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ARTICLE

Will Requirements for Last Wills Remain as They Are? The 'Physical Presence Requirement' of Witnesses and Notaries in the Light of the COVID-19 Interim Measures and the EU Freedom of (Notarial) Services

J. W. A. Biemans*

The COVID-19-crisis has exposed the shortcomings of formal requirements for legal acts which involve the physical presence of others. This is in particular true with regard to last wills which require the physical presence of a notary and/or witnesses, who have to authenticate and/or attest to the last will of the testator. In such cases, the physical presence requirement imposes an outright obstruction to passing a last will in times of COVID-19. Western countries have responded differently to COVID-19. In the civil-law jurisdictions where only notarial wills are offered, such as the Netherlands, the government has introduced interim measures allowing the testator (and witnesses, if required) to appear before the notary by audio-video technology, leading to authorized remote notarization and remote witnessing. The same has been done in common law jurisdictions where only witnessed wills are offered, including Australia, New Zealand and some states in the United States with regard to witnessing. The first part of this paper researches the different types of last wills and seeks to explain why countries have responded differently in this respect to COVID-19. The second part discusses the different solutions available and argues that solutions introducing audio-video technology as an alternative for physical presence are more favourable than other solutions. Remote authentication and remote witnessing leaves intact the existing will-types of the particular jurisdiction as they are, modernizing the presence requirement of the notary and/or the witnesses, while at the same time preserving legal certainty by anchoring these possibilities in legislation. Introducing audio-video technology in making last wills seems a logical step forward in the 21st century. Building on the two previous parts, the third part investigates a more fundamental issue relating to the physical presence requirement for notarial wills from a European Union free movement of services perspective. Discussing ECJ case law and two applicable directives, it shows that Member States are allowed to restrict the freedom of establishment of notaries and freedom to provide notarial services. These restrictions often lead to a domestic monopoly of notaries, where notaries appointed in the Member State offer exclusively notarial services under the legislation of that Member State, with the requirement that these notaries can only be established in and only offer their services that Member State. Combined with the physical presence requirement, these restrictions to the freedom of establishment and the freedom of services effectively force a testator desiring to make its last will before a notary to travel to the Member State of that notary. Even without COVID-19, it is the question whether this physical presence requirement unnecessarily restricts the freedom of services under art. 56 TFEU, as it deprives the notary and the testator of a rapid and direct technique of passing notarial wills. The possibility of remote authentication under interim legislation raises the question whether the physical presence requirement is objectively justified and proportionate to restrict the freedom of services.

Keywords: last wills; freedom of services; COVID-19; notarial wills; remote notarial deed

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1. Introduction

The COVID-19 crisis has exposed the shortcomings of formal requirements for legal acts which involve the physical presence of others. This is, in particular, true with regard to those types of last wills which require the physical presence of a civil-law notary ('notary') and/or witnesses, who have to authenticate and/or attest to the last will of the testator. Although various legal systems having such notarial wills or witnessed wills also recognize the holographic will as an alternative, some legal systems do not. In such cases, the physical presence requirement imposes an outright obstruction to passing a last will when confronted with lockdowns, travel restrictions and/or multiple quarantines in times of COVID-19, aside from the actual risk of and fear for contamination with the virus. More in general, it is the question whether the physical presence requirement has not become out of date in times where direct communication can also be achieved through digital means. Moreover, within the EU the physical presence requirement may conflict with the freedom of services under Art. 56 TFEU. This article argues that COVID-19 shows that remote authentication and remote-rendering do not violate existing types of wills in individual jurisdictions, but modernize the notary and/or witness requirement, while maintaining legal certainty by anchoring these possibilities in the legislation, and that for EU member states using notarial wills this conclusion is boosted by EU internal market law.

