

## Roadmap of the European Commission

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### ***“Update of the reform recommendations for regulation in professional services”***

#### **Feedback Statement of the CNUE**

(29 March 2021)

The Council of the Notariats of the European Union (CNUE) is the European umbrella organisation representing 22 national Notary Chambers and more than 45,000 notaries.

The CNUE is following with great interest the **initiative** taken under the leadership of DG GROW within the framework of the **roadmap “Update of the reform recommendations for regulation in professional services”** which aims to include notaries in the European “Restrictiveness Indicator for regulated professions” (**Restrictiveness Indicator**).

The CNUE recognises that the **evaluation of professional regulation for certain liberal professions has indeed its justifications**. The last evaluation was conducted in the framework of the so-called **services package in 2017**. The re-evaluation, which has already been announced, is meant to examine new developments as well as regulatory reforms that have been carried out, and to reaffirm those recommendations that have not been addressed to date.

However, the CNUE is very concerned to note that the **Restrictiveness Indicator** included in the re-evaluation is supposed to focus, for the first time, on the **notarial profession**, too.

The Roadmap indeed states that:

*“An additional profession – notaries – will also be covered. It is included in line with the OECD’s similar product-market-regulation indicator (PMR) and due to the importance of this profession, for instance in real estate transactions and company creation.*

*[...]*

*There will also be an additional profession that did not feature in 2017: notaries. This additional profession will be included because of its economic significance (for instance, in real-estate transactions and company-creation processes) and to bring the Commission’s restrictiveness indicator more in line with the OECD’s product-market-regulation indicators for professional services.”*

Therefore, before taking the decision to include the notarial profession into the Restrictiveness Indicator, the Commission should present the new elements that have conducted to a re-evaluation of the notarial profession and to a derogation from the current legislative framework.

#### **1. Aim of the European Commission**

By stating in the **roadmap** that *“the update of restrictiveness indicator and reform recommendations will be **primarily based** on the information presented in: (i) the **regulated professions database**; (ii)*

**reports and notifications required under Article 59 of the Professional Qualifications Directive; (iii) internal research; and (iv) consultation and validation with Member States”, DG GROW is making a direct link between this initiative and the scope of EU secondary legislation on internal market.**

With the **inclusion of notaries** in the Restrictiveness Indicator, DG GROW aims at including notaries in the next revision of the Professional Qualifications Directive (Directive 2005/36/CE, as last amended by Directive 2013/55/CE), the Proportionality Test Directive (Directive 2018/958/CE) and, subsequently, also the Services Directive (Directive 2006/123/CE). There is no other explanation for the initiative and the effort involved than the aim of examining possibilities for deregulation. In any case, the inclusion of notaries in the Restrictiveness Indicator is not an end in itself.

## **2. Incompatibility of the initiative with EU law**

**So far, notaries have not been included in the Commission’s Restrictiveness Indicator for good reason.** This is because the indicator is based on the EU secondary legislation applicable in this area.

In 2005, 2013 and 2018, the EU legislator has **repeatedly decided to explicitly exclude notaries from the Services Directive, the Professional Qualifications Directive and the Proportionality Test Directive.**

DG GROW now argues that notaries would be subject to **EU primary law** and should therefore be treated in the same way as other regulated professions. This argumentation **contradicts** however the **explicit decision of the EU legislator to exempt** notaries from the aforementioned directives.

It also contradicts the **jurisprudence of the CJEU** in the cases “*Commission v. Germany*” (CJEU, judgment of 24 May 2011 - C 54/08) and “*Piringer*” (CJEU, judgment of 9 March 2017 - C-342/15), which **recognize the public functions of notaries as being capable of justifying restrictions of the freedom of establishment as overriding reasons in the public interest** as well as **the regulatory sovereignty of the Member States with regard to the notarial profession:**

*“Second, it is necessary to recall that the Court has already held, in its judgment of 24 May 2011, Commission v Austria, (C 53/08, EU:C:2011:338, paragraph 96), in relation to the freedom of establishment, that the fact that notarial activities pursue objectives in the public interest, in particular that of guaranteeing the legality and legal certainty of documents concluded between individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article 49 TFEU resulting from the particular features of the activities of public notaries, such as the restrictions which derive from the procedures by which they are appointed, the limitation of their numbers and their territorial jurisdiction, or the rules governing their remuneration, independence, disqualification from other offices and protection against removal, provided that those restrictions make it possible for those objectives to be attained and are necessary for that purpose.” (CJEU, judgment of 9 March 2017 - C-342/15, para. 60)*

*“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.” (CJEU, judgment of 9 March 2017 - C-342/15, para. 65)*

### 3. Incompatibility of the initiative with the will of the European Parliament

Furthermore, a study for the **IMCO Committee of the European Parliament** dated **2017** undertook an assessment of the Commission's Restrictiveness Indicator. As regards the inclusion of notaries in the PMR Index, the study expressly states in footnote 22: ***“Another such issue is the activities of notaries, which the OECD has included under ‘lawyers’. The Commission, rightly, does not do this (also, notaries do not fall under the Professional Qualifications Directive).”***

### 4. Misinterpretation of the PMR Index of the OECD

DG GROW refers to the **PMR Index of the OECD**, which classifies notaries as “lawyers”. This confusion in the PMR index can be explained by the large number of common law countries in the OECD that do not have the function of civil law notaries enshrined in EU law, but only "notaries public" who are not appointed by the State and are merely certifiers of private signatures.

