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EUFAMS II

FACILITATING CROSS-BORDER FAMILY LIFE:
TOWARDS A COMMON EUROPEAN UNDERSTANDING

AN EMPIRICAL STUDY ON EUROPEAN FAMILY AND SUCCESSION LAW

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A joint project of the Institute for Comparative Law, Conflict of Laws and International Business Law at Universität Heidelberg, Universitat de València, Università di Verona, Università degli studi di Milano, Lund University, the University of Osijek, the Max Planck Institute Luxembourg for Procedural Law und the Asociacion Española de Abogados de Familia

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EXECUTIVE SUMMARY

Introduction: This survey was conducted within the framework of the project "EUFams II – Facilitating cross-border family life: towards a common European understanding".

Methodology: The questionnaire used for this survey deals with the following instruments: Brussels II bis Regulation, Rome III Regulation, Maintenance Regulation, 2007 Hague Maintenance Protocol, Regulations on Property Regimes, Succession Regulation and Public Documents Regulation. It aims at exploring the experiences of professionals in the field of international and European family and succession law and gain insight into some of the difficulties they may face in their daily professional life. Target groups are: judges, lawyers/attorneys, notaries, state officers, scholars/academics and social counselors. The research group opted for a combination of quantitative and qualitative methods entailing a questionnaire with closed and open questions.

Conceptual framework: The content of the questionnaire is divided into three parts, i.e. a general part, various specific parts and a thematic part. The aim of the general part is to collect demographic and geographical data as well as information on the fields in which the respondents are professionally active. These fields are: divorce, legal separation or marriage annulment; parental responsibility or child abduction; maintenance obligations; property regimes in marriage and registered partnerships; succession; and public documents. The selection by the respondents enables the creation of a path-dependency in order to present only pertinent specific parts. Each specific part commences with a self-assessment of the respondent's familiarity with the relevant instrument(s) followed by various questions on the content. The questions in the thematic part concern general topics and are presented to all respondents. The questionnaire concludes by asking participants to which extent the current framework in their opinion facilitates free movement of persons within the EU. All questions are posed in such a manner that they could be answered intuitively.

Translation and distribution: The questionnaire was drafted in English and subsequently translated into Croatian, Czech, French, German, Italian, Slovak, Spanish and Swedish. It was conducted online via *LimeSurvey* between early January and late March 2019 and distributed in Croatia, Czech Republic, France, Germany, Greece, Italy, Luxembourg, Slovakia, Spain and Sweden. The general strategy was to distribute the questionnaire to persons within the target groups focussing on persons and networks capable of achieving multiplier effects. In total, 1.394 respondents commenced with the questionnaire, 699 of which completed the questionnaire in full.

Main findings: This report categorizes the findings according to the aforementioned fields, followed by a cross-analysis. It concludes with an extensive summary.

Divorce, legal separation or marriage annulment:

Familiarity: More than a third of the respondents possess an advanced or excellent understanding of the Brussels II bis and the Rome III Regulation. Surprisingly, 13% stated to be not acquainted with the instruments even though they were applicable in their state of professional activity.

Private divorce: Private divorces do not appear to play a great role in practice. 72% have never or hardly ever encountered them. At present, no congruent practice on the

applicability of the Brussels II bis and/or the Rome III Regulation to private divorces exists (cf. CJEU 20.12.2017, C-372/16 – *Sahyouni v Mamisch*).

Forum and *ius*: In the vast majority of cases, forum and applicable law coincide.

Brussels II bis Recast Proposal: The Proposal is largely unknown in practice. 6% stated that in their opinion the Proposal will indeed solve some of the current difficulties, while 8% was of the opposite opinion.

Parental responsibility or child abduction:

Familiarity: 64% have a basic understanding of the Brussels II bis Regulation at best.

Current framework: Due to the multitude of instruments and their diverging scopes vis-à-vis different States, the overall framework is characterized by a high degree of complexity.

Mediation de lege ferenda: 31% welcomed and 20% opposed a more extensive use of mediation in child abduction cases, while 49% had no opinion on the matter. Northern European States predominantly decline while Eastern and Southern European States are more positive about a more extensive use of mediation.

Brussels II bis Recast Proposal: Also in the field of parental responsibility, the Proposal is largely unknown. Those acquainted with the Proposal predominantly welcomed the new provisions.

Maintenance obligations

Familiarity: Familiarity with the Maintenance Regulation and the 2007 Hague Maintenance Protocol is remarkably poor as 32% and 43% respectively were entirely unacquainted with these instruments.

Central Authorities: 45% had no opinion on the functioning of the system of Central Authorities. Of the remaining respondents, 73% rated the system's functioning to be average or better. Judges are more positive as 91% rated the system to be average or better. In contrast, only 51% of lawyers were of that opinion.

Property regimes in marriage and registered partnerships

Familiarity: 57% had not yet familiarized themselves sufficiently with the Regulations on Property Regimes or wrongly indicated that these instruments were not applicable in their State of professional activity. 76% of judges are entirely unacquainted with them. The fact that many respondents were unacquainted may indicate that professionals do not prepare themselves proactively but rather learn by doing.

Succession

Familiarity: In comparison with other instruments, familiarity with the Succession Regulation is fairly high.

Habitual residence: Even though the Succession Regulation explicitly mentions various additional criteria which have to be taken into account when determining the deceased's last habitual residence, 90% answered that they would determine habitual residence in accordance with the general criteria of other regulations.

Choice of law: Testators do not appear to frequently make use of choice of law clauses. Two-thirds of the respondents never or seldom encounter such clauses.

European Succession Certificate (ESC): The ESC appears to have not yet been fully embraced in practice. More than half of the participants indicated to have no opinion on the ESC's functioning and 42% of the remainder rated its functioning to be poor or next to poor. Respondents complained about the length, complexity and mandatory completion of all fields of the form as well as about the ESC's limited temporal validity.

Public documents

Familiarity: 72% had not yet familiarized themselves sufficiently with the Public Documents Regulation or wrongly indicated that the Regulation was not applicable in their State of professional activity.

Cross-analysis

Overall familiarity: Overall familiarity with the instruments of European family and succession law is fairly poor. Almost all instruments show remarkably low values. Particularly the most recent regulations on property regimes and public documents are not (yet) well-known in practice. It has to be borne in mind that the questionnaire was distributed amongst professionals active in the relevant field(s). In addition, respondents only answered questions on their familiarity with pertinent regulations. Only few respondents possess an advanced or excellent understanding which is likely to be a prerequisite for legal counseling and the application of the law.

Third-country nationals: Global migration flows and the so-called refugee crisis appear to result in an increase in cases involving third-country nationals. In the last 5 years, 49% observed an increase of family law related cases involving third-country nationals, while 21% answered in the negative.

Habitual residence and indirect party autonomy: Parties appear to be able to frame facts relevant for the determination of jurisdiction and applicable law at least to some extent as 28% observed that courts only assess habitual residence if it is contested by one of the parties. To the extent that the parties do not contest habitual residence, 36% indicated that courts rely solely on the facts presented by the parties.

Free movement: Respondents did not agree on whether the framework of European family and succession law facilitates free movement of persons. When invited to name the main difficulties for the effectuation of free movement rights, respondents indicated that the general framework is characterized by a high degree of complexity due to the multitude of instruments. Further difficulties include legal and practical uncertainty in the application of the relevant instruments as well as a general lack of awareness amongst citizens of the legal implications of cross-border family life.

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A. INTRODUCTION AND BACKGROUND

This survey was conducted within the framework of the project "EUFams II – Facilitating cross-border family life: towards a common European understanding". EUFams II is a study on European private international law in family and succession matters conducted by various academic institutions and co-funded by the European Commission[1]. The project's overall objective is to assess the functioning and the effectiveness of the framework of international and European family and succession law, detect potential problems and propose possible improvements. Ultimately, the project aims at developing a common European expertise and understanding to secure the uniform, coherent and consistent application of European family law, so as to facilitate the cross-border movement of persons within the EU.

This survey constitutes the first stage of EUFams II. It aims at exploring the experiences of experts in the field of international and European family law and gain insight into some of the difficulties they may face in their daily professional life. On the basis of the findings of this survey, national and international seminars will be conducted in which some of the topics identified will be dealt with more extensively and subjected to a legal assessment. In addition, the findings will serve as an empirical foundation for various thematic studies conducted over the course of the project. Finally, this study may provide a valuable source of empirical data for other researchers active in the field of European private international law in family and succession matters.

This report will commence by providing an overview of the methodology employed (B.) and the sample generated (C.). It will then lay out in greater detail the main findings within the various fields of European family and succession law (D. I.). Subsequently, a thematic cross-analysis of general subjects relevant to all examined fields of law will be conducted (D. II.). The report will conclude with an extensive summary of the findings (E.).

[1] Grant No. 800780 – JUST-AG-2017/JUST-JCOO-AG-2017.

B. METHODOLOGY

I. OBJECTIVES

The EU system of private international law in family and succession matters has rapidly extended its material scope over the last two decades. Of particular interest to the EUFams II research group are the following instruments:

- Brussels II bis Regulation[2]
- Rome III Regulation[3]
- Maintenance Regulation[4]
- 2007 Hague Maintenance Protocol[5]
- Matrimonial Property Regimes Regulation[6]
- Regulation of Property Consequences of Registered Partnerships[7]
- Succession Regulation[8]
- Public Documents Regulations[9]

Additional sources, e.g. the 1980 Hague Child Abduction Convention[10] and the 1996 Child Protection Convention[11], may accordingly play a role in practice.

These instruments deal with family law matters in a fragmentary yet interconnected manner. Consequently, demarcation and the interplay of different instruments have become increasingly difficult. Potential difficulties include the determination of the scopes of the regulations, their interplay and actual workability, and the application of their provisions in practice.

Against this background, the EUFams II research group is interested in gaining insight into the actual implementation of these instruments and application of their provisions throughout the EU. It aims at exploring the general familiarity of various groups of

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[2] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[3] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

[4] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

[5] Protocol on the Law applicable to Maintenance Obligations of 23 November 2007.

[6] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[7] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

[8] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

[9] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

[10] Convention of 25 October 1980 on the civil aspects of international child abduction.

[11] Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

(legal) professionals with the European framework of family and succession law. Furthermore, for reasons of rule of law, it is of importance to shed light on the practical experiences of professionals with the uniform application and effective implementation of the aforementioned instruments. Finally, the research group aims at revealing potential difficulties for, obstacles to and problems with matters of free movement and cross-border family life as observed by professionals.

II. TARGET GROUPS

In order to achieve these objectives, the research group designated as target groups the following professions, insofar as they are active in the fields of interest corresponding to the aforementioned instruments:

- judges;
- lawyers/attorneys;
- notaries;
- state officers;
- scholars/academics;
- social counselors;
- any other comparable profession.

Judges ultimately apply the law and therefore constitute the primary target group of this survey. Lawyers are accordingly involved in the judicial process, yet in a different role. In addition, they are in direct contact with the parties concerned and may thus provide insights from a different perspective. Notaries are particularly yet not exclusively of importance for matters relating to succession law. State officers, e.g. civil registrars, judicial officers and members of ministries involved in the legislative process, are able to provide valuable insights from the administrative and legislative perspective. Scholars and academics systematically analyze the framework of European family law and the application of the regulations' provisions and may therefore be able to provide a more general overview as well as answers to unresolved matters. Social counselors, similar to lawyers, are in direct contact with affected citizens and can shed light on some of the non-legal and social dimensions of family law.

The composition of the target group ensures the achievements of the study's objectives by providing insights on phenomena in European family law from a multitude of perspectives.

III. DESIGNATION OF APPROPRIATE METHOD

The research group opted for a combination of quantitative and qualitative methods. It found a questionnaire to be the most suitable instrument as it permits the collection of a considerable amount of numerical data in line with some of the identified objectives. Accordingly, this method enables the research group to reach a large number of respondents throughout the EU. Conducting expert interviews could potentially cater to some of the more qualitative-oriented objectives, yet such a course of action was subject to numerous factual, financial and linguistics constraints. However, by including open questions and text fields, which enable respondents to express their personal experience in greater detail and in a non-standardized fashion, a

questionnaire could simultaneously incorporate the qualitative benefits of expert interviews.

IV. RESEARCH DESIGN

1. Preliminary matters

The research group took note of the survey conducted within the predecessor project EUFams I[12] and thereby built on previous experiences while avoiding redundancies. However, EUFams I had a significantly smaller substantive scope as various regulations only became applicable after the completion of that project.[13]

A general conceptual framework and first draft of the questionnaire were developed at the Institute for Comparative Law, Conflict of Laws and International Business Law of Heidelberg University. The draft was subsequently submitted to the members of the Consortium who evaluated and approved the concept.

2. Hypotheses

It was taken as a starting point that the target groups for various reasons lack familiarity with private international law in general and with the numerous EU regulations in the field of family and succession law in particular. First of all, in many Member States, private international law (at least in its totality) was or still is not a mandatory component of legal education. Rather, training often occurs on the job and on an *ad hoc* basis. Consequently, many practitioners are unlikely to possess a profound understanding of the principles of private international law in general and of international family law in particular. In addition, it has to be borne in mind that the majority of family law cases is likely to be solely domestic and without cross-border elements. Consequently, private international law does not play a role in many of the cases professionals deal with on a daily basis. Finally, the field of European family law has developed with considerable pace and its complexity is constantly increasing. Against this background, professionals are under constant pressure of keeping up to date.

It can be derived from the initial hypothesis that practitioners are more likely to accumulate knowledge in a selected number of fields which they encountered in the past or continue to encounter on a regular basis. For similar reasons, practitioners are not likely to be familiar with instruments that became only recently applicable. Additionally, it is presumed that practitioners are neither likely to proactively prepare themselves for new instruments nor that they receive the necessary support or training in advance.

Furthermore, it is assumed that the application of and potential problems with European family law differ both across Member States as well as across various groups of professionals within the target groups. When it comes to the former, recent changes in European family law are unlikely to erase pre-existing, historically developed national conceptions of private international law and general mindsets of professionals. Moreover, the number of cases with international aspects are likely to

[12] Grant No. 7729 – JUST/2014/JCOO/AG/CIVI.

[13] These include in particular the Regulation on Marital Property Regimes, the Regulation on Property Consequences of Registered Partnerships and the Public Documents Regulation.

vary across Member States and therefore the depth of experiences and scope of potential learning effects may differ accordingly. More in particular, the amount of cases involving third-country nationals is likely to have increased due to the so-called refugee crisis to which Member States have been exposed to different degrees. In addition, Member States are likely to take diverging preparatory measures for the factual implementation of new EU instruments. With regard to professions, it is presumed that their different roles and functions in family and succession cases will accordingly result in different perspectives on numerous matters.

Finally, discrepancies between the academic interest in certain topics of European family law and their practical importance are likely to exist in both directions. On the one hand, topics may have received extensive scholarly attention despite their seldom occurrence in practice. In contrast, some practical issues may not have been object of academic discourse.

3. Conceptual framework

The questionnaire commences with a short preface which aims at informing the participants on the project, the questionnaire and their objectives. Furthermore, the preface contains information on data protection (cf. below D. IV. 3. d)).

The questionnaire is divided into three parts, i.e. a general part, various specific parts and a thematic part.

a) General part

The aim of the general part is to collect demographic and geographical data as well as information on the fields in which the respondents are professionally active.

Demographic data includes professional occupation[14], age[15] and gender[16]. Participants are subsequently asked to indicate the region[17] and country in which they are predominantly professionally active in order to establish whether various instruments are applicable in the respondent's country. The last question of the general part establishes the fields with which the respondents at least occasionally come or have come into contact as part of their professional activities. This selection enables the creation of a path-dependency. These fields are:

- Divorce, legal separation or marriage annulment;
- Parental responsibility or child abduction;
- Maintenance obligations;
- Property regimes in marriage and registered partnerships;
- Succession;
- Public documents.

The fields are described in a factual or at least non-legal rather than instrument-based manner as such a description does not presuppose knowledge on the relevant instruments. On the basis of the selection made by the respondent, for each

[14] Judge; lawyer/attorney; notary; state officer; scholar, academic or similar; social counselor or similar; other.

[15] In 10 year increments.

[16] Male; female; undetermined.

[17] EU; EEA; other.

participant only pertinent questions are shown in the specific parts while the questions to non-selected fields are automatically suppressed.

b) Specific parts

In the specific parts, the factually described domains are linked to questions on the relevant instruments in the respective field of professional activity. Each block commences with a self-assessment of the respondent's familiarity with the relevant instrument(s), ranging from not acquainted[18] to an excellent understanding. On the basis of this information, a further path-dependency is created. In the event that a respondent is not acquainted with the respective instrument(s), only follow-up questions for which no familiarity is required will be asked. However, in the event that a respondent has at least a basic understanding of the instrument(s), more detailed follow-up questions are presented. Partially, these follow-up questions are designed as testing questions with a single answer option being the most correct answer.

Furthermore, the specific parts on various occasions explore if and how respondents have familiarized themselves with regulations which only became applicable during the period of time in which the survey was conducted. In the same period, a Recast Proposal of the Brussels II bis Regulation had previously been presented by the European Commission which was queried where thematically appropriate.

c) Thematic part

The questions in the thematic part only concern general topics and can therefore be answered by all respondents even if participants possess no specialized knowledge in any of the aforementioned fields. These questions primarily deal with the regularity with which participants encountered cases involving third-country nationals, whether there has been an increase in the number of these cases and, if so, in which fields.

The questionnaire concludes by asking participants to which extent the current framework in their opinion facilitates free movement of persons within the EU.

d) Miscellaneous

Design of questions: In general, the questions are posed in such a way that they can be answered intuitively and without the necessity of looking up particular legal provisions or consulting handbooks. This strategy was chosen in order to prevent participants from abandoning the questionnaire before completion for reasons of time or loss of interest.

The answer options for questions relating to the frequency with which participants encounter certain phenomena are based on a scaling system. This system entails verbal rather than numerical assessment criteria, e.g. never – hardly ever – seldom – occasionally. The questionnaire opted to refrain from employing absolute numbers as they may vary in relation to the number of cases participants deal with and can therefore cause distortion. Accordingly, it declined the use of relative criteria, e.g. in percent, since providing these numbers would force participants to engage in

[18] The answer option 'not acquainted' is subdivided into subsequent answers entailing the possibility to inquire into the reason for the participant's lack of familiarity. The participant can either be unacquainted because the instrument is not applicable in State of professional activity or be unacquainted for other reasons.

potentially difficult calculations. These are likely to either increase the duration of the questionnaire or result in mere estimations. In short, verbal estimations therefore allow for more intuitive answers and are apt to provide insight on the perceived regularity.