The first part (Section 2) researches how Western countries have responded differently to COVID-19 in respect of the physical presence requirement. In the civil-law jurisdiction of the Netherlands, for example, where only notarial wills are offered, the government has introduced interim measures allowing the testator (and witnesses, if required) to appear before the notary by audio-video technology, leading to authorized remote notarization and remote witnessing. The same has been done in common law jurisdictions where only witnessed wills are offered, including Australia, New Zealand and some states in the United States with regard to witnessing. The first part of this paper investigates the different types of last wills and seeks to explain why countries have responded differently in this respect to COVID-19.

The second part (Section 3) discusses the different solutions available. Building on this, it will be argued in the third part (Section 4) that solutions introducing audio-video technology as an alternative for physical presence are more favourable than the two other solutions: the introduction of the holographic will and the adoption of doctrines such as the harmless-error doctrine or substantial compliance doctrine. Introducing remote authentication and remote witnessing leaves intact the existing will types of the particular jurisdiction as they are, while at the same time preserving legal certainty by anchoring these possibilities in legislation. Moreover, introducing audio-video technology in making last wills seems a logical step forward in the 21st century, given the possibilities at hand.

The fourth part (Section 5) investigates the more fundamental issue relating to the physical presence requirement for notarial wills from a European Union free movement of services and establishment perspective. Discussing ECJ case law and two applicable directives, it shows that Member States are allowed to restrict the freedom of establishment of notaries and the freedom to provide notarial services. These restrictions often lead to a domestic monopoly of notaries, where notaries appointed in the Member State offer exclusively notarial services under the legislation of that Member State, with the requirement that these notaries can only be established and offer their services in that Member State. Combined with the physical presence requirement, these restrictions to the freedom of establishment and the freedom of services effectively force a testator desiring to make his or her last will before a notary to travel to the Member State of that notary. Even without COVID-19, it is the question whether this physical presence requirement unnecessarily restricts (especially) the freedom of services under Art. 56 TFEU, as it deprives the notary and the testator of a rapid and direct technique of passing notarial wills. The possibility of remote authentication under interim legislation raises the question of whether the physical presence requirement is objectively justified and proportionate to restrict the freedom of services.[1]

[1] This also holds true for other legal acts requiring a notarial deed (and which can be executed using a power of attorney), ranging from real estate transaction deeds, premarital agreements, establishment, (de)merger and statutes (by-laws) of legal persons and the transfer and encumbrance of limited liability company shares.

2. Why have Western jurisdictions responded differently to COVID-19 in respect of last wills?

2.1. Three types of wills

To (roughly) understand why Western jurisdictions have responded differently to COVID-19 in respect of last wills, it is necessary to discuss the three types of last wills available in these jurisdictions.[2]

In order to be valid, a testament or last will has to meet formal requirements. The reason for this is that a will only takes effect once the testator has died and can no longer be questioned as to his intentions. In order to establish evidence of the content and the authenticity of the will, Western legal systems basically resort to three types of (partly overlapping) form devices: the requirement of handwriting, the requirement of the will being witnessed and the requirement of the will being authenticated by a neutral professional third party. Generally, three types of last wills are encountered in these legal systems: (1) the holographic will; (2) the witnessed will; and (3) the 'public' or notarial will (as opposed to the holograph and the witnessed will, being 'private' wills).[3]

A *holographic will* is a will which is handwritten and signed by the testator. With the exception of some states of the United States, holograph wills are confined to the civil law world. Although the testator has to write the will himself, he may copy it from a draft prepared by someone else, provided that the testator understands what he is writing.[4] Recently, some states in the United States have permitted 'e-wills,'[5] allowing testators to make their last will in emails, text messages and word processing programs, appearing like a modern, electronic (and type-written instead of handwritten) version of the holographic will.[6]

The *witnessed will* occurs generally in the form of the testator's will being set down in writing (as opposed to the testator declaring his or her will in speech before witnesses) and signed by the testator and attested by (mostly two) witnesses. Just as a holograph, the witnessed will is a private will which, nonetheless, is often made under legal supervision like the notarial will. The witnessed will is therefore, in common law jurisdictions, often doing the work of both the holographic and the notarial will.[7]

