one was the Amendment of 1977. Following the 1990 change of regime and the transition to market-economy, the enactment of a new Code became imperative.

In 1998, the Hungarian Government passed a resolution about the urgent need of a comprehensive reform of civil law and to that effect, it established the High Committee for the Codification of Civil Law and the Redaction Committee for the Codification of Civil Law. The first one was primarily constituted by state leaders and heads of professional bodies, while the other consisted of scholars and practising lawyers, i.e., experts. Professor Lajos Vékás was invited to be the President of the High Committee. The Draft-Bill for debate was prepared in 2006 by the Redaction Committee, however, it was taken over in 2007 for further legislative work by the Ministry of Justice and Law Enforcement. The National Assembly of the Republic of Hungary is debating the Draft Bill reviewed and completed by the Ministry right now.¹

The proposal for the new Civil Code provides an all-embracing regulation for the entire scope of private law except for company law, thus, the legislation process is of outstanding importance for all fields of law, including the functions of civil law notaries. Hungarian notaries, the functions of which proudly date back to a past of several centuries may acquire several new competences due to the new Code, which may substantially transform its present functions. We wish to provide an outline of the history of Hungarian notaryship as well as of the impact of current civil law codification on the functions of notaries in the following.

¹ Vékás L. (ed.): *Szakértői javaslat az új Polgári Törvénykönyv tervezetéhez* (Expert proposal to the Draft of the New Civil Code). Budapest, 2008. 53–57.

I. Historical Overview

1. The Hungarian notaryship celebrated the 700th anniversary of its establishment in the previous year. Namely, when Charles Robert, or Carobert of Anjou-Naples (reigned between 1308–1342), was elected to be the King of Hungary on 27th November, 1308, two civil law notaries, Johannes de Pontecurvo and Guilelmus de Sanguitneto were delegated to Hungary under the escort of Cardinal Gentilis, the Papal Legate, authorized with their powers by the Pope and the Emperor in order to prepare an attesting notarial document (attestation)² about the fact of the King's election. And unlike foreign civil law notaries, who had operated until then only with a temporary character in the country, they settled down in Hungary and practised their profession with a permanent character later on.

In medieval Hungary, peculiar parallelism had emerged in respect of the activities related to public authenticity. It was as early as in the last third part of the 12th century that the so-called locus authenticus et credibilis (hereinafter: authentic places) had appeared, which had discharged a kind of notarial, investigational and legal activity in the modern sense of the word, mainly within the structure of the ecclesiastical organs (chapters, convents). Authentic places were established owing to a need for legal certainty, for putting private law transactions into writing, and taking into consideration the fact that in the Kingdom of Hungary only the ecclesiastical organs were in possession of the infrastructure, culture and influence necessary to perform this kind of activity, these powers were transferred into the jurisdiction of the church. If we take the Western-European development into account, the role of notaries in respect of the activities related to public authenticity had not been exclusive in our country. The system of authentic places, unparalleled in Europe, consisted of about 80 such bodies in Hungary in their prime time, i.e., in the 15th century. It is important to point out, however, that the usability of the deeds prepared by authentic places was limited: interestingly enough, they did not have probative force just before the ecclesiastical courts, only the worldly courts accepted

² The instrument was published in Latin: *Codex diplomaticus Hungariae ecclesiasticus ac civilis* I–XI. Cura et studio Georgii Fejér. Budae, 1829–1844. VIII/1. 264–269. (selection) and the instruments originating from the legation of Cardinal Gentilis in Hungary (1307–1311). *Hungarian Instruments Record in the Vatican* I. 2. Budapest, 1885. 155–199. The instrument is published in Hungarian: Kristó Gy.–Makk F. (eds.): *Károly Róbert emlékezete* (In Memoriam to Charles Robert). Budapest, 1988. 79–82. as well as in: Rokolya G. (ed.): *700 éves a közjegyzőség Magyarországon* (Notaryship Celebrates its 700th Anniversary in Hungary). Budapest, 2008.