In addition to closed questions, the questionnaire provides numerous text fields by means of which the participant can submit detailed personal opinions, exemplifications and any other information they deem necessary to share. These text fields are employed in any instance which calls for a qualitative rather than quantitative method.

Data protection: The survey was conducted anonymously. The respondents are merely asked to indicate their profession, age (in 10 year increments) and gender. The combination of these attributes does not allow for the identification of individuals.

4. Translations

The questionnaire was drafted in English. However, in order to overcome anticipated language barriers of the respondents as well as to ensure a high response rate, the questionnaire was translated into the most common languages within the EU as well as into the languages of some less common speech areas (Croatian, Czech, French, German, Italian, Slovak, Spanish, Swedish). Answers submitted via text fields in the respondents' native language subsequent to the closing of the questionnaire were translated back into English for the purpose of this report.

5. Distribution

Heidelberg University, acting as coordinator, provided the research group with a general strategy on the distribution of the questionnaire which was implemented in and adapted to the needs of the respective country.

a) General strategy

The survey was conducted online via *LimeSurvey*, a leading open source survey software. It was accessible via special subdomains for each language:

- Croatian: upitnik.eufams.eu
- Czech: pruzkum.eufams.eu
- English: survey.eufams.eu
- French: enquete.eufams.eu
- German: umfrage.eufams.eu
- Italian: sondaggio.eufams.eu
- Slovak: dotaznik.eufams.eu
- Spanish: encuesta.eufams.eu
- Swedish: undersoekning.eufams.eu

The survey was conducted between early January and late March 2019.

The questionnaire was distributed in the Member States in which the members of the research group are based as well as in various other countries. The former category consists of Germany (Heidelberg University), Croatia (University of Osijek), Italy (University of Milan, University of Verona), Luxembourg (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law), Spain (University of Valencia, Spanish Association of Family Lawyers (AEAFA)), Sweden (Lund University). The latter group includes the Czech Republic, Greece, Slovakia and

France. These Member States cover the main legal realms (Roman, Germanic, Nordic and Eastern) in the EU. In addition, the composition entails both founding Member States as well as those which acceded to the EU in later decades.

The general strategy was to distribute the questionnaire through any potentially relevant national network of persons in the target groups to which the research group had or could obtain access. Such networks included: general associations on family law; professional associations of family lawyers, judges, notaries, social counselors and civil servants; public authorities; family law chambers of the judiciary; bar associations; judicial academies; social media and blogs on family law; scholars and academics; and any other platform, contact or interested group of persons. More in particular, the strategy focussed on gatekeepers and other persons capable of achieving multiplier effects.

b) National strategies

Germany: Heidelberg University contacted the main target group by sending personalized serial emails to the presidents of all magistrates' courts (*Amtsgerichte*) and all higher regional courts (*Oberlandesgerichte*) in Germany. The list of email addresses was automatically generated by means of a search algorithm. In several federal states, Heidelberg University was in close contact with ministries of justice or other competent authorities in order to inform on the design and data protection matters of the survey and to obtain clearance for distribution.

When it comes to lawyers and notaries, both the federal as well as all regional bar associations and all regional notary chambers respectively were contacted via personalized emails with the request to distribute the questionnaire amongst their members. In addition, an internet search was conducted to target individual professionals with a strong focus on European and international family and succession law.

Heidelberg University contacted all professors for private international law in Germany and additionally requested them to forward the questionnaire to their research fellows.

Finally, various professional networks[19] were initially contacted by telephone to inform key contacts on the project and the questionnaire. Subsequently, emails with request for distribution were sent out.

Croatia: PRAVOS University reached out to various pre-existing contacts such as courts, scholars, lawyers, public servants[20], postgraduate students and NGOs by means of standardized email.

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[19] Vereinigung Demokratischer Juristinnen und Juristen e.V. (Association of Democratic Lawyers); Deutsche Anwalts-, Notar- und Steuerberatervereinigung für Erb- und Familienrecht e.V. (Association of Lawyers, Notaries and Tax Consultants for Succession and Family Law); Arbeitsgemeinschaft Familienrecht im Deutschen Anwaltsverein (Association of German Lawyers – Family Law Working Group); Deutsche Vereinigung für Erbrecht und Vermögensnachfolge e.V. (German Association for Succession Law and Estate Planning); Deutsch-Australisch-Pazifische Juristenvereinigung e.V. (German-Australian-Pacific Association of Lawyers); Deutscher Familiengerichtstag e.V. (German Family Court Committee); Süddeutsches Familienschiedsgericht (Southern German Court of Arbitration in Family Matters); Neue Richtervereinigung e.V. (New Association of Judges); Interessenverband Unterhalt und Familienrecht (Association for Maintenance and Family Law); Deutsches Institut für Jugendhilfe und Familienrecht e.V. (German Institute for Youth and Family Law).

[20] Social Welfare Center, Central Authority, Center for Special Guardianship.

Italy: The University of Verona relied upon a number of pre-existing contacts established through cooperation with lawyers, judges and legal practitioners and various institutions in the context of previous events and projects regarding European and international family law. Requests for dissemination were sent to lawyers and bar associations[21], while single requests to participate in the questionnaire were sent to practitioners, members of the judiciary and academics. Personalized emails were sent to key contacts (e.g. president, chairs) within institutions with the request to redistribute the questionnaire through internal channels.

The University of Milan distributed the questionnaire through a network established over the course of the predecessor project EUFams I. This network included academics, practitioners, judges and other legal practitioners from various EU Member States.

Luxembourg, Greece and France: For each of the three countries covered by the MPI Luxembourg's team, the same strategy was followed. Based on previous experiences and through additional internet search, the pertinent national institutions were identified and contact details were collected. The team members additionally employed personal networks and directly addressed certain representatives from academia and legal practice with the request to forward the questionnaire. Various institutions in Luxembourg[22], Greece[23] and France[24] were contacted.

Spain: The University of Valencia relied upon contacts derived from previous cooperation with lawyers, judges, land registrars, notaries and other legal professionals, based on personal contacts and through professional associations.[25]

Sweden: Lund University reached out to the Nordic group of Private International Law, the Swedish Bar Association, the Swedish Enforcement Authority[26], district courts[27],

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[21] Lawyers associations: Associazione Italiana degli Avvocati per la Famiglia e i minori; Associazione Italiana Giovani Avvocati; Rete Lenford (Avvocatura per i diritti LGBTI); Italian Child Abduction Lawyers Italy; Osservatorio nazionale sul diritto di famiglia; Unione Nazionale Camere Minorili); Camera Nazionale Avvocati per la persona, le relazioni familiari e i minorenni; Bar Association of Verona.

[22] Chambre des Huissiers de Justice (Association of Bailiffs Luxembourg); Groupement des Magistrats Luxembourgeois (Association of Judges Luxembourg); Centre de Médiation Civile et Commerciale, Centre de Médiation ASBL (Associations of Mediators Luxembourg); Ordre des Avocats du Barreau de Luxembourg, Ordre des Avocats du Barreau de Diekirch, Chambre des Notaires du Grand-Duché de Luxembourg, Conférence du Jeune Barreau de Luxembourg (Associations of Lawyers and Notaries Luxembourg); University of Luxembourg.

[23] Hellenic Institute of International and Foreign Law; Union of Greek Civilists; Union of Greek Proceduralists; Ministry of Justice, Department of International Judicial Cooperation in Civil and Criminal matters; Legal Council of the State; Union of Judges and Prosecutors; National School of Judges; Greek universities (three law schools of the country); bar associations (6).

[24] Huissiers de Justice Associés, Chambre Nationale des Huissiers de Justice Association of Bailiffs France); Notaries of France Directory, Notaviz, Mediation notaires I-IV (Association of Notaries France); Association professionnelle des magistrats, Association Française des Magistrats de la Jeunesse et de la Famille (Association of Judges France); Association Nationale des Avocats Spécialistes et Praticiens en Droit des Personnes, Association Française des Praticiens du Droit Collaboratif, Conseil national des barreaux, Ordre des avocats de Paris, Ordre des avocats de Marseille, Ordre des avocats de Toulouse, Ordre des avocats de Strasbourg, Ordre des avocats de Lyon, Ordre des avocats de Poitiers, Barreau Nantes (Lawyer and Bar Associations France); Ministère de la Justice, Direction des Affaires Civiles et du Sceau (Central Authority France/Ministry of Justice).

[25] Asociación Española de Abogados de Familia; Ilustre Colegio de Abogados de Valencia; Colegio de Registradores de la Comunidad Valenciana and Colegio Notarial de Valencia.

[26] Kronofogden.

the Swedish Tax Office[28] as well as various individual contacts by means of personalized and standardized emails.

Czech Republic and Slovakia: The pre-existing contacts within Czech Republic and Slovakia were reactivated, mainly through personalized emails. Various persons and institutions[29] were re-contacted, in particular persons capable of achieving multiplier effects, e.g. those with direct access to the Czech Judicial Network. Moreover, the questionnaire was circulated amongst the members of Czech Association of Family Lawyers. Other personal contacts enabled the distribution amongst different experts specialized in cross-border family and succession matters.

[27] Stockholm, Gothenburg, Malmö and Lund.

[28] Skatteverket.

[29] Czech notary bar; judges in Regional Court of Brno; Slovak Ministry of Justice; Slovak Centre for International Legal Protection of Children and Youth.

C. SAMPLE DESCRIPTION

In total, 1.394 respondents commenced with the questionnaire, approximately half of which completed it in full (699). The partially completed responses (695) range from aborting the questionnaire on its first page to near completion. These responses will accordingly be taken into account as much as possible.

I. GENERAL

Of the participants (1108), approximately two-thirds were female (740), one-third were male (364), while 4 participants indicated that their gender was undetermined (<1%). The number of female participants deviates from the general societal distribution which appears to support the common belief that women are traditionally over-represented in the field of family law.

When it comes to the participants' age, the sample shows a nearly normal distribution (Chart 1).

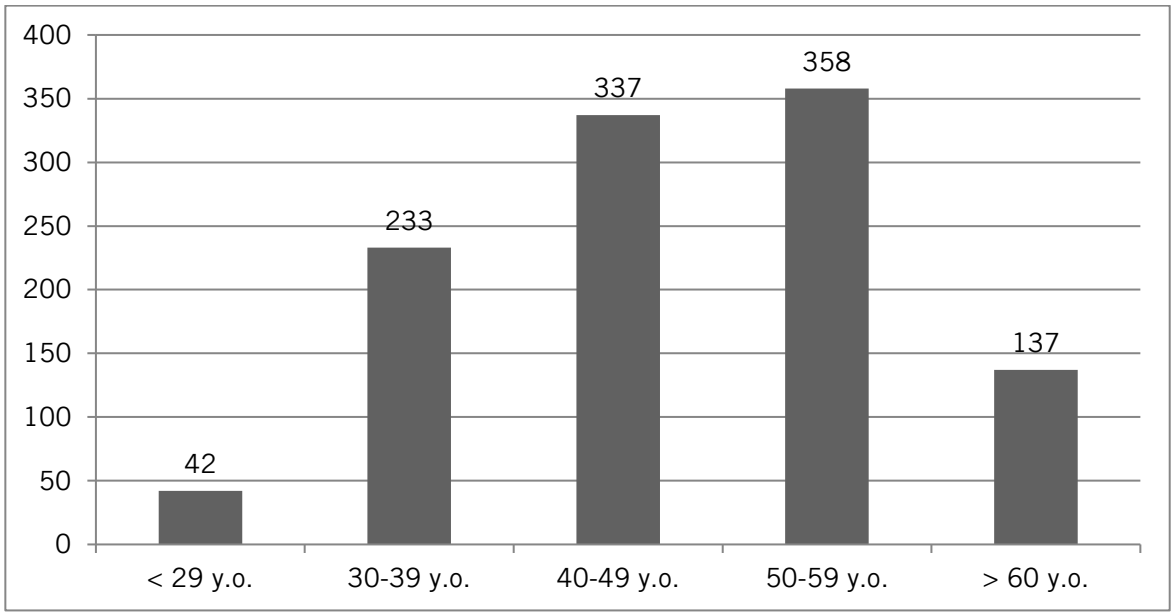

Chart 1: Age
Please indicate your age. (n[30]=1107)

The professional fields with which the participants at least occasionally deal are shown in Chart 2.

[30] n=number of total respondents.

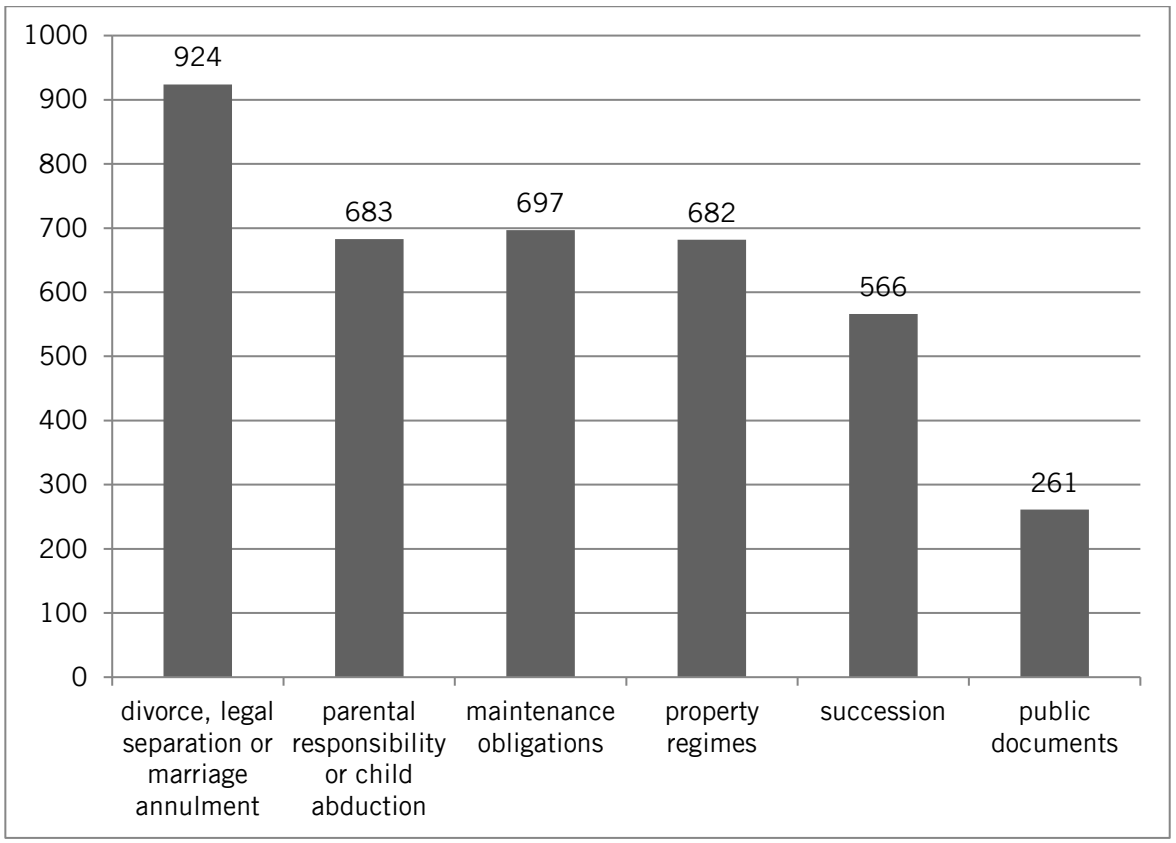

Chart 2: Professional fields
With which of the following field(s) do you at least occasionally deal in your professional activities? (n=1194; multiple answers possible)

II. COUNTRIES AND PROFESSIONS

1. Countries

In view of the fact that the research group was largely dependent on national partners for the distribution of the questionnaire and of the fact that it did not strive for EU-wide distribution, the non-targeted countries are underrepresented. Nonetheless, within the targeted countries, the distribution of respondents appears to be comparatively congruent to the countries' population with a minor exception of Spain. In any event, all these countries have reached relatively high numbers of participants which will enable the comparison between Member States in line with the research hypotheses. The distribution of participants amongst States of predominant professional activity is shown in Chart 3.

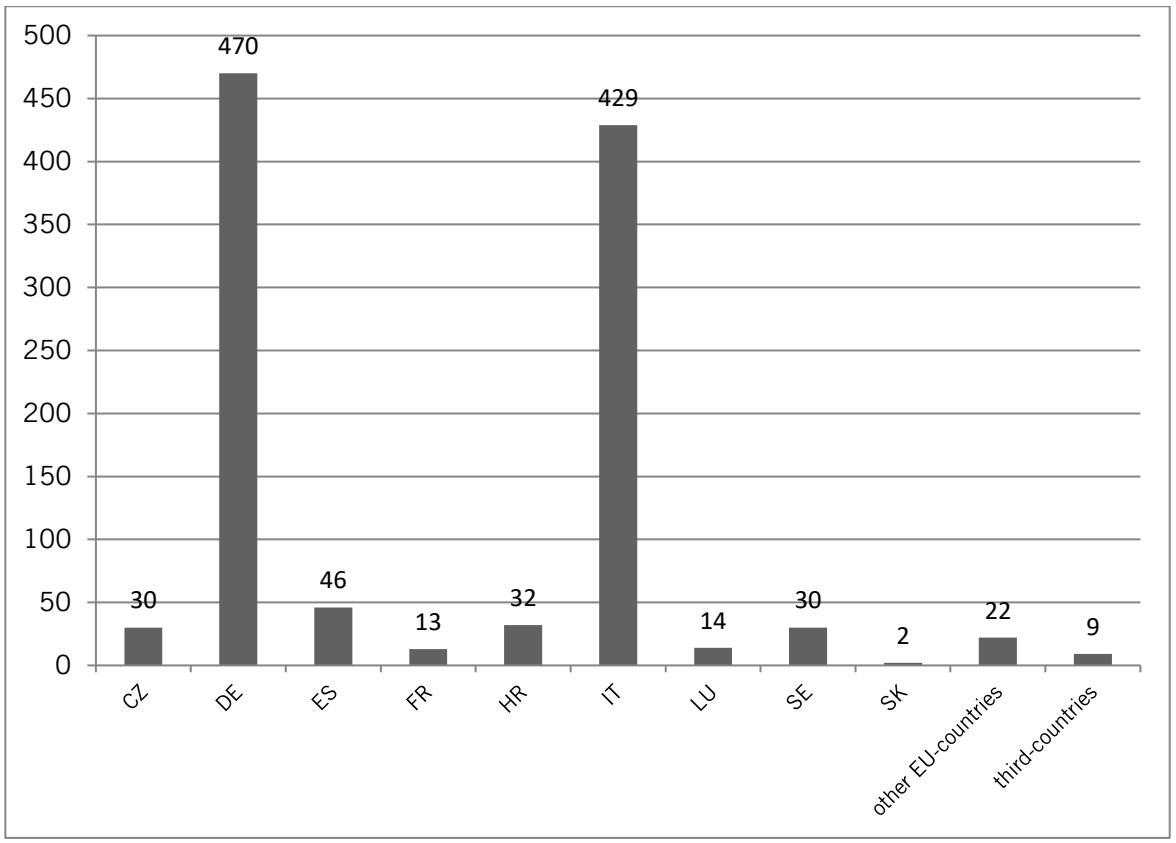

Chart 3: Country of professional activity
Please indicate the country in which you are predominantly professionally active. (n=1097; EU total=1088; other EU-countries: AT (4), BE (1), DK (1), EL (6), LT (2), NL (1), PL (3), UK (4))

2. Professions

The main actors in the judicial process, i.e. the main targeted profession of judges (31%) and lawyers (48%), are adequately represented in the sample making up 79% of the total number of respondents. The other target groups serve an important supplementary role.