The *public* or *notarial will* has been adopted by all of the legal systems of the civilian tradition in their codifications and subject to both general notarial law and special rules for wills. The key element of the public will is the authentication by a public body or official, often a notary.[8] In the Netherlands and Portugal it is the only ordinary form. Legal systems belonging to the common law world (as well as the mixed jurisdictions of South Africa and Scotland) do not recognize a public will. Compared to the private will, the public will is 'a safe but less convenient alternative'. Public wills can be distinguished between 'open' wills and 'closed' wills.[9]

The procedure for *open wills* is generally the following. After the testator declares his or her will in writing or orally to the notary (and the [two] witnesses, if required), the notary (or an assistant) puts the will into written form. In some jurisdictions this process may take one or more meetings and/or one or more draft wills. After the notary reads the (finalized) will aloud, the will is then signed by the testator, the notary and the witnesses (if required), with the notary adding information about its execution, including, usually, its date and place and the names of the witnesses. The notary retains the will and, in some countries, registers the will in a central register. The notarial service is central: the notary verifies the identity of the testator, discusses the wishes of the testator, forms a view as to his mental capacity, drafts the will with care and attention (using legal language) and advises in relation to the applicable (succession and tax) law. Overseeing

[2] See for a description of testamentary formalities in (among other countries) France, Belgium, Spain, Italy, the Netherlands, Germany, Austria, Hungary, Poland, England and Wales, Australia and New Zealand, the United States of America and Scotland, the various contributions to Kenneth G C Reid, Marius J. de Waal, and Reinhard Zimmermann (eds.), *Comparative Succession Law: Testamentary Formalities* (OUP 2011).

[3] Reid, de Waal and Zimmerman (n2), 433–434.

[4] ibid, 441–442.

[5] Arizona, Florida, Indiana, and Nevada, and, similarly, the Uniform Electronic Wills Act (UEWA 2019). See David Horton and Reid Kress Weisbord, 'COVID-19 and Formal Wills' (2020) 73 Stan. L. Rev. <https://www.stanfordlawreview.org/online/covid-19-and-formal-wills/> accessed 5 July 2021, 26; Adam J. Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills' (2020) 61 Boston College Law Review 827, 846–51; Adam J. Hirsch and Julia C. Kelety, 'Electronic-Will Legislation: The Uniform Act versus Australian and Canadian Alternatives' (2020) 34(5) Probate and Property, electronic copy available at: https://ssrn.com/abstract=3697819, both with further references.

[6] E-wills are just one step away from audio- and video-wills, see Hirsch and Kelety (n5), 10.

[7] Reid, de Waal and Zimmerman (n2), 446–447.

[8] Public wills can sometimes also be made before a judge (Austria, Hungary) or a public official (Poland). See Reid, de Waal and Zimmerman (n2), 433–434.

[9] ibid, 448–449.

the whole process, he ensures that the will is properly signed and that all formalities are duly complied with.[10] Relying on the evidence of notaries, some jurisdictions[11] have abandoned the requirement of the witness for notarial wills.[12]

A *closed* or *deposited will* is a private document which, nonetheless, is presented to a notary for authentication and, often, for safe keeping as well. The will can be holograph or another document signed by the testator on each numbered page as well as at the end. After the testator seals the will and presents it to the notary, he or she declares that the document contains his or her will. The notary makes a notarial instrument noting all this, which is then signed by the testator, the notary and the witnesses (if required). Usually, the notary retains the will.[13]

In addition to these ordinary wills,[14] most countries recognize one or more special or extraordinary wills, such as emergency wills, wills made on board of a ship or aircraft, or military (nuncupative) wills.

2.2. The (implicit) 'physical presence' requirement

From the above, it follows that if a country or jurisdiction offers holographic wills, it should not pose fundamental problems in times of COVID-19. Although holographic wills as private wills can be prone to error or even fraud, the testator can easily opt for one made with legal advice. A notary or another lawyer could discuss with the testator, through digital means, his or her intentions with regard to the content of the last will, provide for legal advice on succession and tax law issues and even provide by e-mail for a draft will, which the testator could turn into a handwritten and signed holographic will.