them.³ In the country torn into three parts after the Battle of Mohács (1526), and particularly in the territory under the occupation of the Ottoman Empire, the conditions for the operation of authentic places became much worse. The authentic places underwent a unique way of development in the Principality of Transylvania (the eastern part of the former Kingdom of Hungary, relatively independent between 1541 and 1690), which was under the influence of Reformation: even if individual solutions were rather random, it can be stated in general that the secularisation of the Transylvanian authentic places was implemented.⁴ In the 18th century—thanks also to the regulation of the relations of land properties—authentic places played an important role for a short time subsequently, since they were exclusively entitled to issue official copies of the documents made or stored by them, and these official copies had a prominent function in the territories recaptured at the end of the 17th century in the restoration or the earlier relations of land properties. In the 18th century, it could be noticed in the whole country that the role of authentic places was slowly, but surely taken over by the County Assemblies and Free Royal City Councils, i.e., by the organs of public administration – implying that their time was over.⁵

In connection with the activities related to public authenticity in the Middle Ages, the civil law notary played another crucial role in Hungary. The institution of notaryship originates in the *tabellio* familiar in Roman law, which revived in Lombardy after the period of the Great Migration: it spread in Italy, in the Southern French territories, which applied the written law, and in Dalmatia, which belonged to Hungary after 1105. The institution was introduced into German legal territories, as well, but in the north of the Alps, notarial documents could only be used before ecclesiastical courts. The first civil law notaries, who operated with the authorisation of the Pope and the Emperor, appeared in Hungary in the 13th century, typically under the escort of some papal legate, but upon the completion of their mission, they immediately left the country along with the Legate. The civil law notaries delegated to Hungary together with Cardinal Gentilis in 1307, however, operated for quite a long time in the country, and with their appearance, the operation of civil law notaries became permanent in the Kingdom of Hungary. It is important to underline that the

³ Köfalvi T.: A hiteleshelyek mint a magyarországi közjegyzőség előzményei (Locus Authenticus as the Predecessor of Hungarian Notaryship). In: *700 éves a közjegyzőség Magyarországon. op. cit.* 12–25.

⁴ Bogdándi Zs.: Az erdélyi hiteleshelyek a szekularizációt követően (Locus Authenticus in Transylvania following the Secularisation). In: *700 éves a közjegyzőség Magyarországon. op. cit.* 41–53.

⁵ Homoki-Nagy M.: Megjegyzések a magyar királyi közjegyzőség történetéhez. In: *700 éves a közjegyzőség Magyarországon. op. cit.* 74–86.

competence of civil law notaries departed from that of the authentic places. While the documents of the authentic places could mainly be used before the secular courts, notarial documents carried a probative force before the ecclesiastical courts under the Decree of 1405 issued by King Sigismund. Therefore, notarial documents were issued first of all for the attestation of legal transactions relating to matrimony, community property, inheritance and ecclesiastical property.⁶ The institution of civil law notaryship, however, did not prove so enduring, as the network of the authentic places. Following the ban of Mohács (1526), civil law notaries disappeared from the country without leaving a trace.

2. The function of the civil law notary reappeared again after the suppression of the 1848/1849 war of independence in the country. The force of the Austrian Civil Code (ABGB) was extended to Hungary according to the written order of the Emperor dated November 29, 1852, and also by means of a written order issued in 1858, Austrian notarial regulations were introduced in Hungary, as well. The Hungarian National Judicial Commission of 1861 reluctantly abolished these modern legal rules, which were introduced definitely by force, but the days of authentic places were already numbered.⁷ Following the Compromise between Austria and Hungary (1867), eventually, Article 35 of 1874 introduced the Latin type of notaryship as a result of a long-lasting preparation, the quintessence of which is that a private person vested with official powers proceeded, who was entitled with the competence of editing deeds. In lieu of the French model, which confers general competence upon civil law notaries in non-litigious proceedings (*iurisdictio voluntaria* in Latin), the legislator followed the more moderate German pattern, which referred some special non-litigious proceedings and the preparation of documents to the competence of civil law notaries, without the application of documentary force. It was in 1875 that the organisation of royal notaryship was established and the scope of authority of civil law notaries was extended with a new type of action, i.e., the probate proceeding. This marked the first step of the process, according to which the non-litigious proceedings of the courts were transferred to notarial powers.

The Latin type of notaryship became a stable part of the domestic legal system and of the institutional system of the civil law procedure in a quarter of a century and it could operate in a suitable framework until the end of World War II.

⁶ Csukovits E.: Közjegyzők a középkori Magyarországon. In: *700 éves a közjegyzőség Magyarországon. op. cit.* 54–73.