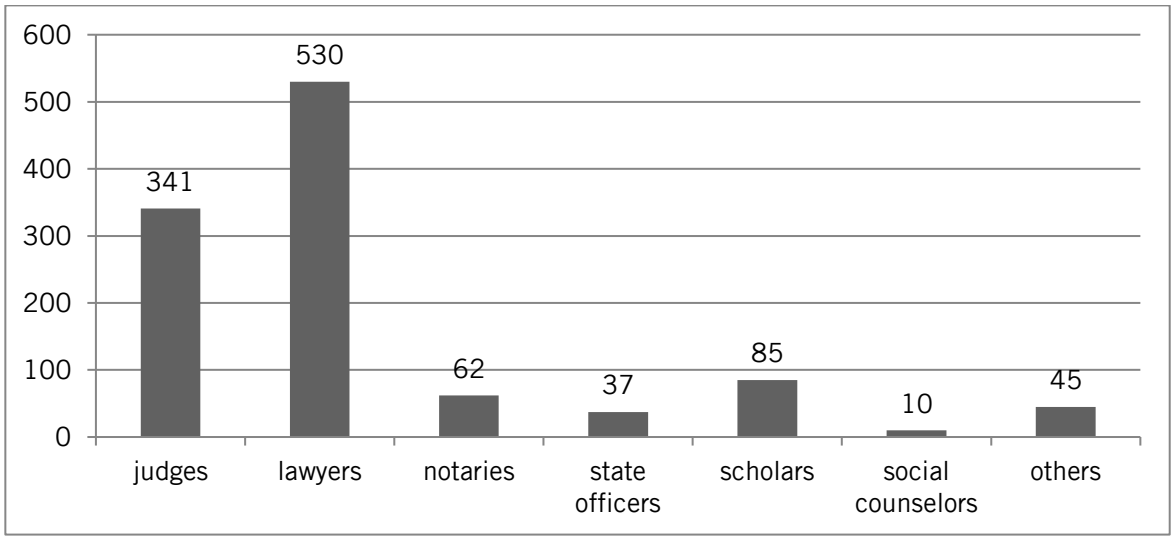

Chart 4: Professions
Pease indicate your main professional occupation. (n=1110; others[31])

[31] Others include honorary judges, tax consultants, notary clerks, mediators, special guardians, trainee lawyers, civil registrars, land registrars, insurance consultants and students.

3. Aggregate countries and professions

In general, the distribution of professions throughout the Member States occasionally strongly deviates. Particularly, when it comes to the relation between judges and lawyers, differences can be observed. In addition, 60 of 62 notaries are predominantly professionally active in Germany.

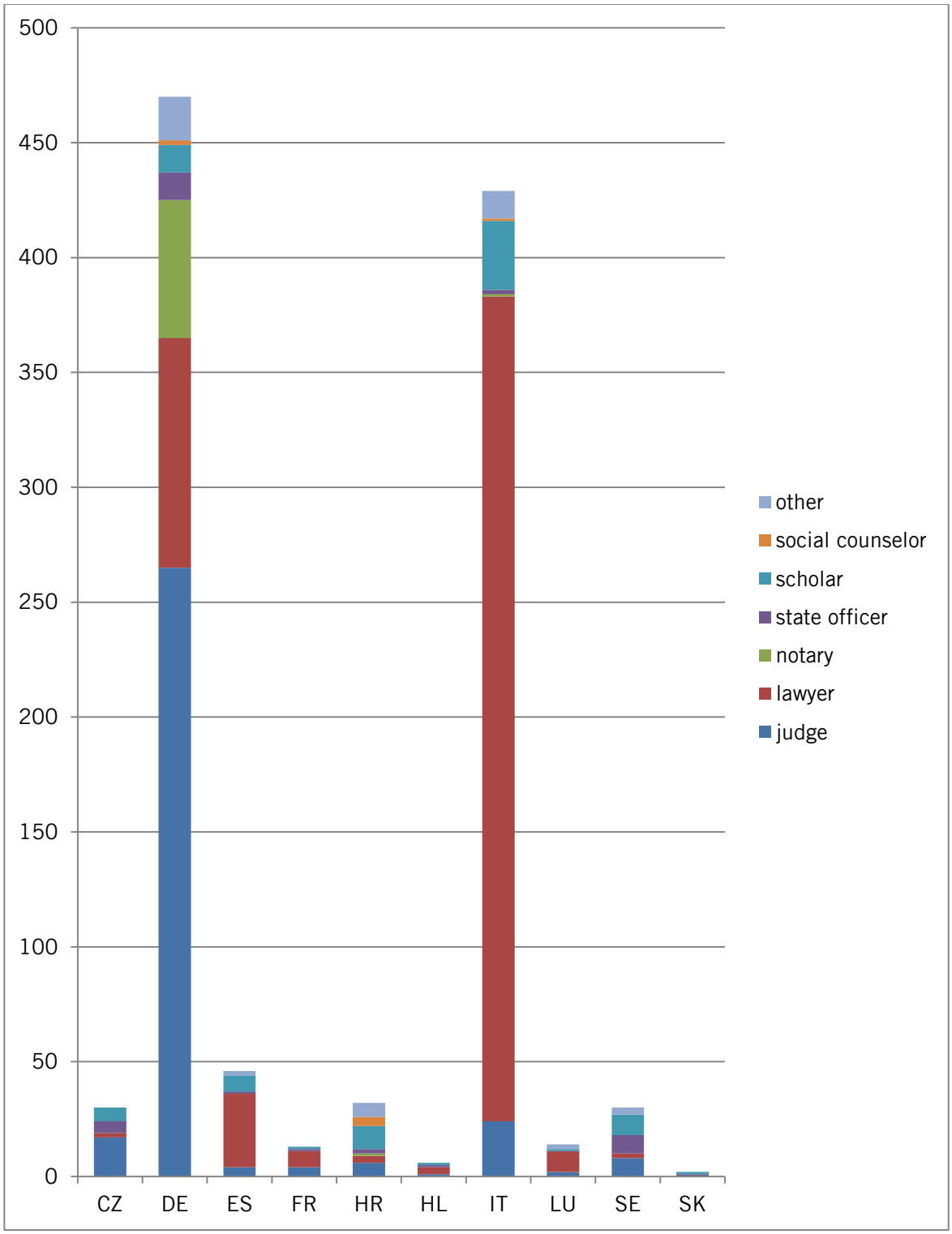

Chart 5: Professions by country
(n=1103; other countries omitted, n*[32]=45)

[32] n*=number of respondents not depicted in the chart.

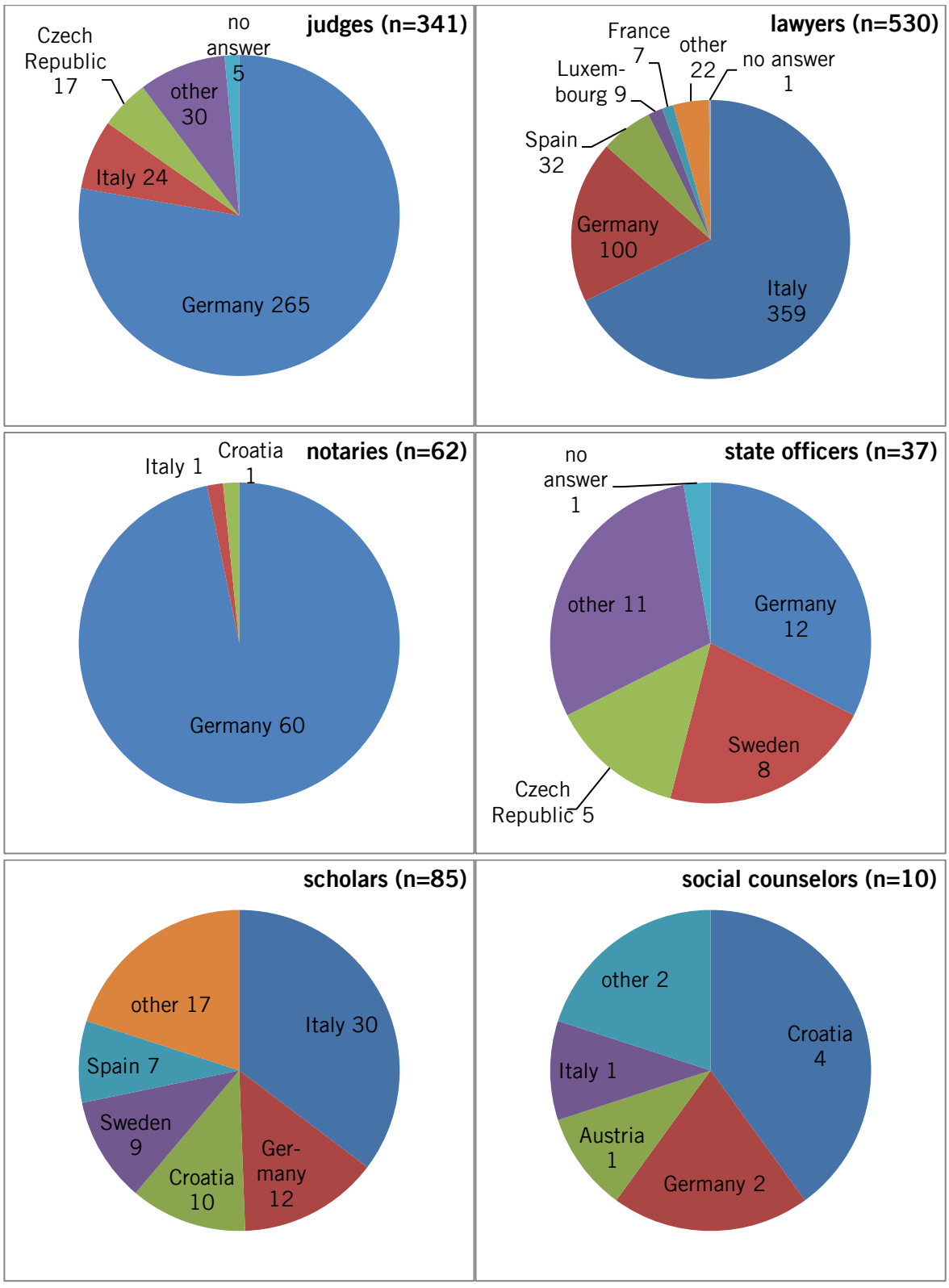

Chart 6: Countries by profession
(n=1110; other professions omitted, n*=45)

D. MAIN FINDINGS

I. FIELDS

This section will discuss the findings along the lines of the fields as established above (cf. B. IV. 3. a)).

1. Divorce, legal separation or marriage annulment

The general European framework on divorce, legal separation or marriage annulment predominantly consists of two instruments, i.e. the Brussels II bis Regulation and the Rome III Regulation. The latter regulation has been adopted in the enhanced cooperation procedure within the meaning of Art. 326 et seq. TFEU. Consequently, the Rome III Regulation is only applicable in participating Member States[33] while Member States which have not participated in the enhanced cooperation still rely on their domestic frameworks in the field of international divorce law.

a) Familiarity

Familiarity with both regulations (Brussels II bis/Rome III)[34] largely coincides as shown in Chart 7 and 8. More than a third of the total respondents claim to have an advanced or excellent understanding (38%/34%), while approximately half of the participants indicated to have a basic understanding (47%/51%). Surprisingly, 13% of the respondents stated to be not acquainted with the instruments even though these were applicable in their state of professional activity.[35]

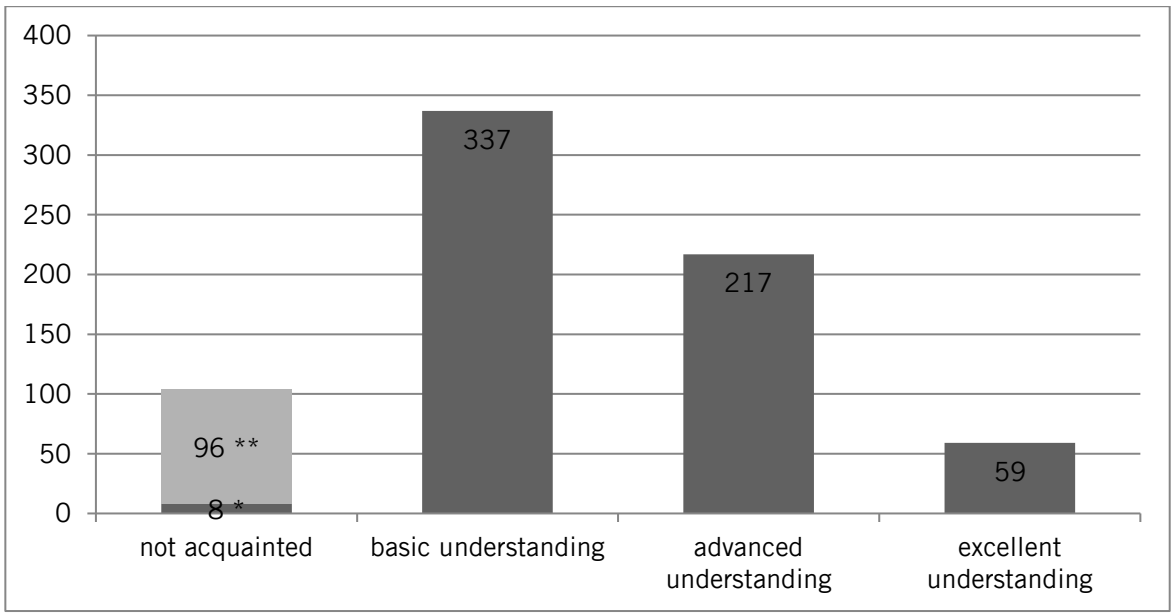

Chart 7: Familiarity Brussels II bis (divorce, legal separation or marriage annulment)
How would you rate your familiarity with the provisions on divorce, legal separation or marriage annulment in the Brussels II bis Regulation? (n=717; *=instrument not applicable in State of professional activity, **=for other reasons)

[33] Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia (21 June 2012); later: Lithuania (22 May 2014), Greece (29 July 2015) and Estonia (11 February 2018).

[34] The following references refer to the instruments in the indicated order.

[35] For the Rome III Regulation in view of its limited geographical scope, the results were corrected in the sense that Member States in which the Regulation is not applicable were not taken into account.

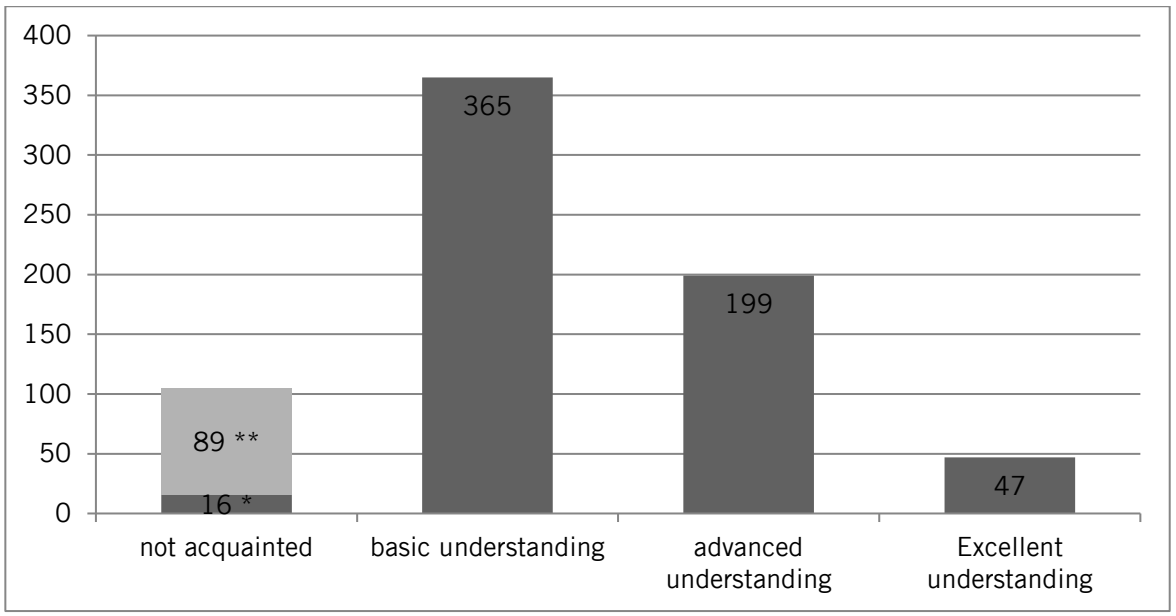

Chart 8: Familiarity Rome III Regulation
How would you rate your familiarity with the Rome III Regulation? (n=716; *=instrument not applicable in State of professional activity, **=for other reasons)

In general, judges (248/248) ranked slightly above average. 42%/39% claim to have at least an advanced understanding while 55%/56% merely have a basic understanding. By contrast, lawyers (340/340) ranked below average. 31%/27% indicated an advanced or better understanding whereas 21%/20% were unacquainted with the instruments. Academics (54/53) rank highly above average, with 96%/77% indicating to have an advanced or excellent understanding.

b) Private divorce

Prior to and still after the *Sahyouni*-decision[36], in which the CJEU held that divorces resulting from a unilateral declaration made by one of the spouses before a religious court are not covered by the Rome III Regulation, private divorces have been extensively discussed in the scholarly literature.[37] Against this background, the questionnaire aimed at gaining insight into the regularity with which respondents encounter private divorces in practice. The results are shown in Chart 9. 56% of the respondents have never encountered private divorces, while 16% have encountered these hardly ever, 13% seldom and 15% occasionally. Differences between countries can be observed. Particularly in Italy and Spain, private divorces appear to play a greater role. In these countries, merely 36%/35% have never encountered private divorces, while in Germany and the Czech Republic 67%/79% indicated to have not come across such divorces in practice.