However, if a country or jurisdiction only offers witnessed wills or notarial wills, (interim) measures are required, as these will require the testator and the notary and/or the witnesses to meet in person.

The testator has to sign the testament personally.[15] He cannot delegate this to another person, for example by granting a power of attorney to one of the witnesses or the notary to sign the last will on his behalf. Although the signature of the testator on a notarial will is not required if the testator is unable to write, whether due to temporary (physical) incapacity or permanent disability,[16] in which case the notary will add this information to the notarial will, the testator needs to be physically present at the time of the authentication of the last will.

With regard to notarial wills, a notary must authenticate the last will, and the witnesses (if required) need to attest to the signature of the testator as well. The testator has to sign the last will immediately after the reading of the testament and the notary and the witnesses have to sign immediately after the testator has signed. Called the unity of action principle, it is partly the result of a practical concern that the document should not be substituted or interfered with.[17] The notary and the witnesses to a notarial will must thus be present during the process of authentication, from the reading of the last will to the signing by the testator, the notary and the witnesses. Although it is not made explicit in many codifications, it is implicitly required that the testator, the notary and the witnesses are *physically* present in the same room when signing the testament.[18]

With regard to witnessed wills, the witnesses need to attest to the signature of the testator, which must have been made, or acknowledged, in their joint presence. Although in many jurisdictions it is not necessary for the witness to see the testator to sign, as it is sufficient if the testator acknowledges a signature which has already been made,[19] witnesses in common law jurisdictions must sign in the testator's presence and, in South Africa and some American states, in the presence of each other as well.[20] Although common law jurisdictions are as such familiar with the unity of action principle, some jurisdictions insist that witnesses sign promptly and/or that the witness's signature must be 'one continuous process' with the signature or acknowledgement of the signature by the testator, and the Uniform Probate Code demands that witnesses

[10] ibid, 449–450.

[11] Such as Spain, Germany, the Netherlands.

[12] Reid, de Waal and Zimmerman (n2), 458.

[13] Although witnessed and holograph wills are not available in the Netherlands, public closed wills are hardly executed as opposed to public open wills. Reid, de Waal and Zimmerman (n2), 450.

[14] And codicils and international wills.

[15] Reid, de Waal and Zimmerman (n2), 455.

[16] ibid.

[17] ibid, 459–460.

[18] See for example, Art. 43 Dutch Notaries Act.

[19] Reid, de Waal and Zimmerman (n2), 458 and 460.

[20] ibid, 446–447.

sign 'within a reasonable time.'[21] According to the Wills Act (United States), the testator either signs the will or acknowledges a previously made signature before two witnesses who are present in the same room at the same time.[22] Thus in order to be valid, a witnessed will in principle requires at some point in time the physical presence of both the testator and the witnesses. Add to this that witnesses usually cannot take direct or even indirect benefit under a will, in the case of a lockdown the nearest and dearest of the testator are restricted in their ability to act as witnesses.[23]

On-line initiatives where the testator can fill out last will templates on the internet, do not fill the blanks, as these wills still need to be executed in conformity with formal requirements, such as witnesses and/or a notary.[24] The same holds true in principle for various emergency wills, which instead of a notary require the physical presence of one or more other officials (such as a mayor, lawyer, captain)[25] and/or one or more witnesses. Moreover, emergency wills are generally only valid for a certain period of time after the extraordinary situation is over.[26]

2.3. The correlation between interim measures and the different will types available

Although this is not true for all legal systems, there is a significant correlation between those legal systems that only offer the witnessed will or only the notarial will, on the one hand, and those countries and jurisdictions that have (interim) measures to deal with COVID-19.

Among other jurisdictions, in any case the Netherlands, Australia, Canada, New Zealand and some states in the United States have taken interim measures and Portugal is or was considering taking such measures.