⁷ Tóth Á.: A magyar közjegyzőség gyökerei dióhéjban (The Roots of Hungarian Notaryship in a Nutshell). *Közjegyzők Közlönye* (The Gazette of Notaries), 12 (2008) 3.

3. After the communist takeover (1948), the Latin type of notaryship fell victim to the transformation of the justice system according to the Soviet pattern. The state clerk notary replaced the private civil law notary in 1949, several prominent civil law notaries were discharged from the profession for political reasons and the notarial community was forced into the organisation of local courts. The state clerk notary could boast with much less prestige than its Latin type predecessor, which is attributable not only to the then negligibly small public prestige of the profession, but also to the fact, that in the business world of the socialist regime there was much less demand for deeds (notarial documents) than in the civil era. Following a forced intermission of 40 years, the institutional system of the Latin or private type of civil law notaryship corresponding to Hungarian legal traditions was again reinstated in 1991.

II. The Situation of Hungarian Notaries in our Days

1. Act 41 of 1991 On Civil Law Notaries (hereinafter: ACLN) reinstated the Latin type of notaryship. Accordingly, civil law notaries appointed by the Minister of Justice shall be organised in a chamber-system under the law. The legislator justified this provision in the Preamble to the Act as follows: “As the State and the society are equally interested in the proper operation of the self-employed notarial institution and in the adequate exercise of public powers conferred upon notaryship by law, civil law notaries shall be organised into a chamber structure according to the Proposal, and the Chambers shall discharge the tasks related to inner administration, scilicet, the supervision of the performance of state duties shall be ensured by mandatory membership. That is the reason why the civil law notary shall not yet be entitled to practise the profession, before gaining chamber membership, because chamber membership shall be established upon the appointment of the Minister of Justice. The continuous and ongoing performance of the official administration of justice assigned to civil law notaries and the interest of the citizens necessitates the restriction of the number of notarial positions, which justifies the fixed character of their seats and territorial jurisdiction.”⁸ The organisation of Hungarian civil law notaries based upon the above consists of five regional chambers,⁹ i.e., the

⁸ The Preamble of the Minister to Act 41 of 1991 on Civil Law Notaries. *Complex DVD Jogtár*.

⁹ See, Section 39 of *Act on Civil Law Notaries*.

“There are 5 territorial chambers operating in the territory of the Republic of Hungary:

Hungarian National Chamber of Civil Law Notaries is constituted by regional chambers. These chambers qualify as public bodies under Section 65 (2) of Act 4 of 1959 on the Civil Code (CC), but their primary task shall be the exercise of the rights of the notarial self-government.

A civil law notary may perform his/her activity individually (as a private entrepreneur) or as a notarial office. The provisions of Act 4 of 2006 on Business Associations concerning limited liability companies shall be applicable to the establishment, inventory, operation, control, termination and members' responsibilities of notaries' offices.¹⁰ Civil law notary candidates and substitute civil law notaries shall replace the outgoing members of the body of civil law notaries. The civil law notary shall employ the civil law notary candidate and the substitute civil law notary. Upon the instruction and according to the responsibility of the civil law notary, the substitute civil law notary may settle notarial matters on his own, with the exception of attestations, the notarial deeds made out by the substitute civil law notary shall not be valid and he shall not issue official or duplicate copies without the counter-signature of the civil law notary.¹¹

By virtue of Section 12 of ACLN, the jurisdiction of civil law notaries is usually the same as the area of jurisdiction of the local court that operates at the seat of the civil law notary, however, taking into consideration the peculiar situation of the capital, the jurisdiction of civil law notaries operating in Budapest shall encompass the territory of the capital. Nevertheless, as the provision sets forth: "the jurisdiction of civil law notaries in the seat of which there is no court operating shall be defined by a decree of the Minister of Justice", which refers to the exception from the court organisational system.¹² At present, 313 civil law notaries operate in Hungary, which is almost the triple of the number

a) the Budapest Chamber of Notaries Public: operating in the jurisdiction of the Budapest Municipal Court, Komárom-Esztergom, Nógrád and Pest County Courts,

b) the Győr Chamber of Notaries Public: operating in the jurisdiction of Győr-Moson-Sopron, Vas, Veszprém and Zala County Courts,

c) the Miskolc Chamber of Notaries Public: operating in the jurisdiction of Borsod-Abaúj-Zemplén, Hajdú-Bihar, Heves and Szabolcs-Szatmár-Bereg County Courts,

d) the Pécs Chamber of Notaries Public: operating in the jurisdiction of Baranya, Fejér, Somogy and Tolna County Courts,

e) the Szeged Chamber of Notaries Public: operating in the jurisdiction of Bács-Kiskun, Békés, Csongrád and Jász-Nagykun-Szolnok County Courts".