[36] CJEU 20.12.2017, C-372/16 – *Sahyouni v Mamisch*.

[37] Cf. inter alia *Pintens*, in: Magnus/Mankowski (Eds.), European Commentaries on Private International Law, Brussels IIbis Regulation (2017), Art. 1 note 4 et seq.

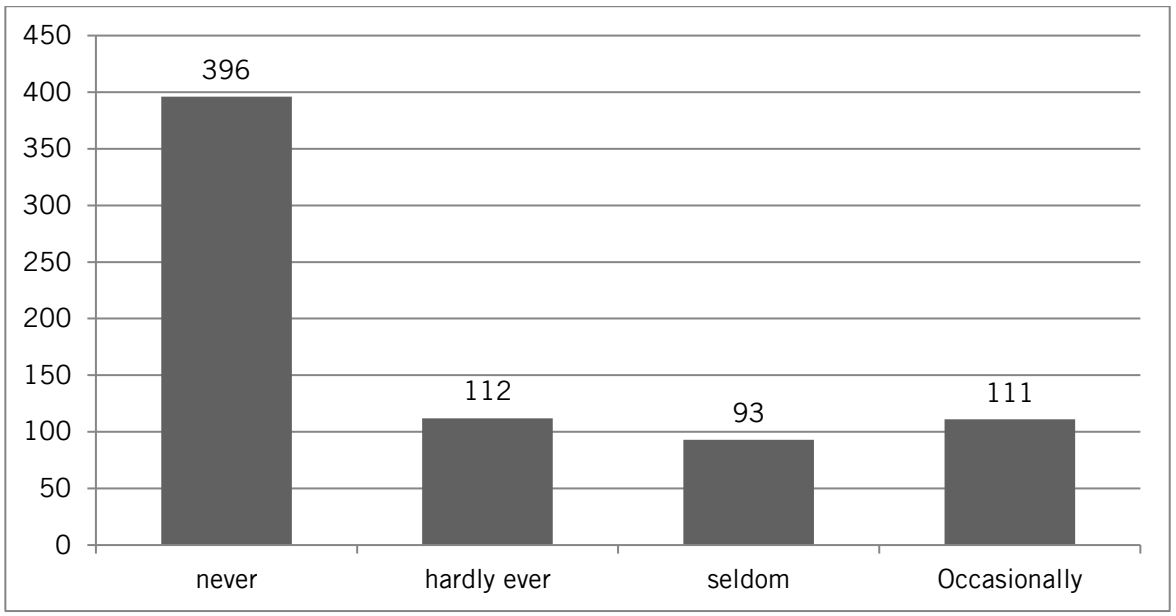

Chart 9: Private divorces in practice
During your professional activities, how often have you encountered private divorces? (n=712)

When it comes to the consequences of the *Sahyouni*-decision, legal uncertainty existed as to whether various forms of private divorces fall within the scope of the Brussels II bis Regulation and/or the Rome III Regulation. Against this background, the questionnaire endeavored to explore whether these instruments are applied to private divorces in practice. The results are shown in Chart 10.

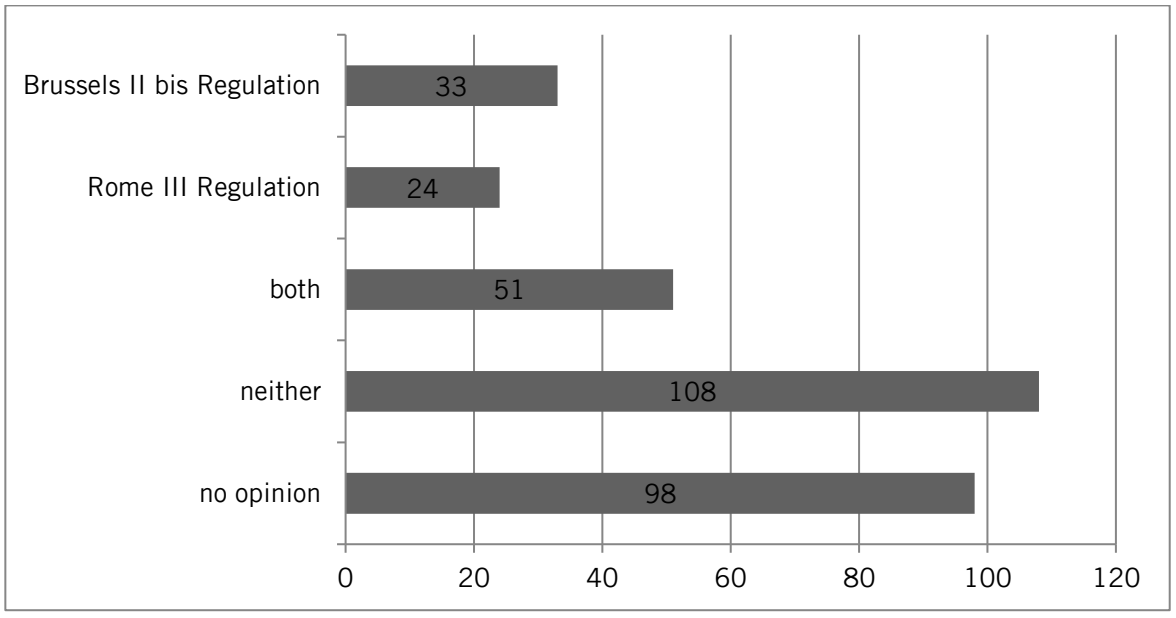

Chart 10: Private divorces (instruments applied)
Private divorces: Were the Brussels II bis Regulation and/or Rome III Regulation applied? (n=314)

The table indeed mirrors the legal uncertainty. One-third of the respondents answered that neither of the regulations was applied while another third observed that at least one of the regulations was applied. Yet another third were unable to provide a conclusive answer. No relevant differences can be observed amongst professions and throughout the Member States. Consequently, no common practice appears to have been established within the EU with regard to private divorces.

c) *Forum* and *ius*

In European family law, habitual residence is repeatedly employed as a connecting factor for jurisdiction and applicable law alike. While not aiming at a full synchronization, the current framework is likely to lead to an overlap of jurisdiction and applicable law. The notion of *forum* equals *ius* goes back to reasons of practicality and efficiency. Against this background, the questionnaire examines whether forum and applicable law indeed coincide in practice (Chart 11).

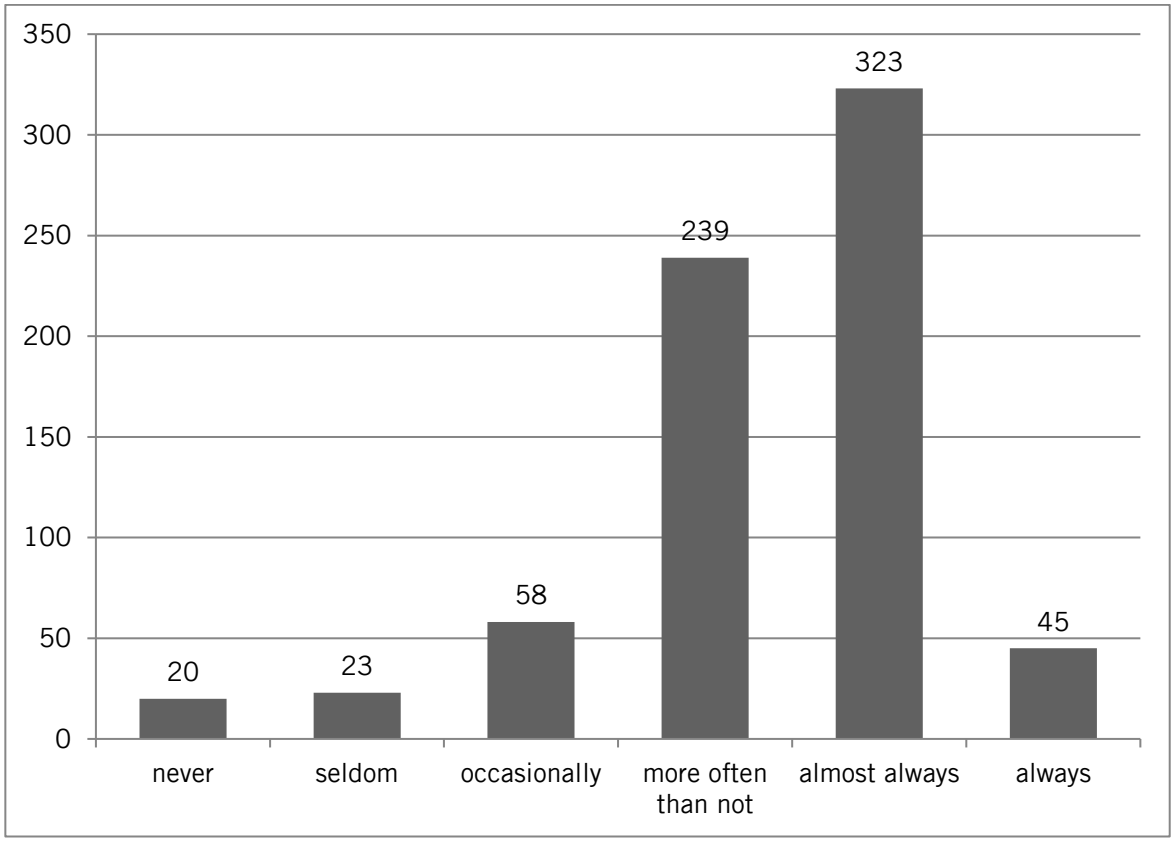

Chart 11: *Forum* equals *ius* in divorce matters
In your experience, how often do forum and applicable law coincide in divorce matters? (n=708)

The general results show that according to 52% of the total respondents, forum and applicable law coincide always or almost always, while an additional 34% indicated that this is the case more often than not. A mere 14% claims that forum and applicable law never, seldom or only occasionally overlap. In particular, German judges stand out: according to 83%, forum and applicable law almost always or always coincide while this number for the average judge is 75%. In contrast, according to only 40% of the lawyers this situation arises always or almost always. These differences between professions are surprising as the numbers should approximately match for logical reasons (all professionals are involved in the same proceedings). When it comes to judges, the results could potentially be indicative of the so-called homeward trend[38].

To the extent that *forum* and *ius* indeed coincide, according to 79% of the total respondents such an overlap is the result of the objective connection. The other 21% indicate that this alignment is only brought about by the parties by means of choice of law.

[38] Cf. inter alia *Fentiman*, Foreign Law in English Courts (1998), p. 29 et seq.

Pursuant to Art. 5 (1) and (2) Rome III Regulation, choice of law agreements in favor of the *lex fori* or another law provided for by these provisions can be concluded at any time up until the commencement of proceedings. In addition, if the law of the forum provides for such a possibility, the spouses can accordingly designate the applicable law even over the course of the proceedings (Art. 5 (3) Rome III Regulation). Therefore, the questionnaire explores at which stages (*ex ante*, before or during proceedings) respondents encountered consensual choices of law. The results are shown in Chart 12.

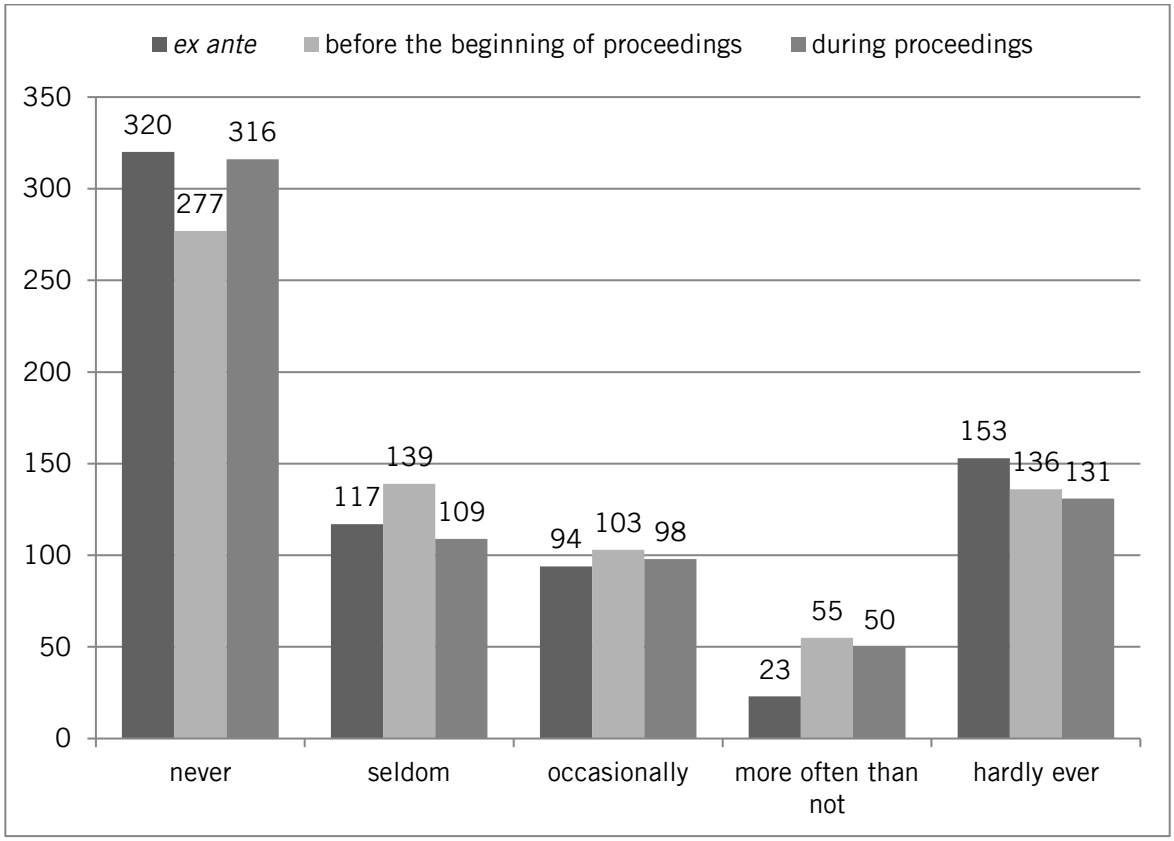

Chart 12: Choices of law in divorce matters
During your professional activities, how often have you encountered choices of law? (n=707/710/704)

80% of the respondents never, hardly ever or seldom encountered choices of law. When it comes to the stage in which a choice of law is made, no relevant differences can be observed. One exception in terms of professions can be observed: 68% of notaries indicated to have come across ex ante choices of law occasionally or more often than not. This observation can likely be explained by a notaries' practice of inserting choice of law clauses intro pre-nuptial agreements.

d) Recast Proposal

In 2016, the European Commission presented a draft proposal for a Brussels II bis Recast[39] which aims at solving practical issues in the field of parental responsibility as well as in matters relating to divorce. 86% of respondents were unfamiliar with the Proposal, which can be considered to be largely unknown in practice. 6% of respondents stated that in their opinion the Proposal will indeed solve some of the

[39] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM (2016) 411 final.

difficulties regarding divorce, legal separation or marriage annulment arising from the Brussels II bis Regulation, while 8% was of the opposite opinion.

The main current practical difficulties identified by the respondents are private divorces (17) and forum shopping in combination with the impermissibility of choice of court agreements (9). Respondents held that the Proposal addresses only the former but neglects the latter. When it comes to private divorces, the respondents acknowledge the Proposal's solution, yet it is dismissed on the merits by German respondents (9) who fear the circumvention of the relatively strict German rules on divorce. As one respondent puts it:

> *„The procedural recognition of private divorces is to be declined from a German perspective. […] There is a risk that the spouses/partners circumvent the German divorce requirements by foreign private divorces which are not or hardly scrutinized by the State."*[40]

2. Parental responsibility or child abduction

The instruments governing parental responsibility and child abduction include in particular the Brussels II bis Regulation, the 1980 Hague Child Abduction Convention and the 1996 Child Protection Convention.

a) Familiarity

When it comes to the familiarity with the provisions of the Brussels II bis Regulation on parental responsibility (Chart 13), 64% of the total respondents have a basic understanding of the regulation at best while the other 36% have at least an advanced understanding.

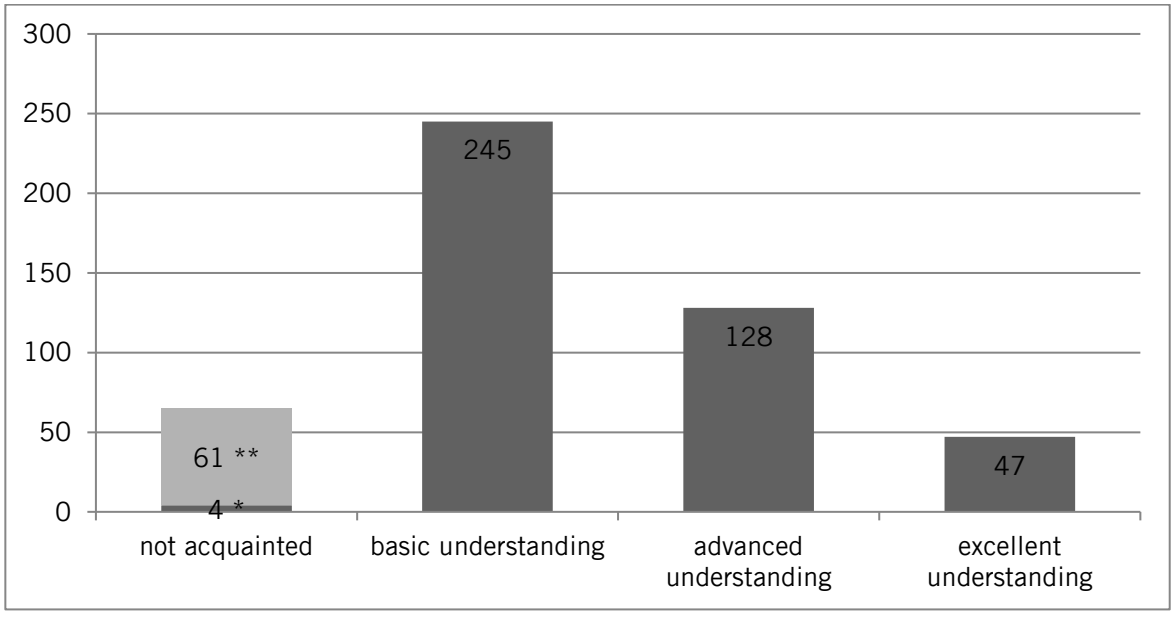

Chart 13: Familiarity Brussels II bis Regulation (parental responsibility)
How would you rate your familiarity with the provisions on parental responsibility in the Brussels II bis Regulation? (n=485; *=instrument not applicable in State of professional activity, **=for other reasons)

[40] „Die verfahrensrechtliche Anerkennung von Privatscheidungen ist aus deutscher Sicht abzulehnen. […] Es droht […] die Gefahr, dass sich Ehegatten/Lebenspartner durch Abschluss privater, staatlich nicht bzw. kaum überprüfter Scheidungsvereinbarungen im Ausland den Scheidungsvoraussetzungen des deutschen Rechts entziehen."

b) Current framework

Due to the multitude of instruments and their diverging scopes vis-à-vis different States, the overall framework is characterized by a high degree of complexity. This is mirrored by the fact that 42% of total respondents indicated to have no opinion on the interplay between the various instruments. Of the remainder shown in Chart 14, 43% rated the interplay on a five increment scale ranging from poor to excellent, to be poor or next to poor. Differences across professions can be observed. While approximately two-thirds of lawyers rate the interplay to be poor or next to poor and one-third rate it to be average or better, these proportions are reversed for judges.