Civil law systems generally offer a choice between notarial wills and private wills, usually the holograph will. The holograph will is found in France and in the countries influenced by France, including Austria, Belgium, Germany, Hungary, Italy, Poland and Spain.[27] The Netherlands and Portugal are typically civil-law jurisdictions. However, as an exception to the aforementioned rule the Netherlands only has (open and closed) notarial wills.[28] The same is true for Portugal.[29] It is no coincidence that especially these countries have provided for interim measures. It may also explain why, for example, Poland has not undertaken any measures.[30] The same holds true for Spain.[31]

In the common law and mixed systems, in England and Wales, Australia, New Zealand, South Africa, many states in the United States, the legal systems only offer the witnessed will.[32] Canada offers the witnessed will, whereas in Quebec a will can also be a notarial will, which must be signed before a notary and one witness; although valid in most provinces and territories, the holographic will is rare in Canada. It explains why Australia, Canada, New Zealand and some states in the United States have adopted interim measures. Around half of the states in the United States recognize both holograph wills and witnessed wills, similar to most European countries which offer both holograph wills and notarial wills.[33] Offering holograph wills to the testator, there is no direct need for interim measures.

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[21] ibid, 460.

[22] Horton and Weisbord (n5), 21.

[23] Reid, de Waal and Zimmerman (n4), 457.

[24] See in relation to COVID-19, for the Netherlands, J.W.A. Biemans and W.D. Kolkman, 'Het teletestament: testeren op afstand onder de Tijdelijke wet COVID-19' (2020) 2020(4) Tijdschrift Erfrecht 94; and for the United States, Horton and Weisbord (n5), 22–23.

[25] The Dutch Civil Code allows for the appointment of such an official by the Minister of Justice and Security, and this official could (in theory) also be the director of a hospital or a nursing home, serving as a substitute for the notary. Articles 4:98–4:108 of the Dutch Civil Code.

[26] Reid, de Waal and Zimmerman (n2), 451–454.

[27] Austria and Hungary, as an exception to the rule that the witnessed will is only offered in common law and mixed systems, also recognize the witnessed will in addition to the holographic will.

[28] Reid, de Waal and Zimmerman (n2), 434 and 448.

[29] Reid, de Waal and Zimmerman (n2), 448 and 108.

[30] See Mariusz Załucki, 'Preparation of wills in times of COVID-19 pandemic – selected observations' (2020) 22(2) Journal of Modern Science 143, 143–152.

[31] See the information memorandum of the law firm Lozano Schindhelm, 'Last wills in the time of COVID-19' <https://es.schindhelm.com/en/news-jusful/covid-19-unit/das-testament-in-zeiten-des-covid-19-1> accessed 29 October 2020.

[32] Reid, de Waal and Zimmerman (n2), 434.The witnessed will is also the standard will in Scotland, but a mere signature by the testator is sufficient to authenticate the document if no witness happens to sign.

[33] Reid, de Waal and Zimmerman (n2), 434; and Horton and Weisbord (n5), 23–24. The witnessed will is also the standard will in Scotland, but a mere signature by the testator is sufficient to authenticate the document if no witness happens to sign.

3. Solutions to the physical presence requirement: taking a closer look at the interim measures

The countries and jurisdictions that have taken interim legislative measures –such as Australia, Canada, England and Wales, New Zealand, some states in the United States and the Netherlands – have all temporarily replaced the physical presence requirement in one way or another by remote notarization and/or remote witnessing using audio-video technology.