¹⁰ See, Section 31/A (3) of *Act on Civil Law Notaries*.

¹¹ Sections 25 and 29 of *Act on Civil Law Notaries*.

¹² IM Decree 15/1991. (XI. 26.) Minister of Justice, on the Number and Seats of Notarial Positions.

of local courts. In most settlements with a seat of a civil law notary, more than one civil law notaries work, therefore, in general it can be stated that the access to notarial services is easier than to courts.

The fees of civil law notaries—taking into account the official activities performed by them—is regulated by decree and they are divided into two elements: a fee and a cost-refund.¹³ Contrary to the public belief, notarial fees are much lower than lawyers' (uncontrolled price) fees, in addition to that, notarial fees have not risen for more than a decade (for instance: their basic hourly payment is fixed at HUF 1500 (EUR 5)—against the hourly wages of HUF 10.000–20.000 of lawyers (which is considered an average amount in their circles).

Right after the reinstatement of the Latin type notaryship in 1992, Hungarian notaryship joined as a member the U.I.N.L., *scilicet*, The International Union of Notaries, which is the framework of Latin type notaries' offices, then, following the accession of Hungary to the European Union, Hungary became a member of the C.N.U.E., i.e., the Council of Notaries' Offices of the European Union.

2. Further to the competence of civil law notaries, Section 1 of ACLN is of crucial significance. The Section declares with a principal force the following:

“(1) The act confers public authenticity upon civil law notaries, so that they shall provide impartial legal services to the parties, in order to avoid legal disputes.

(2) The civil law notary shall prepare public documents (deeds) about contracts and facts of legal significance, keep legal documents, accept money, valuables and securities at the order of the parties in order to transfer them to the obligee, shall help the parties with the exercise of their rights and the fulfilment of their obligations upon instruction, while assuring equal opportunities for all parties.

(3) The civil law notary shall conduct probate action and other non-litigious proceedings assigned to its powers.

(4) Acting within his powers defined by law, the civil law notary shall perform official administration of justice as a part of the justice system of the state.”

“By virtue of the respective Decisions of the Constitutional Court and the Supreme Court, [...] the civil law notary shall belong to the justice system of the state under public law, it may act solely within its powers as defined by law. The whole scope of its activity is regarded exclusively as official activity. Performed in the name of the state, under the authorisation arising from public law, the official notarial service aims to avoid legal disputes on the one hand, and to facilitate due process on the other hand. The two means ordered to reach

¹³ IM Decree 14/1991. (XI. 26.) Minister of Justice, on the Fees of Notaries.

these above-mentioned goals are the preparation of public documents (deeds) and the conduct of other non-litigious proceedings assigned to notarial powers.”¹⁴

a) The notarial non-litigious proceedings, the number of the cases of which was 125,000 in 2007, ended much earlier than court proceedings. In 2007, 79 p.c. of the cases were completed within three months, a further 14 p.c. within 6 months, while the proportion of the matters lasting longer than one year represented 1 p.c.¹⁵ This statistics is enviable also for the courts dealing with similar type of non-litigious proceedings. The scope of non-litigious proceedings of civil law notaries consists of the following groups of cases:

- *Proceeding in Probate Actions*,¹⁶ which is the longest-standing non-litigious proceeding in notarial competence. Its speciality is that the major part of the cases is instituted ex officio, if the testator had an inland real estate.

- *Conduct of Proceedings on the Destruction (since 2009 Annulment) of Securities and Documents* instituted at request with the purpose to deprive lost securities (documents) of their legal effects.¹⁷

- *Maintaining the National Register of Wills*, which has been in operation for a longer period of time, but its application has only been mandatory since 2007 in respect of last wills and testaments made out as notarial deeds and other legal statements containing orders for the case of death and private wills deposited at civil law notaries. The goal of the register is to ensure that the testator's last will or testament shall be enforced, even if the inheritors have adverse interests and it is to be feared that the last will or testament might be concealed. Therefore, Section 135 (4) of ACLN provides that the civil law notary proceeding in a probate action shall be obliged to consult the National Register of Wills with the purpose to enquire about the potential existence of the last will and testament of the testator.