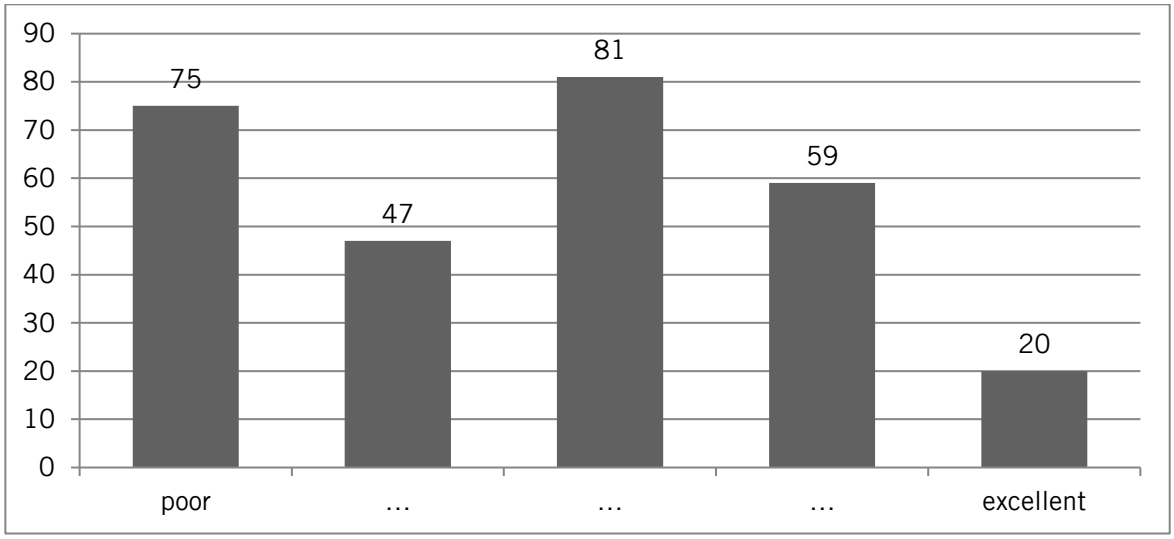

Chart 14: Framework of parental responsibility and child abduction
How would you rate the overall interplay between the various instruments in the field of parental responsibility and child abduction? (n=485; no opinion omitted, n*=203)

Subsequently, 129 respondents provided comments on the main difficulties in the field of parental responsibility and child abduction. In view of the aforementioned multitude of instruments, 24 respondents criticized the complexity of the legal framework and the lack of knowledge amongst those involved in the substance matters governed by the various instruments. Further general difficulties include jurisdiction (9), both internationally as well as nationally and between various authorities (e.g. courts, central authorities, child services and police), the cooperation and communication between courts and Central Authorities alike (16) and particularly the enforcement of decisions (17). In addition, participants mentioned various specific problems, such as courts falsely assuming jurisdiction, while such a ruling cannot be corrected immediately pursuant to Art. 24 Brussels II bis Regulation (6) or (deliberately created) lengthy proceedings which can ultimately lead to a shift in the child's habitual residence and call for a different assessment of the best interest of the child (5).

c) Mediation *de lege ferenda*

In the recent past, mediation in child abduction cases has been discussed extensively as a non-formal dispute resolution mechanism. Of the 482 respondents, 31% welcomed while 20% opposed a more extensive use of mediation in child abduction cases. The remainder (49%) had no opinion on the matter. Apparent differences between Northern European on the one hand and Eastern as well as Southern European States on the other hand can be observed (Chart 15). The former

predominantly oppose while the latter are more positive about a more extensive use of mediation.

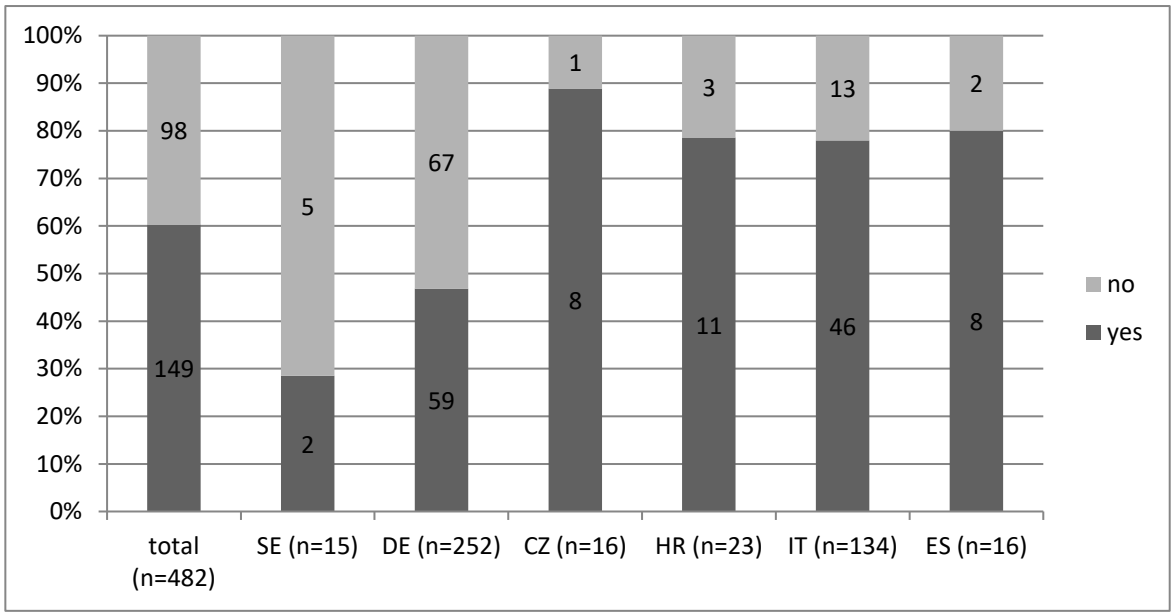

Chart 15: Mediation in child abduction cases
In your opinion, is the more extensive use of mediation in child abduction cases to be welcomed? (n=482; no opinion omitted, n*=235)

When asked to comment on the matter, it was often put forward that disputes settled by mutual agreement are generally preferable to court decisions (38), for example because parents can achieve more flexible solutions and are more likely to solve disputes permanently. In addition, mediation is often said to be in the best interest of the child (25). While some indicated it is faster (15), others on the contrary claimed mediation is slower (18). Opponents feared that mediation could be employed as a delay strategy leading to irrevocable factual situation (12). Therefore, some respondents suggested that mediation be used only after an initial decision on the return of the child (9). On a more general note, some assume that the conflict between parents especially in cases of child abduction is likely to be irreconcilable (21) and that mediation is subject to many factual constraints (9), such as distance and non-traceability of the abducting parent. Finally, as a matter of principle, respondents stated that child abduction is a crime and should therefore not be subject to mediation (13). As one respondent puts it:

> *"Mediation in child abduction? Child abduction is a crime! How can one mediate?"* [41]

d) Recast Proposal

The Brussels II bis Recast Proposal predominantly deals with cross-border issues in the field of parental responsibility and child abduction. 85% of the respondents (415) were unfamiliar with the Proposal, while 12% indicated that the Proposal will indeed solve some of the current difficulties regarding parental responsibility and child abduction arising from the Brussels II bis Regulation. Merely 3% did not see such an improvement. In general, the respondents welcomed the new provisions. Therefore, it

[41] "Mediation bei Kindesentführung? Kinderentführung ist eine Straftat! Was soll man da bitte mediieren?"

appears that modifications in the field of parental responsibility and child abduction can count of more approval than those on divorce matters (cf. D. I. 1. d)).

3. Maintenance obligations

The framework of international maintenance law primarily consists of the Maintenance Regulation which refers to the 2007 Hague Maintenance Protocol for the designation of the applicable law (cf. Art. 15 Maintenance Regulation).

a) Familiarity

When it comes to the familiarity of the respondents with the Maintenance Regulation and the 2007 Hague Maintenance Protocol (Chart 16 and 17), 75%/81% had a basic understanding at best, which includes 32%/43% being entirely unacquainted with the instruments. Judges rank below average with 84%/87% having a basic understanding at best and 36%/54% being entirely unacquainted with these instruments. By contrast, 13%/19% of the scholars respectively indicate to have a basic understanding; none of them is unacquainted.

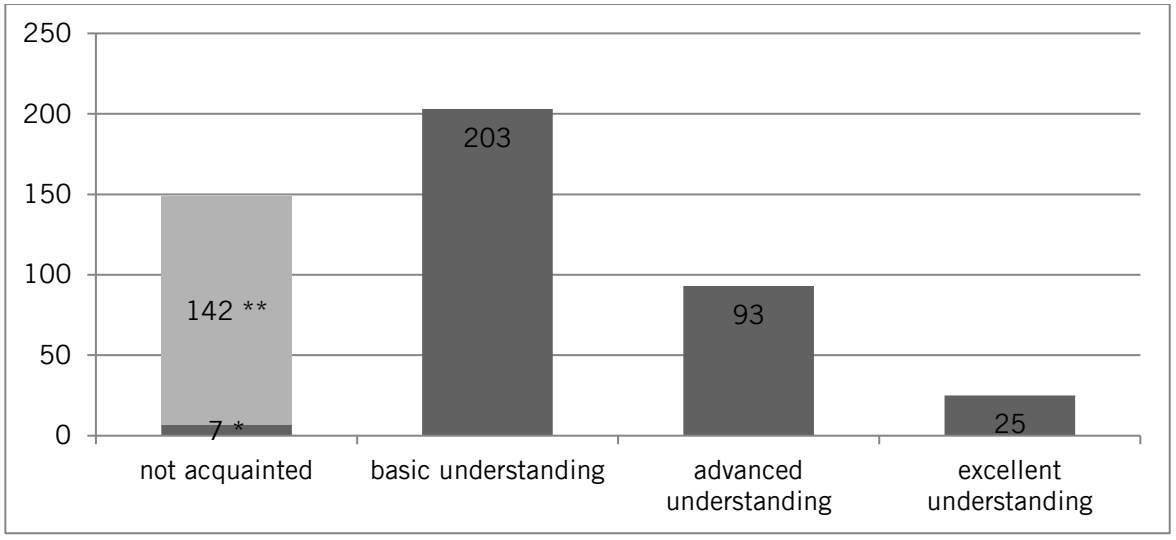

Chart 16: Familiarity Maintenance Regulation
How would you rate your familiarity with the Maintenance Regulation? (n=470; *=instrument not applicable in State of professional activity, **=for other reasons)

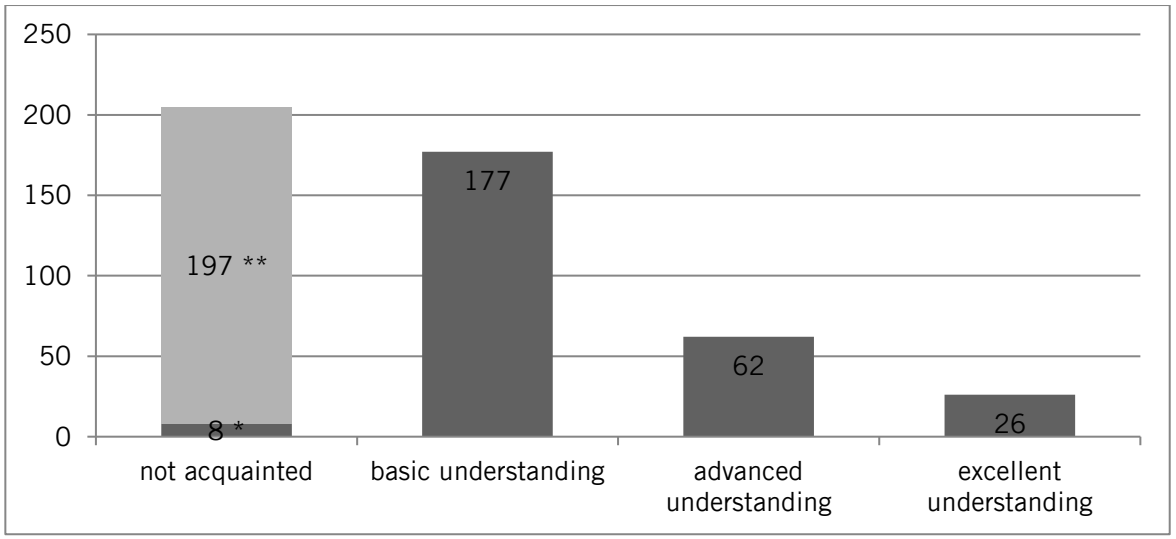

Chart 17: Familiarity 2007 Hague Maintenance Protocol
How would you rate your familiarity with the 2007 Hague Maintenance Protocol? (n=470; *=instrument not applicable in State of professional activity, **=for other reasons)

The subsequent question aims at assessing the actual understanding in practice of the interplay between the Maintenance Regulation and the 2007 Hague Maintenance Protocol. The following question was posed to the participants: "In your experience, when dealing with divorce, parental responsibility and/or property regimes on the one hand, and maintenance obligations on the other hand in the same proceedings, which law have authorities applied to maintenance obligations?". The research group's hypothesis was that in cases in which several matters are dealt with simultaneously, e.g. divorce proceedings combined with maintenance for spouses and children, courts prefer to apply the same law to all matters. However, pursuant to Art. 15 Maintenance Regulation, the law applicable to maintenance obligations is to be assessed independently and in accordance with the 2007 Hague Maintenance Protocol. The results show that only 27% opted for this correct answer (Chart 18).

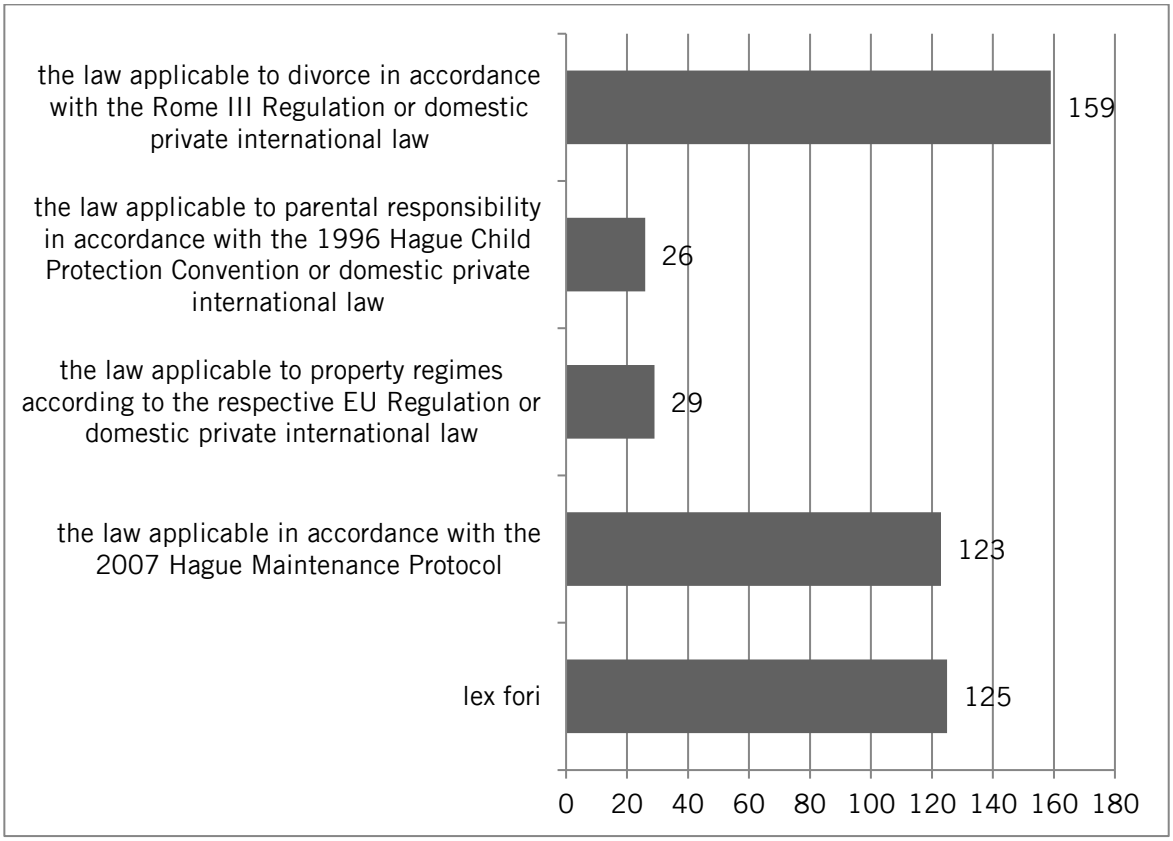

Chart 18: Interplay Maintenance Regulation and 2007 Hague Maintenance Protocol
In your experience, when dealing with divorce, parental responsibility and/or property regimes on the one hand, and maintenance obligations on the other hand in the same proceedings, which law have authorities applied to maintenance obligations? (n=470)

b) Central Authorities

The system of Central Authorities within the meaning of the Maintenance Regulation is highly specialized and not all practitioners are likely to have been confronted with it. Indeed, 45% of the total respondents had no opinion on the system's functioning. Of the remaining respondents (Chart 19), 73% rated the system to be average or better on a five-increment scale ranging from poor to excellent. Judges are more positive about the system of Central Authorities as 91% rated it to be average or better. In contrast, only 51% of lawyers were of that opinion.