Of the *common law jurisdictions*, New Zealand has introduced the principle that during COVID-19 witnessed wills can be signed and witnessed using audio-visual links, allowing witnessed wills to be done by Zoom, Skype, Facetime, Google Meet etc.[34] The same has happened in Australia, where for example in Queensland video conferencing technology has been admitted to be used for having important end of life legal documents witnessed.[35] Some Canadian provinces have taken steps to allow individuals to witness a will through video conferencing technology.[36] In England and Wales, signing can be witnessed remotely (for example by video conferencing), as long as the other person has a clear view of the person and the act of signing, and the testator and the witnesses sign the same document.[37] In the United States, several states (including Connecticut, Illinois, Kansas, Michigan, New York, and Tennessee) through interim measures have allowed witnesses to appear by audio-video technology rather than in person, thus authorizing remote witnessing, sometimes with some additional requirements.[38] Under the Uniform Electronic Wills Act (Uniform Act) by the Uniform Law Commission (United States), the testator can execute a will not only creating it on a computer and signing it electronically, but also signing it in the (physical or) virtual presence of witnesses.[39]

Of the *civil law jurisdictions*, the Netherlands has introduced the rule that if parties cannot appear in person before the notary, and if a power of attorney is not allowed, the notary can authenticate the notarial deed using audio-video technology means,[40] which is an interim measure especially intended for notarial wills. Using these audio-video technology means, the notary has to be able to assess the identity of the testator and to communicate with the testator. He has to add to the notarial deed that the signing of the deed by the testator is not possible and that the testator has appeared before him in this special manner. According to the legislator, it goes without saying that the notary has to exercise the usual due care.[41] The notary must satisfy him/herself as to the legal capacity of the testator and must establish that the testament contains the last will of the testator, meaning that the testator should not be influenced (coerced) by a third party in the same room. In line with this, in Quebec (Canada), notarial wills are admitted to be signed remotely 'using technological means,' requiring that the notary, the testator and witnesses must be able to see and hear each other, and that the signatories other than the notary must affix their signature using technological means enabling them to be identified and confirming their consent.[42] In the United States, Colorado and North

[34] With some additional requirements, see Article 4 (3) (a) of the Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020, dated 16 April 2020, <http://www.legislation.govt.nz/regulation/public/2020/0065/latest/whole.html> accessed 5 July 2021.

[35] With some additional requirements, see Article 4 of the COVID-19 Emergency Response Act 2020 (A2020-11), dated 14 May 2020, <https://www.legislation.act.gov.au/a/2020-11/> accessed 5 July 2021. See also Kelly Purser, Tina Cockburn and Bridget J. Crawford, 'Wills Formalities Beyond COVID-19: an Australian United States Perspective' (2020) 2020(5) U. New S. Wales L.J. Forum 1 See also, Bridget J. Crawford, Kelly Purser and Tina Cockburn, 'Post-Pandemic Wills' (forthcoming), U. Chi. Legal Forum <https://ssrn.com/abstract=3615151>.

[36] See Załucki (n30).

[37] <https://www.gov.uk/make-will/make-sure-your-will-is-legal>.

[38] Most of these interim measures were introduced between 26 March and 9 April 2020. See Horton and Weisbord (n5), 27; and Hirsch and Kelety (n5), 4–5; Purser, Cockburn and Crawford (n35), part III; and American College of Trust and Estate Counsel, Emergency Remote Notarization and Remote Witnessing Orders of June 8, 2020 <https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/>.

[39] See Hirsch and Kelety (n5), 1, 4. See also Senate Bill 1625, the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2021 (the 'SECURE Notarization Act'), which was introduced on May 13, 2021, as bipartisan legislation to authorize and establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce.

[40] Art. 26 of the Dutch Temporary COVID-19 Justice and Security Act (Tijdelijke wet COVID-19 Justitie en Veiligheid), dated 24 April 2020, enacted per 16 March 2020 (with retroactive force).