- Since 1997, for the creation of an equitable mortgage on movable assets, the mortgage contract should be documented in front of a civil law notary and mortgage should be registered in the *National Register of Mortgages*. The

¹⁴ Anka T.: A közjegyzői nemperes eljárások (Notarial Non-Litigious Proceedings). *Közjegyzők Közlönye*, 12 (2008) 3.

¹⁵ Preamble of the Minister to Act 45 of 2008 on Certain Notarial of Non-Contentious Proceedings, in *Complex DVD Jogtár*.

¹⁶ IM Decree no. 6/1958. (VII. 4.) Minister of Justice on Probate Actions.

¹⁷ Sections 40–45 of the MT Decree no. 105/1952. (XII. 28.) of the Council of Ministers on the Provisions Necessary to the Enactment of Act 3 of 1952 on the Code of the Civil Procedure as of January 1, 2009, Sections 28–36 of Act 45 of 2008 on Certain Administrative Non-Contentious Proceedings.

priority objective of this Register is to attest the existence of the mortgage with public authenticity.¹⁸

– As of 2009, the scope of the duties of notaries shall be extended with two new powers, on the one hand with *preliminary evidence*, which was already subject to notarial competence before 1992 [see, Sections 207–211 of Act 3 of 1952 on the Code of the Civil Procedure (hereinafter: CCP)], on the other hand, with the non-litigious proceeding directed to order *expert evidence* (which was an effective type of court proceeding since 2005). Act 45 of 2008 on Certain Notarial Non-Litigious Proceedings (hereinafter: ACNNP) assigned both proceedings to notarial powers with the purpose of the avoidance of later action or its expedition, if possible. In the previous proceeding, a record of evidence qualifying as a public instrument shall be issued, whereas, in the latter case an expert opinion shall be issued, which may be used in a court proceeding.

– It is important to point out here that recently it has been raised to introduce and to assign to the competence of civil law notaries the so-called *register of general authorisations or powers of attorney (both in case of concluding contracts/transactions and proceeding in law-suits)* as well as *the procedure for the order of payment* regulated under Chapter 19 of CCP from the extremely overloaded courts.

In general it may be concluded as regards these proceedings that they cover the exercise of typical official powers of administration of justice described under AB Decision no. 1/2008 of the Constitutional Court as the so-called “non-contradictory type of the administration of justice”, which are subject to strict jurisdictional rules.

b) The other important part of notarial functions dating back to almost a thousand years’ history is the drafting of instruments. Notarial deeds may be divided into two categories:

– *Instruments for legal transactions* shall attest with public authenticity the fact that the party expressed his will to conclude legal transactions (for instance: contract, agreement, last will or testament). The preparation of the instruments of legal transactions may be interpreted as instrument-drafting.

– *As to instruments for attestations*, the civil law notary shall certify with public authenticity the facts of legal significance in the form of records or clauses, for instance: that the copy is identical with the document presented to him, the translation is correct, the signature and the initials are genuine, but shall also certify the date of the presentation of a document, the communication of a statement or notification, consultation and resolution, other facts of legal significance, the

¹⁸ Section 262 of Civil Code.

protest against non-payment of promissory notes, cheques and other securities, the contents of public authenticity records.¹⁹

The common feature of notarial deeds is that both types qualify as public documents and the presumption of authenticity is attached to them under Section 195 of CCP, that is, as public documents, they shall fully prove as notarial documents the measure or decision in it, together with the authenticity of the data and facts certified by the documents, making declarations contained by the documents in line with their times and manners. The presumption of authenticity also means that the person whose name is indicated in that form in the instrument shall be considered as the issuer of the document, until the contrary is proved. The reversal of the burden of proof might be of decisive significance in an action. In addition to the fact that private documents never prove the authenticity of the facts included in them, the great difference between public and private documents is that while the presumption of authenticity is attached to public documents, it is exclusively the presumption of genuineness that is attached to private documents, i.e., the text preceding the signature shall be considered unchanged and not forged. Thus, even in case of a private document with full probative force, the party proving with the instrument must prove that the instrument derives from the person indicated as the issuer of the instrument, if this is disputed by the opposing party or the court raises doubts as to its authenticity.²⁰

It follows from the probative force of public documents and the public trust surrounding them that notarised documents are deemed immediately enforceable,²¹ therefore, in case of the non-performance of an obligation included in a notarised document, protracted litigation shall be avoidable.