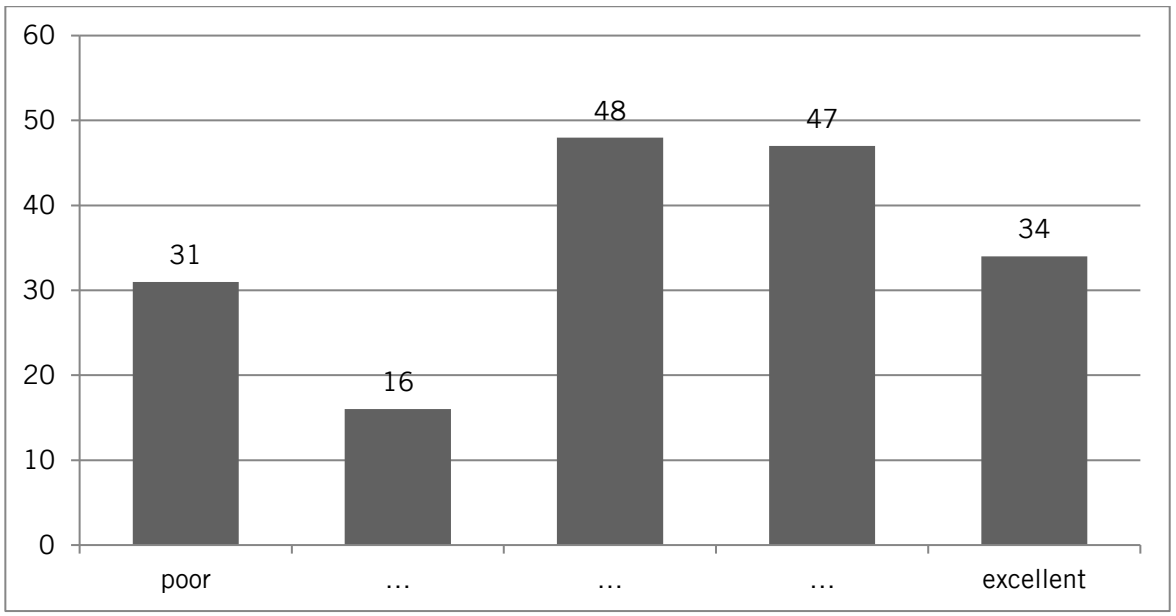

Chart 19: Functioning Central Authorities
How would you rate the functioning of the system of Central Authorities within the meaning of the Maintenance Regulation? (n=320; no opinion omitted, n*=144)

Subsequently, respondents were invited to indicate the main difficulties of the current system of Central Authorities. Participants mentioned as main difficulties the practical implementation of the system[42] (13), the duration of proceedings (9) and the cooperation between Central and other authorities (9).

4. Property regimes in marriage and registered partnerships

The regulations on property regimes in marriage and registered partnerships were adopted within the enhanced cooperation procedure and became applicable in the participating Member States[43] on 29 January 2019, i.e. during the time period in which the survey was conducted. As is shown in Chart 20, 57% of the respondents had not yet familiarized themselves sufficiently with these instruments or wrongly indicated that the instruments were not applicable in their State of professional activity[44]. 76% of judges are entirely unacquainted with these instruments.

[42] Such as bureaucracy and lack of personal and financial resources.

[43] Belgium, Bulgaria, Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland, Sweden and Cyprus.

[44] In fact, these regulations were indeed applicable in their respective Member State.

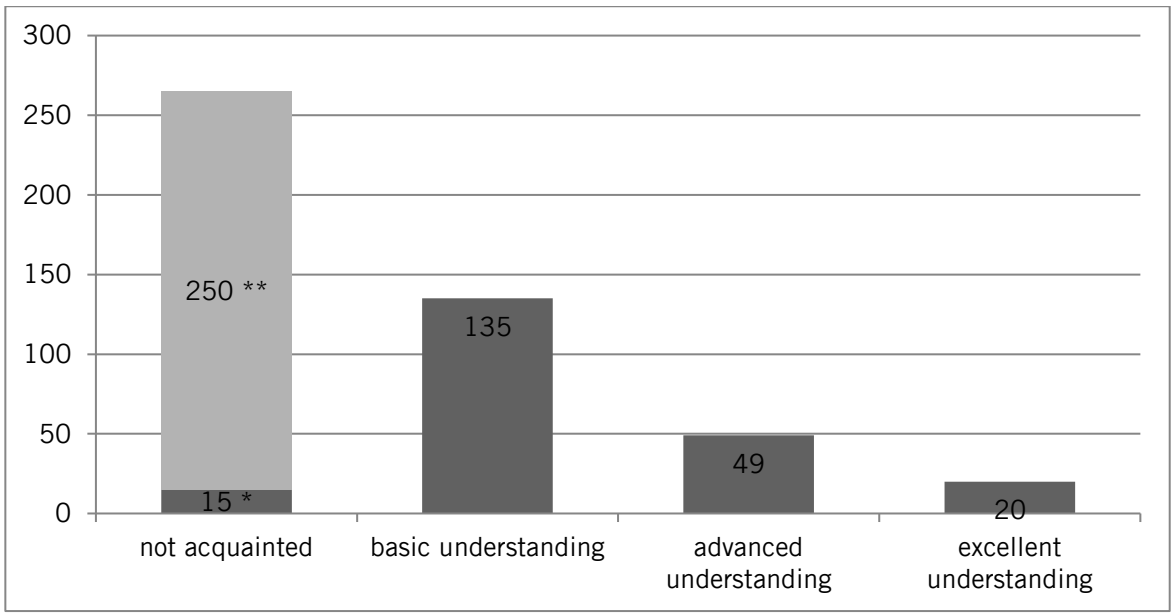

Chart 20: Familiarity Regulations on Property Regimes
How would you rate your familiarity with the Matrimonial Property Regimes Regulation and the Regulation on Property Consequences of Registered Partnerships (applicable as of 29 January 2019)? (n=469; *=instrument not applicable in State of professional activity, **=I have not familiarized myself sufficiently with these instrument)

The fact that many respondents were unacquainted may indicate that professionals indeed do not prepare themselves proactively. Consequently, in practice, new regulations are unlikely to sink in before the occurrence of actual cases.

For those who had at least a basic understanding of the regulations (204), Chart 21 shows the manner in which these respondents familiarized themselves with the regulations.

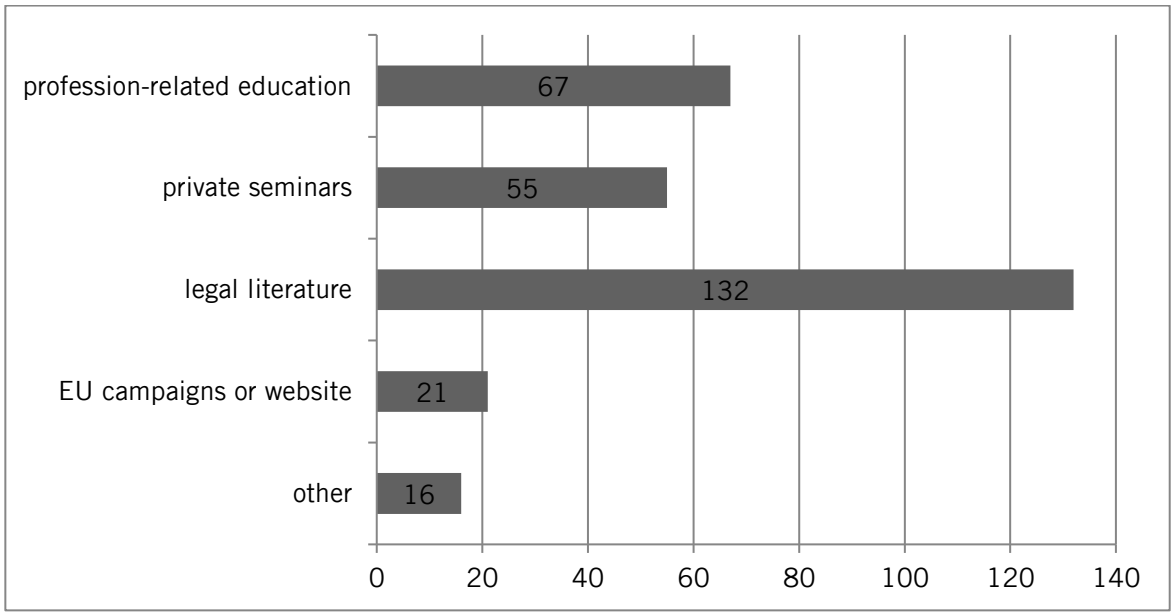

Chart 21: Familiarization Regulations on Property Regimes
How did you familiarize yourself with the new Regulations on Property Regimes? (multiple answers possible; other[45])

[45] Others include “by doing”, general internet research and “reading the original text”.

5. Succession

The European framework of private international law in succession matters predominantly consists of the Succession Regulation, which became applicable in its entirety on 17 August 2015.

a) Familiarity

As can be derived from Chart 22, 60% of the respondents indicated to have a basic understanding of the Succession Regulation at best while 40% rated their understanding to be advanced or excellent. The 48 notaries rank highly above average as 77% claimed to have an advanced or excellent understanding. This can likely be linked to their extensive involvement in most stages of succession matters, such as in the drafting of testaments and execution of last wills. When it comes to lawyers (166), by contrast, merely 23% indicated to have such an understanding.

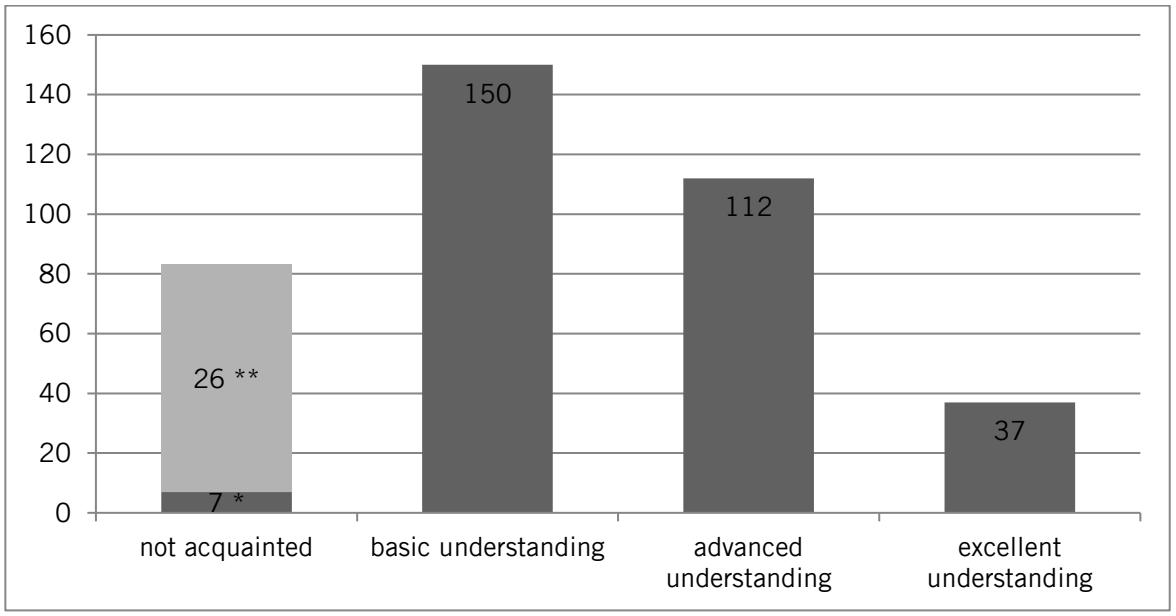

Chart 22: Familiarity Succession Regulation
How would you rate your familiarity with the Succession Regulation? (n=382; *=instrument not applicable in State of professional activity, **=for other reasons)

b) Habitual residence

The notion of habitual residence in European private international law in family and succession matters has been much discussed in the literature.[46] While some advocate a unitary interpretation for all fields of law, others differentiate between the several instruments of European private international law. When it comes to succession law, however, recitals 23 to 25 of the Succession Regulation explicitly mention various additional criteria which have to be taken into account when determining the deceased's last habitual residence. Against this background, the research group attempted to examine whether in practice this notion of habitual residence for the purpose of the Succession Regulation is indeed modified in comparison with other regulations.

[46] Cf. inter alia *Beatge*, Habitual Residence, in: Basedow et al. (Eds.), The Max Planck Encyclopedia of European Private Law, Vol. 1 (2012), p. 813 et seq.; *Weller/Rentsch*, 'Habitual Residence': A Plea for 'Settled Intention', in: Leible (Ed.), General Principles of European Private International Law (2016), p. 171 et seq.

90% of the total respondents (298) answered that they would determine habitual residence within the scope of the Succession Regulation in accordance with the general criteria developed in the case law of the CJEU on other regulations. Only 10% stated to rely on the specific concept of habitual residence of the Succession Regulation and its additional criteria. The results are similar throughout the Member States and across professions. Minor deviations can be observed in Spain as well as amongst scholars and notaries. In Spain, 29% differentiate between the notions, while 25% of scholars do so. Of 47 notaries answering this question, quite on the contrary, only a single one adhered to the specific notion.

The 10% having indicated to determine habitual residence in succession law on the basis of additional factors were asked to name the criteria on which they would predominantly rely. Two respondents explicitly mentioned that they would determine habitual residence in accordance with the recitals of the Succession Regulation. On the other hand, one respondent named as criteria:

> *"professional and economic activity; real property and municipal registration; participation in elections; bank accounts and tax payments"*[47].

These criteria were separately mentioned by other respondents accordingly. However, these factors are generally considered to be of no immediate importance for the purpose of determining the deceased's last habitual residence.[48]

c) Choice of law

Choices of law by the parties in family matters in general and in succession law in particular were highly controversial in many Member States and have received a great amount of scholarly attention. Against this background, the research group endeavored to find out whether practitioners actually encounter choice of law clauses in testaments. The results are shown in Chart 23.

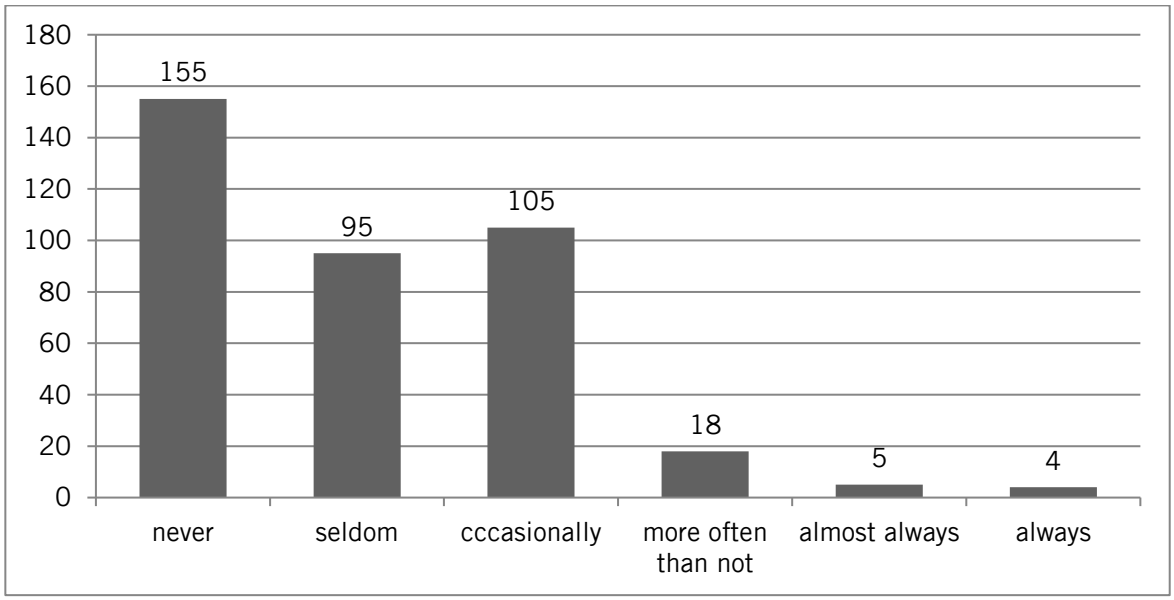

Chart 23: Choice of law clauses in testaments
During your professional activities, how often have you encountered choice of law clauses in testaments? (n=382)

[47] "Actividad profesional y económica; bienes inmuebles y empadronamiento; participación en elecciones; cuentas bancarias y pago de impuestos".

[48] Cf. *Beatge*, Habitual Residence, in: Basedow et al. (Eds.), The Max Planck Encyclopedia of European Private Law, Vol. 1 (2012), p. 814.

Two-thirds of the respondents never or seldom encounter choice of law clauses in testaments, while 7% come across these clauses more often than not. When it comes to respondents never or seldom encountering these clauses, striking differences can be observed for notaries (17%) and judges (83%). These differences could be explained by the general lack of awareness of the possibility of including choice of law clauses in testaments. Those obtaining professional advice, e.g. by notaries, are more likely to include such clauses.

d) European Succession Certificate

The Succession Regulation introduced a European Succession Certificate (ESC) which enables heirs to attest their capacity throughout the EU. Shortly after its introduction, the CJEU decided on several preliminary references regarding the ESC.[49] The questionnaire was interested in gaining insight into practitioners' first experiences with the functioning of the system of the ESC.

Lack of familiarity due to the recent introduction of the ESC is mirrored by the fact that more than half (198 of 382) of the participants indicated to have no opinion on the ESC's functioning. 42% of the remainder shown in Chart 24 rated the functioning on a five increment scale ranging from poor to excellent, to be poor or next to poor, 31% rated it to be average and 27% to be excellent or next to excellent. The distribution is therefore fairly equal with a negative tendency. Major variations throughout the Member States and across professions cannot be observed with the exception of notaries (39) as 57% of them claimed the ESC to function poorly or next to poorly.