[41] See the Explanatory Memorandum (Kamerstukken II 2019/20, 35434, nr. 3), 12; Biemans and Kolkman (n24), 96–97 with further references, including: P. Blokland, B.E. Reinhartz, F.A.M. Schoenmaker, F. Sonneveldt, A.H.N. Stollenwerck, M.C.W.H. van Valburch, 'Coronacrisis: nood eist wet!' (2020) 2020(5) FTV 6, 6–12; P. Blokland & A.H.N. Stollenwerck, 'De Tijdelijke wet COVID-19 Justitie en Veiligheid: de notariële akte – over telepasseren en quasi-comparanten' (2020) 2020/3(11) FTV 12; B.C.M. Waaijer, 'Moedige notarissen in de ure des gevaars' (2020) 7286 WPNR 413; P.C. van Es, 'Covid-19 en het notariaat: "Heden verscheen – met gebruikmaking van audiovisuele communicatiemiddelen – voor mij …"' (2020) 7285 WPNR 401; and T.F.H. Reijnen, 'Waar passeert de notaris de akte?' (2020) 7290 WPNR 487.

[42] See Order 2020-010 of the Minister of Health and Social Services, dated 27 March 2020, and effective per 1 April 2020.

Dakota, the only jurisdictions allowing notaries to serve as substitutes for witnesses, have authorized remote notarization.[43] In May 2020, the Portuguese Government approved a draft act establishing an experimental regime for remote realization of authentic acts, the authentication of private documents and signature acknowledgments,[44] but this is (even in June 2021) still a draft document. Portugal has taken several other interim measures, but not dealing with notarial acts.[45]

4. The advantages of audio-video technology over its alternatives

Solutions introducing audio-video technology as an alternative for physical presence are far more favourable than the two other solutions: the introduction of the holographic will and the adoption of doctrines such as the harmless-error doctrine or substantial compliance doctrine.[46]

The advantage of introducing audio-video technology as an alternative for physical presence is that it only tweaks one element of the essential requirement that notaries and/or witnesses are involved in the process of will-making, while keeping this requirement (and the will type) as such intact. In fact, the interim measures *modernize* witnessed wills and notarial wills using 21st century technological means. They modernize in particular the requirement of the *presence* of the witnesses and the notary, following societal norms about the meaning of 'presence' in light of modern technological developments.[47] By comparison, the introduction of the holographic will in the common law jurisdictions and countries such as the Netherlands and Portugal that are unfamiliar with this type of last will would not only be controversial, but also cumbersome, fundamentally changing succession law.

The interim measures also share the advantage of preserving legal certainty by anchoring the use of audio-video technology in legislation. Although applying doctrines such as the harmless-error doctrine or substantial compliance doctrine may be helpful in cases where the legislator has not intervened, this 'cure' will breed uncertainty and litigation. Moreover, if it concerns notarial wills, the position of the notary as a professional is also at risk.[48] Passing a void notarial will does not only lead to litigation over the validity of the last will itself, but also to litigation over the position of the notary, facing liability claims and disciplinary complaints. Most importantly, the interim measures may provide a gateway to permanent remote witnessed wills and remote notarial wills in the 21st century, rather than patching up hard to meet century-old requirements in times of COVID-19.

It goes without saying that there will be resistance among notaries to use the so-called 'Skype-testament' or 'teletestament.'[49] The prevailing view (in the Netherlands) seems to be that it should only be used if it absolutely cannot be done otherwise. This view has not so much to do with the physical presence requirement within the authentication process (the signing in each other's presence), but rather with the fact that a notary is also legally required to assess the will of the testator. The lack of the will of the testator – whether due to a lack of mental capacity or due to undue influence from third parties – makes the notarial will voidable or even void. The prevailing view is that it is much harder to comply with this requirement if audio-visual technical means are used instead of an in-person meeting. Although these concerns are understandable,

[43] See Horton and Weisbord (n5), 27, with further detail and references. Other states (including Idaho, Iowa, Maryland, Minnesota, Mississippi, Nebraska, Nevada, and New Hampshire) have sought to provide access to legal services by temporarily permitting remote notarizations. See ibid, 22, referring to Susan B. Garland, 'What to Know About Making a Will in the Age of Coronavirus' *New York Times* (New York, 30 Mar 2020) <https://www.nytimes.com/article/what-is-a-will-and-how-to-make-one.html> accessed 5 July 2021 and <https://www.naepcjournal.org/wp-content/uploads/issue34i.pdf>.