What is important to mention as regards the differences between the regulation of instrument-drafting and non-litigious proceedings is that concerning instrument-drafting, ACLN does not specify grounds for jurisdiction, thus, the parties can take benefit of the services of any civil law notary. This almost creates a competition situation among civil law notaries with one major point of departure, that the fees are relatively fixed.

c) In addition to the above-mentioned two main case-groups, civil law notaries are also vested with other authorities, which are specifically connected with the confidential nature of the notarial service. Accordingly, the civil law notary shall be entitled to taking any instrument, data-medium into custody, and money, valuables and securities in public circulation into entrusted

¹⁹ Chapter 9 of *Act on Civil Law Notaries*.

²⁰ See, Section 197 of the Code of the Civil Procedure.

²¹ See, Section 21 of Act 53 on Judicial Enforcement.

custody from a party.²² Since 2009, this group of cases has been extended with a new service: at the request of the party, the civil law notary shall deposit the notarised copy of the document included in the request in electronic custody.²³ The aim of the procedure is to ensure that the notarised copy of the party's important document could be stored in an electronic form, in case the original document is contingently destroyed.

3. Following the accession of Hungary to the EU in 2004, however, several problems arose in respect of the competences, the organisational rules and the fees of civil law notaries.

Namely, the instrument-drafting process could just as well operate on the basis of free market principles and formally it does not differ from the document-drafting activity of lawyers—at first sight. But—as I have already mentioned above—the instrument prepared by the civil law notary is a public document, and as such, it is immediately enforceable, which implies a great advantage against the private documents. After the accession of Hungary to the EU, the European Commission (Directorate General for Competition) formed his informal opinion concerning instrument-drafting, precisely that as regards the number of positions and the fees of civil law notaries, the free-market principles should be confirmed and he also considered to institute an action at the European Court for this reason. The grounds of this deliberation are to be found primarily in the Anglo-Saxon (not Latin type) way of thinking. In common-law countries, the Latin type of notaryship (i.e., the civil law notary) is not familiar, since in Anglo-Saxon states the notary public mostly discharges certifying activities and does not prepare instruments. It is worth mentioning as a point of interest that among continental countries, only the Netherlands abolished the system of fixed fees and of fixed number and seat positions, which resulted in catastrophic results: the price of notarial services soared up in the country and the territorial position fulfilment rate badly declined, because civil law notaries moved to large cities in the hope of a better life there. Since that time, the Netherlands has taken serious efforts to reinstate the system of fixed fees and of position number and seats.

In regard of EU-related matters, we have to underline the so-called citizenship action, which was instituted by the Commission versus several Member States (Austria, Germany, Luxembourg, Belgium, France), because the law of these states prohibits persons holding foreign citizenship to discharge notarial functions in the respective countries. Since this proceeding had started before 2004, and considering that Hungarian law also prohibits foreign citizens to pursue notarial activity in the country, Hungary is also involved in the case as

²² Sections 158–165 of *Act on Civil Law Notaries*.

²³ Section 171/A of *Act on Civil Law Notaries*.

an intervening party not simply as a party. In the citizenship action, the argument of the Member States is based on the fact that the civil law notaries discharge public duties.

III. The Transformation of the Role of Notaryship in the Future

The role of Hungarian notaryship—also by reason of EU-related legal problems described above—is undergoing transformation at the moment, as well. The notarial functions mainly based upon document-drafting activities until now will be replaced by notarial functions based upon powers embracing non-litigious procedures of clearly official character. This trend has already been heralded by ACNP described earlier, but even more peculiar instances are the proposal concerning the new Civil Code (hereinafter: Draft CC) and the draft-law on the Enactment of the new CC (hereinafter: DECC), which would transfer new powers into the competence of civil law notaries.