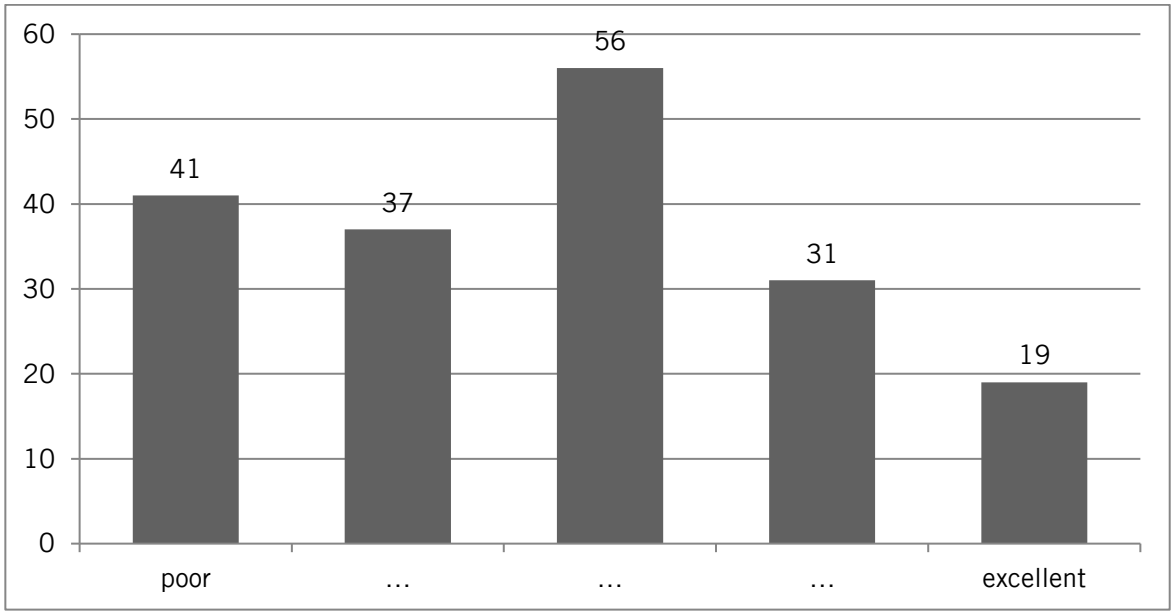

Chart 24: Functioning European Succession Certificate
How would you rate the functioning of the system of the European Succession Certificate? (n=184; no opinion omitted, n*=198)

The respondents were then asked to indicate the main difficulties with the ESC. Most respondents (42) complained about the length, complexity and mandatory completion of all fields of the form. As one German respondent puts it:

[49] CJEU 12.10.2017, C-218/16 – *Kubicka*; CJEU 01.03.2018, C-558/16 – *Mahnkopf*; CJEU 21.06.2018, C-20/17 – *Oberle*.

"Utterly confusing too long form. German Succession Certificate = 1 page European Succession Certificate = 126 pages or more"[50].

Other respondents (24) perceive the limited temporal validity (6 months, cf. Art. 70 (3) Succession Regulation) of the ESC to be a practical downside. More general difficulties include the lack of practical experience amongst users (11) and non-compatibility with existing software and national registries (8).

6. Public documents

The Public Documents Regulation became applicable on 16 February 2019, i.e. during the time period in which the survey was conducted. Of the 195 respondents, 72% had not yet familiarized themselves sufficiently with the regulation or wrongly indicated that the regulation was not applicable in their State of professional activity (Chart 25).

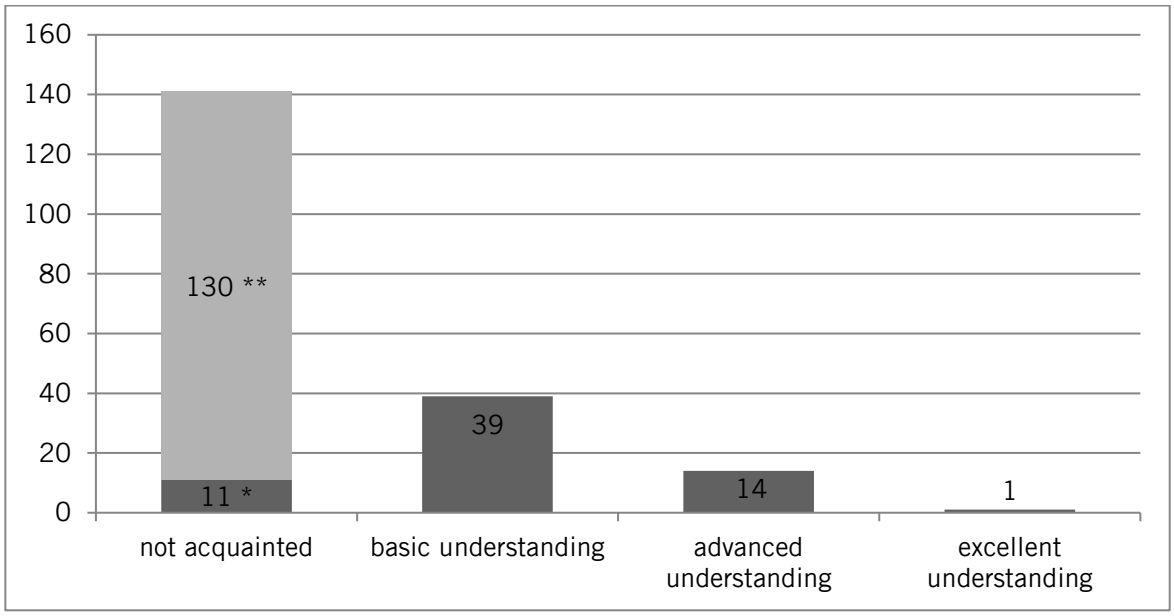

Chart 25: Familiarity 2007 Hague Maintenance Protocol
How would you rate your familiarity with the Public Documents Regulation (applicable as of 16 February 2019)? (n=195; *=instrument not applicable in State of professional activity, **=I have not yet familiarized myself sufficiently with this instrument)

As noted above (cf. D. I. 4.), the fact that many respondents were unacquainted may indicate that professionals indeed do not prepare themselves proactively.

For those who had at least a basic understanding of the regulation (54), Chart 26 shows the manner in which they familiarized themselves with the regulation.

[50] "Völlig unübersichtliches viel zu langes Formular. Deutscher Erbschein = 1 Seite Europäisches Nachlasszeugnis = 126 Seiten oder mehr."

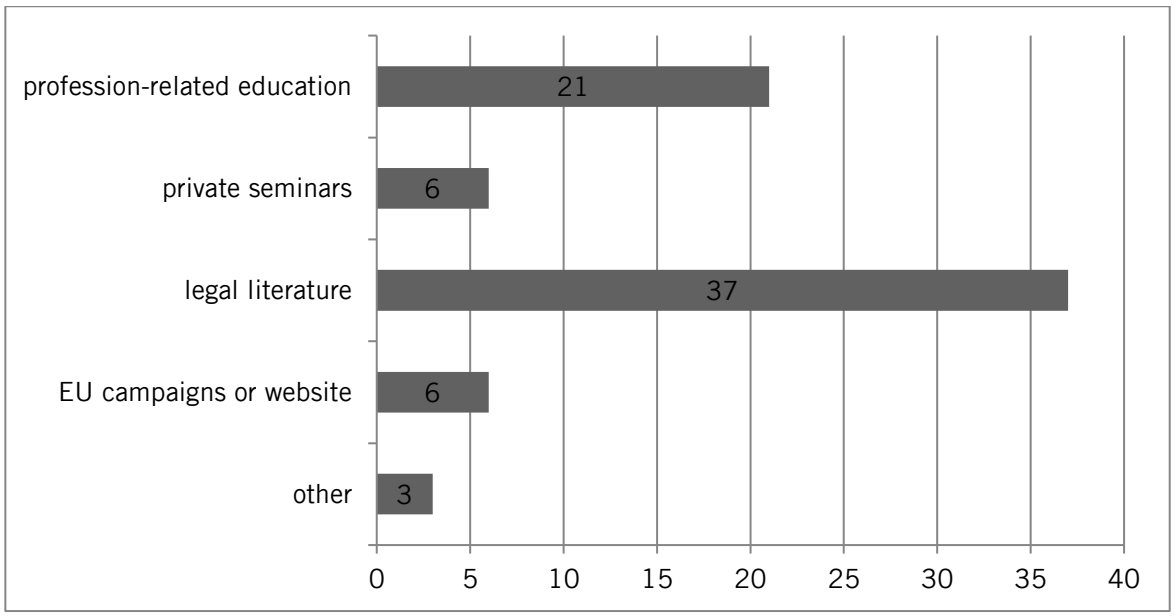

Chart 26: Familiarization Public Documents Regulation
How did you familiarize yourself with the new EU Regulation on Public Documents? (multiple answers possible)

II. CROSS-ANALYSIS

1. Overall familiarity

Chart 27 shows the overall familiarity with the various instruments of European family and succession law which are placed in chronological order of their entry into force. Best-ranking is the Succession Regulation: compared to the other instruments, unacquaintedness is the lowest while advanced and excellent understanding rank highest. Nonetheless, respondents having indicated to possess an advanced or excellent understanding make up less than 50%. All other instruments show remarkably lower values. Particularly the most recent regulations on property regimes and public documents are not (yet) well-known in practice, as not even 15% and 10% respectively indicated to have an advanced or excellent understanding.

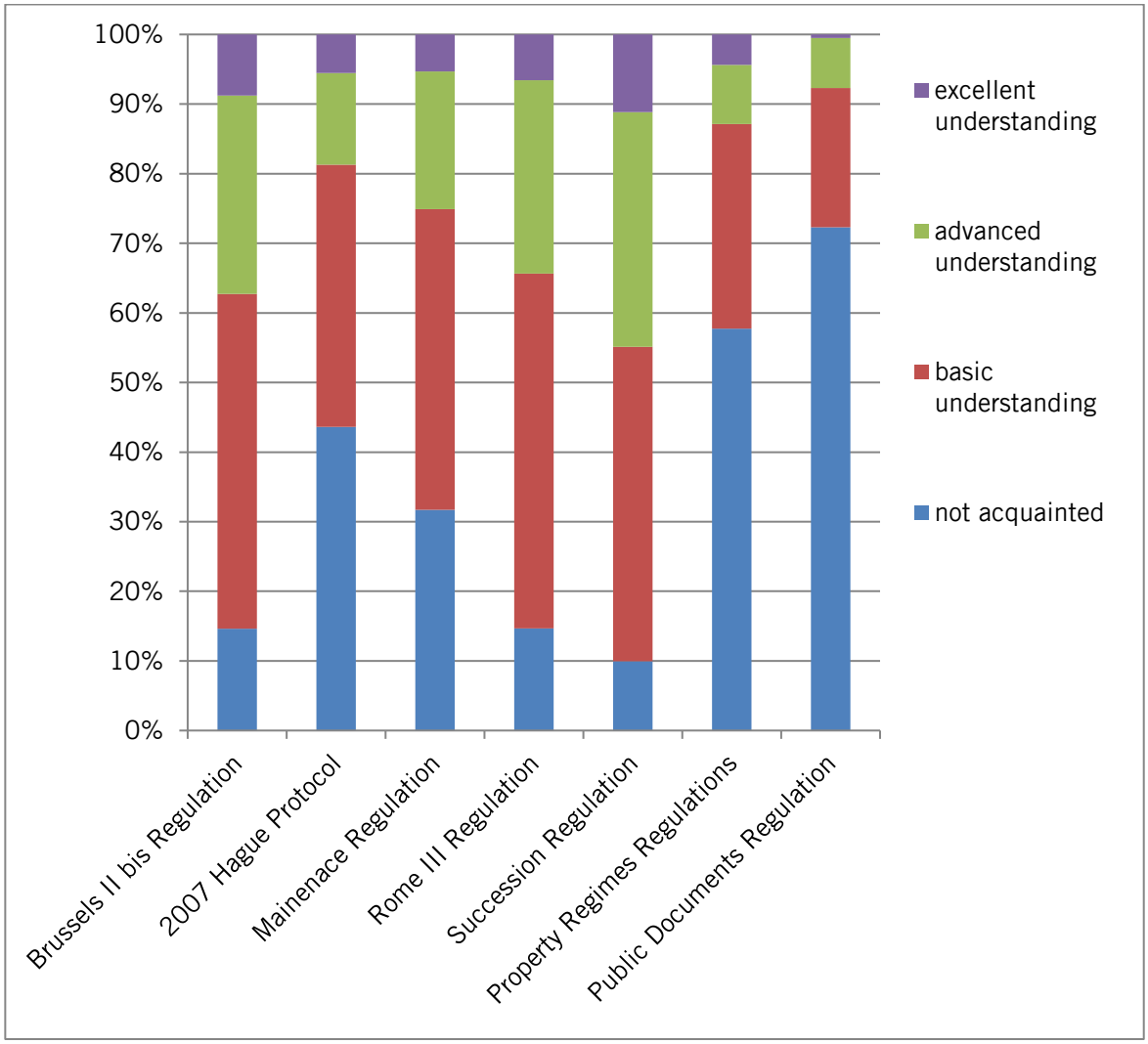

Chart 27: Overall familiarity
Cf. Chart 7, Chart 8, Chart 13, Chart 16, Chart 17, Chart 20, Chart 22 and Chart 25 respectively for individual instruments.

Overall familiarity with the instruments of European family and succession law is therefore fairly poor. To begin with, it has to be borne in mind that the questionnaire was distributed amongst professionals active in the field of family and succession law. In addition, respondents themselves indicated the field(s) with which they deal at least occasionally in their professional activities. Therefore, respondents only answered questions on their familiarity with the pertinent regulation(s). Finally, on a four increment scale, the first two answer-options (i.e. not acquainted and basic understanding) are indicative of a non-existing or merely rudimentary familiarity. It can

be doubted whether such a basic understanding suffices to adequately deal with practical exigencies. Rather, an advanced or excellent understanding is likely to be a prerequisite for legal counseling and the application of the law. Against this background, it cannot only be expected that respondents who are professionally active in the various fields have at least heard of the relevant instruments but rather they can be expected to be thoroughly acquainted with and possess a profound understanding of these instruments. This is particularly true for judges as most continental European jurisdictions adhere to the principle of *iura novit curia*. However, as shown in Chart 28, judges rank below average when it comes to the three most recent regulations which can again be indicative of the fact that judges do not prepare proactively.

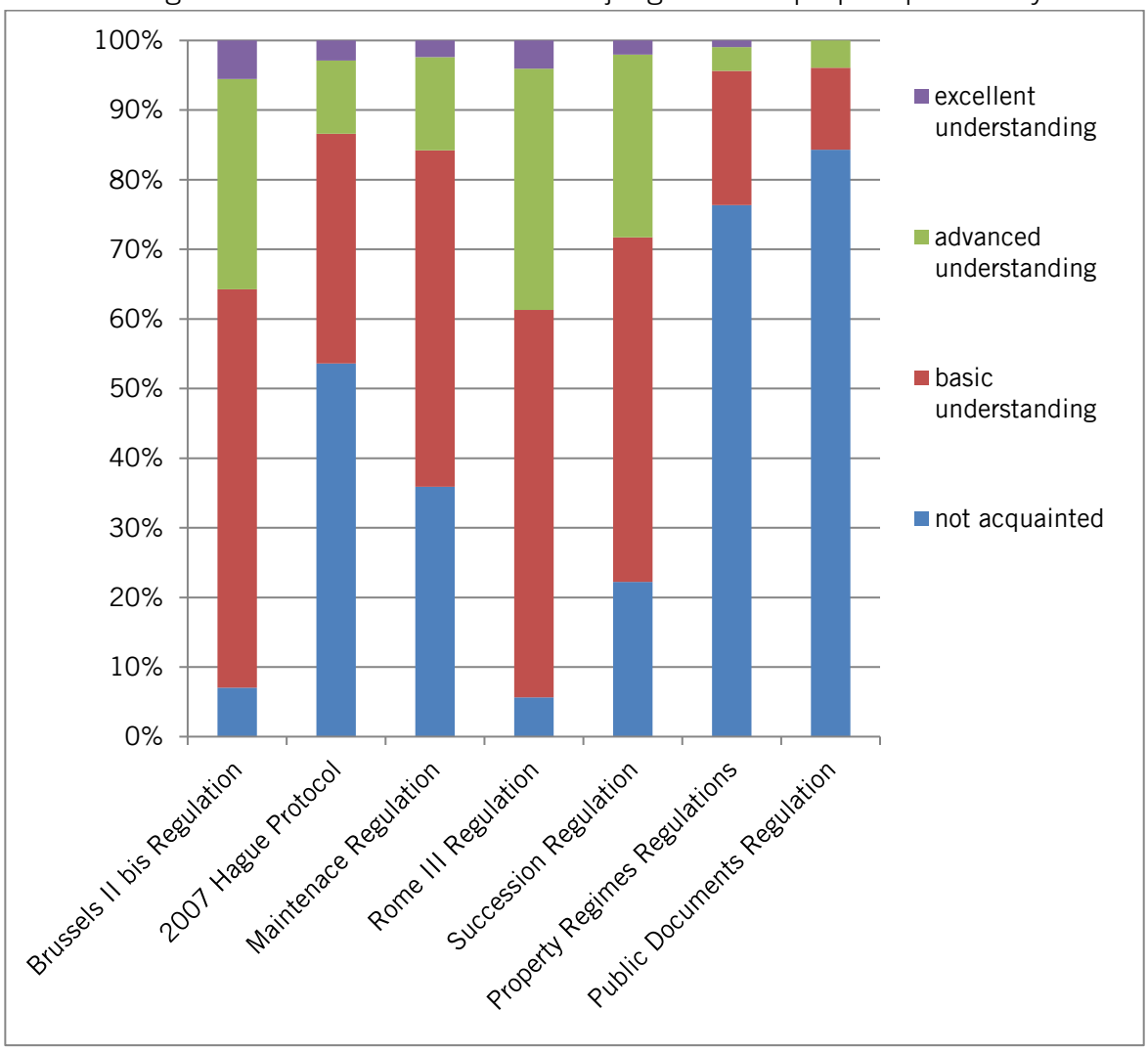

Chart 28: Overall familiarity judges

2. Third-country nationals

The European framework of private international law in family and succession matters is predominantly designed for the facilitation of free movement rights within the EU. However, for various reasons, such as the historically developed presence of minorities from non-EU States, global migration flows and the so-called refugee crisis, family cases may accordingly involve third-country nationals. Against this background, the questionnaire queried how often these cases occur in practice, whether the respondents observed an increase in these cases and to which fields these cases typically relate.

As is depicted in Chart 29, 45% of the respondents indicated to encounter cases involving third-country nationals occasionally, while 9% even claimed to encounter them more often than not.