This is why it was necessary to distinguish civil law notaries in this indicator, and the PMR index contains an explicit clause for notaries. Accordingly, the PMR 2018 index states in paragraph 94:

*“The analysis of the regulation of notaries (Figure 36) deserves some additional qualifications. (...) Furthermore, in civil law countries, (...), notaries exercise administrative and judicial tasks by virtue of power delegated by the state. Hence, notaries play a special role in the legal services market in these countries that justifies some regulatory constraints.”*

Corresponding disclaimers can also be found in the relevant tables of the PMR Index 2018. DG GROW simply **ignores these disclaimers**.

It should also be noted that the PMR Index is a scientific study that goes beyond the area of justice of the EU or the EEA. However, DG GROW's Restrictiveness Indicator is a political instrument. It is intended to serve as a reference for the Commission in a future revision of the above-mentioned directives when it will come to the question of lifting the sectoral exemption for notaries.

In view of these differences, the professions included in the two indicators have not been the same since their inception. While the OECD covers architects, engineers, accountants, real estate agents and the legal sector, the European Commission's indicator also includes patent attorneys and tour guides, but does not cover notaries.

### 5. Negative consequences of a deregulation of the notarial profession

The notary, due to the close control by the State, is delegated sSate tasks, such as drafting and preserving public instruments, entering these documents into public registers, granting divorce by mutual consent, calculating and collecting taxes, affixing legalisation and apostille, order for payment procedures for example. European Union law enshrines the special probative value and enforceability of authentic instruments within the European Union as public documents. Therefore, deregulation

would no longer allow the State to exercise the same control and would force it to take over these tasks, with a high cost for public finances.

Therefore, such an intervention in a well-functioning system would be politically inappropriate, especially in times of the Corona pandemic. In fact, the **notary is an essential factor for societal stability** in the existing system of preventive administration of justice. People can rely on the legal certainty of transactions, also in an increasingly digitised society. They can be sure that they get the legal ownership of a real property when they pay for it. They can trust in the fact that their last will is legally effective and will be safely stored and made available to their heirs. And creditors can rely on the existence and the correct representation of their corporate business partners. **This trust is a central aspect for societal stability and reinforces the confidence of the people in the performance of basic and essential functions of the legal system.**

## **6. Interference in the judicial sovereignty of the Member States is contrary to EU law**

In the European Union, it is quite usual for Member States to **delegate** the power to **perform public tasks** to **state-appointed public officers**. This is a form of **indirect public administration**.

Notaries are public officers who have been delegated public authority by the State and have been entrusted with the performance of **sovereign tasks** by the State. Authentic instruments drawn up by notaries are public (State) documents received on behalf of the State that guarantee legal certainty to the parties and ensure the reliability of transactions involving communication with public registers. Civil law transactions of Continental Europe are not conceivable without notaries. The functions of notaries in the area of **preventive administration of civil justice** are **more comparable to those of a judge** than to those of a lawyer. If there was no notariat, the State would have to perform the tasks currently assumed by notaries itself.

The **organizational decision of a State on a domestic level** to entrust notaries with the performance of certain public-law tasks cannot be put into question by the Commission. It neither concerns the internal market nor the fundamental freedoms, but falls within the sole **competence of the Member States within the framework of their judicial sovereignty**.

If, however, the notarial profession was deregulated at EU-level, the logical consequence would be that Member States would no longer have the possibility to **entrust** notaries with parts of indirect public administration as a **form of internal State organization**. As a matter of fact, all holders of a public office would then be subject to the internal market. Numerous other professions such as **bailiffs**, who perform public tasks, would then also be fully subject to internal market regulations.

The deregulation of the notarial profession by the European Union would thus constitute a **serious intervention in the organizational sovereignty of the Member States**. For that reason, **numerous Member States**, including Austria, Belgium, the Czech Republic, France, Germany, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Romania and Spain, have already **strongly opposed** D29 G GROW's initiative. They point out, in particular, that the choice of regulated professions for this indicator was based on their relatively high mobility, which called for a certain harmonisation of the conditions of access and exercise. However, such mobility does not exist within the notarial profession, as the notary is a public officer appointed by the State to exercise his activity on behalf of the State on the territory of that State only. Moreover, there is **no legal basis** for including notaries in the Restrictiveness Indicator and – a fortiori – for possible recommendations on the reform of the notarial

profession. **The organisation of the notariat remains the exclusive responsibility of the Member States.**

Moreover, the main argument for the Commission to include notaries into the Restrictiveness Indicator is that notaries are involved in company-creation processes. However, the Commission does not take into consideration that the Directive (EU) 2019/1151 states, in recital 20, that provisions concerning online procedures provided for in the Directive should also include controls on the identity and legal capacity of persons seeking to form a company or register a branch or to file documents or information, in order to tackle fraud and company hijacking and to provide safeguards for the reliability and trustworthiness of documents and information contained within national registers. To that effect, Member States should be able to require the involvement of notaries or another legal profession in any part of the online procedures.

Furthermore, notarial competences differ greatly from one member state to another and any comparison between notaries at the EU level would not be sustainable.

## **7. Conclusion**

In the light of the above, **DG GROW should cease its initiative to include notaries in the Restrictiveness Indicator.**

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