The Draft CC would entrust civil law notaries with the responsibility of maintaining some further new registers. Thus, under Version ‘A’ of Section 3:65 of the Draft CC: “the Hungarian National Chamber of Civil Law Notaries shall keep the Register of Community Property Contracts. The Hungarian National Chamber of Civil Law Notaries shall provide information at the request of the parties on whether the contract of a married couple is included in the register. Concerning the contents of the contract, information cannot be furnished, unless upon the presentation of the written authorisation of either of the spouses or for authorities, so that they can fulfil their tasks as defined by the law.”²⁴ Although, the draft-law submitted to Parliament does not mention notaryship as such in most of the places and refers the assignment of the tasks related to the maintenance of registers to the purview of separate laws, it becomes clear from the preamble to the Draft CC that according to the intent of Government, the responsibility to keep the new registers proposed under the Draft CC shall be assigned to the Hungarian National Chamber of Civil Law Notaries.²⁵ Accordingly, the civil law notary shall keep the register of common-law spouses’ common property contracts,²⁶ in addition to the register of marital community

²⁴ The text of the Draft Civil Code submitted to Parliament for official administrative discussion (IRM/PJKNMFO/2007/356.) by the Ministry of Justice and Law Enforcement on 29th October, 2007.

²⁵ See, 407 of the Preamble to Civil Code.

²⁶ Section 3:66 applicable under Section 3:89 (1) c) of the Draft Civil Code.

property contracts, the register of the so-called preliminary legal statements,²⁷ and moreover, the records of general authorisations,²⁸ as well.

The responsibility to keep these registers is by all means connected with the notarial function of public authenticity and enhances the role of the notaryship as part of the public power. With regard to the authentic registers, the marital and common-law spouses' community property contracts are of a declarative type,²⁹ whereas, the register of preliminary legal statements and the records of general authorisations are of constitutive force, thus, the entitlements entered into the register are established upon the entry.

Furthermore, the Draft CC directed at the out-of-court, peaceful settlement of legal disputes in order to relieve the overloaded courts shall establish a new non-litigious procedure, scilicet, the termination of the matrimony or conjugal community relationship (of registered common-law spouses) by the civil law notary. By virtue of Sections 3:21 (1) and 3:25 of the Draft CC, the civil law notary shall dissolve the marriage, and taking into consideration Section 3:89, the conjugal community relationship upon the agreed request of the parties, if requested by the spouses (registered common-law spouses) jointly and without influence, if the spouses (registered common-law spouses) do not have a common minor child, or a child entitled to maintenance, or, if the spouses (registered common-law spouses) agreed in the alimony according to law burdening them against one another, in the use of the common apartment with the exception of the termination of the joint property on the real estate. The issue of the distribution of the joint properties shall be laid down in a notarial document or in a private document counter-signed by a lawyer. At the same time, the dissolution of matrimony or of conjugal community shall not be

²⁷ According to Section 2:16 of the Draft Civil Code: "a major person may make a preliminary legal statement—even if restricted or deprived of his disposing capacity in the future in the event of a possible reduction of his mental ability—in the interest of the settlement of his property relations and certain personal relationships. The precondition of the validity of the preliminary legal statement is to have it recorded in accordance with the provisions of separate law." Based on the previously said, the preliminary legal statement may be regarded as a last will or testament for case of life.

²⁸ By virtue of Section 5:59 of the Draft Civil Code: "the right of representation may be granted (general authorisation) in the scope of certain cases not defined in advance for a definite or indefinite period of time. General authorisation becomes valid only, if it is laid down in a private document of full probative force or in a public document. General authorisation shall be established upon recording it in the electronic registry kept as specified under a separate act on general authorisations."—It is to be noted that general authorisation may be valid or invalid right before it is established.

²⁹ Section 3:66 (2) of the Draft Civil Code.

possible, if the disposing capacity of either of the spouses (registered common-law spouses) is limited in respect of making legal statements concerning his/her financial situation, or, if the invalidity or non-existence of matrimony or conjugal community must be declared.

Conclusions

In a nutshell, the Draft CC enlarges the scope of the authority of Hungarian notaries and at the same time, it would clearly transfer it closer to the activities of public power, ensuring on the one hand the job-security of the notarial community, on the other hand, that the notaryship as to its functions and organisational structure will not be challenged by the law of the EU.