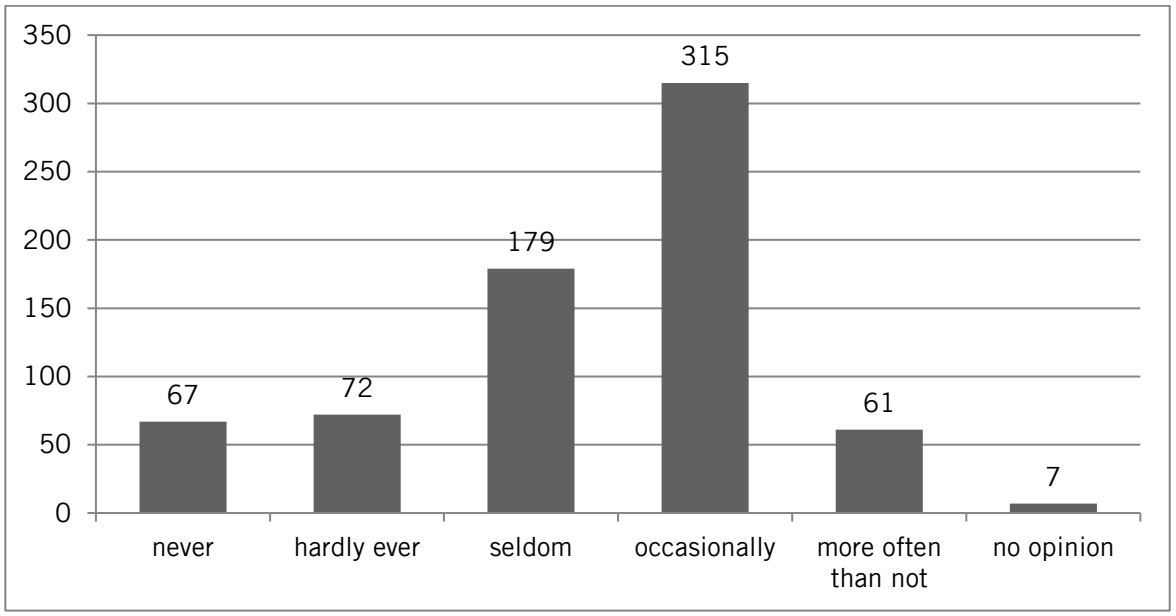

Chart 29: Cases involving third-country national
In your experience, how often have you encountered cases involving third-country nationals? (n=701)

In the last 5 years, 49% of the respondents (701) observed an increase of family law related cases involving third-country nationals, while 21% answered in the negative. 30% had no opinion. This result supports the assumption that global migration flows and the so-called refugee crisis indeed lead to an increase in cases involving third-country nationals.

3. Habitual residence and indirect party autonomy

Habitual residence in European family and succession law serves as the primary connecting factor for both jurisdiction and applicable law. While already the notion itself is highly disputed (cf. D. I. 5. b)), it is unclear in which circumstances and on the basis of which facts courts (should) determine habitual residence. Under certain procedural circumstances, parties may be able to frame factors relevant for the application of private international law. Ultimately, such a course of action can result in indirect modes of private autonomy.

As shown in Chart 30, 28% of the respondents (699) observed that courts only assess habitual residence if it is contested by one of the parties. To the extent that the parties do not contest habitual residence, 36% indicated that courts rely solely on the facts presented by the parties while 17% stated that courts *ex officio* ordered the parties to present evidence. The remaining 19% had no opinion on the matter.

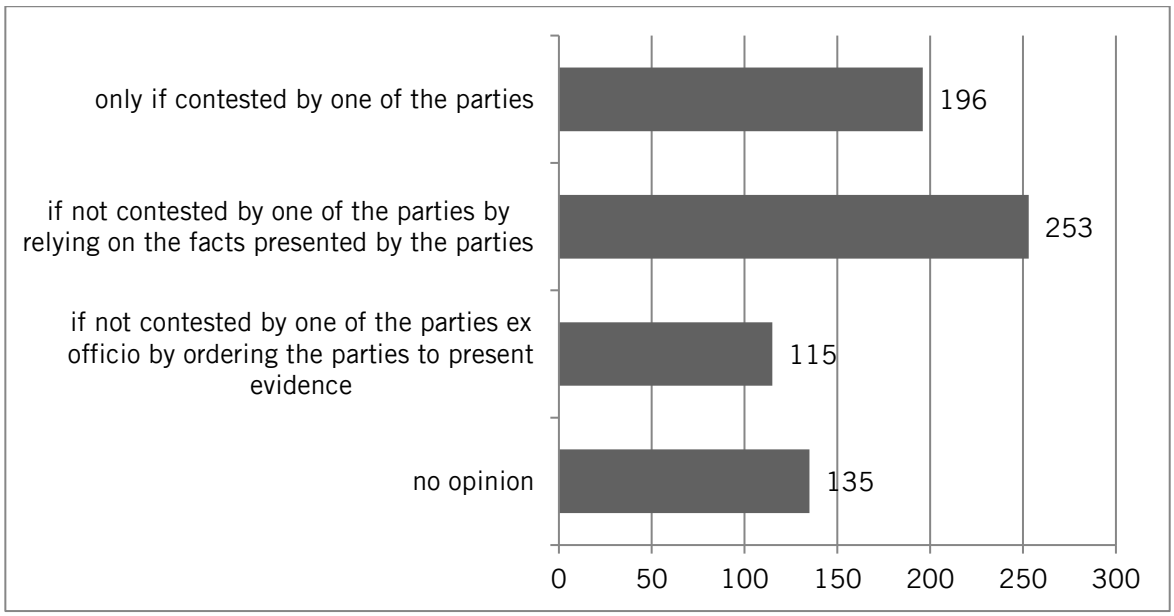

Chart 30: Determination habitual residence
Habitual residence in international and European family laws serves as a connecting factor for both jurisdiction and applicable law. In your experience, when and how do courts determine habitual residence? (n=701)

Against this background, parties appear to be able to frame facts relevant for the determination of jurisdiction and applicable law at least to some extent.

4. Free movement

The European framework of private international law in family and succession matters was designed to facilitate the free movement of persons within the EU. Respondents were asked to indicate whether the framework has in their opinion indeed contributed to the achievement of this goal. The results are shown in Chart 31.

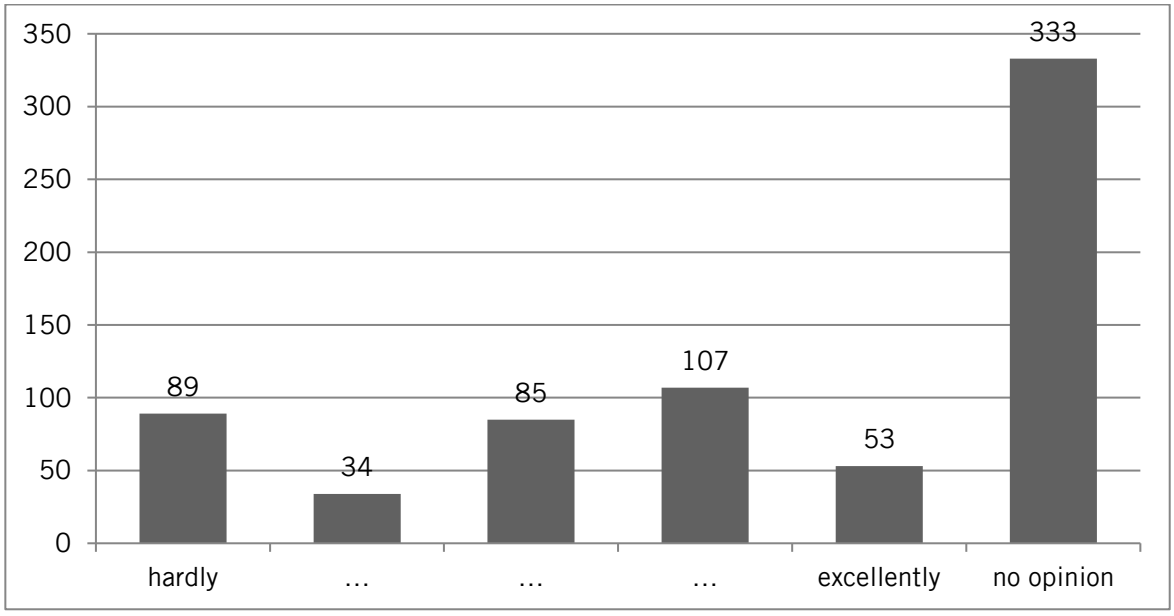

Chart 31: Free movement
In your opinion, does the current general framework of European family law facilitate the free movement of persons within the EU? (n=701)

From these results, no clear picture of whether the framework of European family and succession law facilitates free movement of persons emerges.

Subsequently, respondents were invited to mention the aspects which constitute the main obstacles to the effectuation of free movement rights. They considered the

general framework of European family law to be highly complex due to the multitude of instruments (10). One respondent criticized

> *"the plurality of regulations governing the various issues and the lack of an actual coordination between them"*[51].

Furthermore, legal and practical uncertainty in the application of the instruments of European family law were mentioned (12). In addition, citizens were considered to be simply unaware of the legal implications of cross-border family life by the respondents. In general,

> *"people do not think about which law could be applicable and assume that the law is the same as in their home country everywhere"*[52].

As one respondent explains in greater detail:

> *"The common use of habitual residence [as the objective connecting factor; QCL/TR] frequently results in changes of applicable law which are overlooked by the affected citizens. For example, in practice, the possibility of a choice of law is often left unused or cannot be agreed upon at a later stage or is often not used due to costs (lawyers, notaries)."*[53]

Another respondent, therefore, pointed towards the necessity of

> *"intensive information campaigns directed at citizens concerning the need for choices of law"*[54].

Finally, various respondents (12) doubted whether the framework of European family law indeed facilitates the free movement of persons within the EU. One respondent simply "cannot imagine that legal provisions influence the decision"[55] of citizens to exercise their right to free movement. Consequently, "the rules are more of a reflex rather than targeted facilitation"[56]. While that may very well be true, for those exercising their free movement rights, the framework of European family and succession law is likely to serve an important function.

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[51] "La pluralità dei regolamenti che disciplinano i diversi aspetti e la mancanza di un reale coordinamento tra gli stessi".

[52] "Die Menschen machen sich keine Gedanken darüber, welches Recht anwendbar sein könnte und gehen immer davon aus, dass das Recht überall so ist, wie in ihrem Heimatland."

[53] "Durch das inzwischen übliche Abstellen auf den gewöhnlichen Aufenthalt kommt es häufig zu Statutenwechsels, die von der Betroffenen übersehen werden. So wird in der Praxis oft auch die Abhilfemöglichkeit einer Rechtswahl nicht wahrgenommen oder sie ist nachträglich nicht mehr verhandelbar bzw. wird wegen der damit verbundenen Kosten (Rechtsanwälte, Notare) oft unterlassen."

[54] " […] intensive Informationsbemühungen gegenüber den Bürgern zu den erforderlichen Rechtswahlen".

[55] "Kann mir nicht vorstellen, dass rechtliche Vorschriften Einfluss auf Entscheidung haben".

[56] "Die Regeln stellen daher eher einen Reflex als eine konkrete Förderung dar".

E. SUMMARY OF THE FINDINGS

Divorce, legal separation or marriage annulment

- Familiarity: More than a third of the respondents possess an advanced or excellent understanding of the Brussels II bis and the Rome III Regulation. Surprisingly, 13% stated to be not acquainted with the instruments even though they were applicable in their state of professional activity.
- Private divorce: Private divorces do not appear to play a great role in practice. 72% have never or hardly ever encountered private divorces, while 13% have seldom and 15% occasionally come across such divorces. At present, no congruent practice on the applicability of the Brussels II bis and/or the Rome III Regulation to private divorces exists. One-third answered that neither of the regulations was applicable while another third held that at least one of the regulations was applicable. Yet another third were unable to provide a conclusive answer.
- Forum and ius: In the vast majority of cases, forum and applicable law coincide. 86% respondents indicated that this is the case more often than not. 79% claim that such an overlap is the result of the objective connection. Accordingly, 80% never, hardly ever or seldom encountered consensual choices of law, regardless of the stage at which these are made (*ex ante*, before or during proceedings).
- Brussels II bis Recast Proposal: In practice, the Proposal is largely unknown as 86% were unfamiliar with it. 6% stated that in their opinion the Proposal will indeed solve some of the current difficulties, while 8% was of the opposite opinion. The main practical difficulties identified by the respondents are private divorces and forum shopping in combination with the impermissibility of choice of court agreements. Respondents held that the Proposal addresses only the former but neglects the latter. When it comes to private divorces, the respondents acknowledge the Proposal's solution, yet it is dismissed on the merits by German respondents.

Parental responsibility or child abduction

- Familiarity: 64% of the respondents have a basic understanding of the Brussels II bis Regulation at best.
- Current framework: Due to the multitude of instruments and their diverging scopes vis-à-vis different States, the overall framework is characterized by a high degree of complexity. This is mirrored by the fact that 42% indicated to have no opinion on the interplay between the various instruments. Of the remainder, 43% rated the interplay to be poor or next to poor. Respondents named as general difficulties complexity, jurisdiction, the cooperation and communication between courts and Central Authorities alike and particularly the enforcement of decisions.
- Mediation de lege ferenda: 31% welcomed, 20% opposed a more extensive use of mediation, while 49% had no opinion on the matter. Northern European States predominantly decline while Eastern and Southern European States are more positive about a more extensive use of mediation. Respondents indicated that disputes settled by mutual agreement are generally preferable to court

decisions and mediation is often said to be in the best interest of the child. Opponents feared that mediation can be employed as a delay strategy leading to irrevocable factual situation. Finally, as a matter of principle, opponents stated that child abduction is a crime and should therefore not be subject to mediation.

– **Brussels II bis Recast Proposal:** Also in the field of parental responsibility, the Proposal is largely unknown, as 85% were unfamiliar with it. Those acquainted with the Proposal predominantly welcomed the new provisions.

Maintenance obligations

– **Familiarity:** Familiarity with the Maintenance Regulation and the 2007 Hague Maintenance Protocol is remarkably poor as 75% and 81% respectively had a basic understanding at best, while 32% and 43% respectively were entirely unacquainted with the instruments. This is underlined by the fact that when asked how in their experience the law applicable to maintenance obligations is determined in practice, only 27% opted for the correct answer.
– **Central Authorities:** 45% had no opinion on the functioning of the system of Central Authorities. Of the remaining respondents, 73% rated the system's functioning to be average or better. Judges are more positive as 91% rated the system to be average or better. By contrast, only 51% of lawyers were of that opinion. Main difficulties of the system include its practical implementation, the duration of proceedings and the cooperation between Central and other authorities.

Property regimes in marriage and registered partnerships

– **Familiarity:** 57% had not yet familiarized themselves sufficiently with the regulations on property regimes or wrongly indicated that the instruments were not applicable in their State of professional activity. 76% of judges are entirely unacquainted with these regulations. The fact that many respondents were unacquainted may indicate that professionals do not prepare themselves proactively but rather learn by doing.

Succession

– **Familiarity:** Familiarity with the Succession Regulation in comparison with the other instruments is fairly high, as 40% rated their understanding to be advanced or excellent. Notaries rank highly above average: 77% claimed to have an advanced or excellent understanding.
– **Habitual residence:** Even though the Succession Regulation explicitly mentions various additional criteria which have to be taken into account when determining the deceased's habitual residence (recitals 23 to 25), 90% claimed to determine habitual residence in accordance with the general criteria of other regulations.
– **Choice of law:** Testators do not appear to frequently make use of choice of law clauses, as two-thirds of the respondents never or seldom encounter such clauses. Notaries, on the contrary, come across choices of law far more frequently. These differences could be explained by the general lack of awareness of the possibility and necessity of including choice of law clauses in

testaments. Those obtaining professional advice, e.g. by notaries, are more likely to include choice of law clauses in testaments.

– European Succession Certificate (ESC): The ESC appears to have not yet fully arrived in practice. More than half of the participants indicated to have no opinion on the ESC's functioning and 42% of the remainder rated its functioning to be poor or next to poor. Respondents complained about the length, complexity and mandatory completion of all fields of the form as well as about the ESC's limited temporal validity.

Public documents

– Familiarity: 72% had not yet familiarized themselves sufficiently with the regulation or wrongly indicated that the regulation was not applicable in their State of professional activity. The fact that many respondents were unacquainted may again indicate that professionals do not prepare themselves proactively but rather learn by doing.

Cross-analysis

- Overall familiarity: Overall familiarity with the instruments of European family and succession law is fairly poor. Best-ranking is the Succession Regulation: compared to the other instruments, unacquaintedness is the lowest while advanced and excellent understanding rank highest. Nonetheless, respondents having indicated to possess an advanced or excellent understanding make up less than 50%. All other instruments show remarkably lower values. Particularly the most recent regulations on property regimes and public documents are not (yet) well-known in practice, as not even 15% and 10% respectively indicated to have an advanced or excellent understanding. It has to be borne in mind that the questionnaire was distributed amongst professionals active in the field of family and succession law. In addition, respondents themselves indicated the field(s) with which they deal at least occasionally in their professional activities. Therefore, respondents only answered questions on their familiarity with pertinent regulations. Finally, on a four increment scale, the first two answer-options (i.e. not acquainted and basic understanding) are indicative of a non-existing or merely rudimentary familiarity. It can be doubted whether such a basic understanding suffices to adequately deal with practical exigencies. Rather, an advanced or excellent understanding is likely to be a prerequisite for legal counseling and the application of the law. Against this background, it cannot only be expected that respondents being professionally active in the various fields have at least heard of the relevant instruments but rather they can be expected to be thoroughly acquainted with and possess a profound understanding of these instruments.
- Third-country nationals: Global migration flows and the so-called refugee crisis appear to lead to an increase in cases involving third-country nationals. 45% indicated to encounter cases involving third-country nationals occasionally, while 9% even claimed to encounter them more often than not. In the last 5 years, 49% observed an increase of family law related cases involving third-country nationals, while 21% answered in the negative.
- Habitual residence and indirect party autonomy: Parties appear to be able to frame facts relevant for the determination of jurisdiction and applicable law at

least to some extent as 28% observed that courts only assess habitual residence if it is contested by one of the parties. To the extent that the parties do not contest habitual residence, 36% indicated that courts rely solely on the facts presented by the parties while 17% stated that courts *ex officio* ordered the parties to present evidence.

– **Free movement:** Respondents did not agree on whether the framework of European family and succession law facilitates free movement of persons. When invited to mention the main difficulties for the effectuation of free movement rights, respondents considered the general framework to be highly complex due to the multitude of instruments. Additional difficulties include legal and practical uncertainty in the application of the relevant instruments as well as a general lack of awareness amongst citizens of the legal implications of cross-border family life.