[44] <https://www.portugal.gov.pt/pt/gc22/governo/comunicado-de-conselho-de-ministros?i=345>accessed 5 July 2021. See on this draft, the opinion of João Ricardo Menezes, notary: <https://www.jornaldenegocios.pt/opiniao/detalhe/gato-por-lebre---even-better-than-the-real-thing> accessed 5 July 2021.

[45] Article 5º of Decree-Law 1-A/2020, 19.03 (last amended by Law 58-A/2020, 30.09) allows general assemblies, meetings, academic juries, and other reunions of public and private entities by teleconferencing, videoconferencing and similar means, but nothing is said about notarial acts. Additionally, Decree-Law 16/2020, 15.04, establishes exceptional and temporary measures to respond to the COVID-19 pandemic, allowing the practice of acts by means of remote communication in the context of urgent justices of the peace processes; registration procedures and acts; and procedures conducted by the National Institute of Industrial Property. It does not cover notarial acts either. With many thanks to Prof. Dra. Maria Raquel Guimarães and Dra. Helena Mota, Faculty of Law, University of Porto, Portugal.

[46] Horton and Weisbord (n5) and Załucki (n30) also seem in favour of this.

[47] See also Purser, Cockburn and Crawford (n35), 2.

[48] Exemplary for this is the way the COVID-19 legislation in the Netherlands for notarial wills was put on the agenda. Whereas the Royal Dutch Association of Civil-law Notaries first advised notaries to pass notarial wills even if they could not meet the requirement of meeting the testator in person due to COVID-19 (which would lead to void notarial wills), the notaries strongly rejected this approach and lobbied for interim measures.

[49] See for example, Blokland and Stollenwerck (n41), 18, and the point of the view of the Royal Dutch Association of Civil-law Notaries, both discussed in Biemans and Kolkman (n24) 97.

there are many instances thinkable where passing a notarial will using audio-video technology means does not pose any problems at all. For example, if a young couple wishes to make a last will, having no children yet, there are no reasons why there would be a lack of mental capacity or undue influence from third parties. These risks are just as well present when passing a notarial will in the physical presence of the testator; case law shows various examples of cases where last wills have been passed while the testator was lacking mental capacity, which last wills were later nullified because of this. The question is whether the possibility of risks should prevent the modernisation of will-making altogether in these times of widely used digital means, while maintaining the same duty of care by the notary. Introducing audio-video technology in making last wills, as has been done in the COVID-19 interim measures, seems a logical step forward in the 21st century.[50] A wills, a notary could also discuss the content of the last will in the physical presence of the testator and then later pass the last will remotely. After having discussed the content of his or her last will, the testator could even go abroad attending business or going on a holiday, and still be able to finish his or her last will. If a remote (notarial) last will is introduced, the notary could at least *decide* when to use this possibility. It goes without saying that introducing such a possibility would require a high level of technological means in order to prevent for example security issues and (identity) fraud (which will not be further discussed here). Also, it should be clear that in case of doubt as to possible undue influence by a third party or a doubt as to the mental capacity of the testator, the notary should not resort to the digital last will, as this could be a violation of his or her duty of care. However, in other 'normal' cases, the notary, the witnesses (if any) and the testator could opt for the possibility of a remote (notarial) last will.

5. EU internal market law and notarial services within the EU as another angle for innovation

5.1. Introduction

Apart from COVID-19 and 'the 21st century argument', there is another argument for the digitalisation of notarial services in general and last wills in particular. In the explanatory memorandum to the interim measures for notarial wills,[51] the Dutch legislator seemed to imply that the testator needed to be on Dutch soil in order to make use of the 'teletestament.' This would relate to the requirement that the notary is not allowed to provide notarial services if the notary him/herself is outside the Netherlands. As has been argued before, if the notary can authenticate the last will using audio-video technology means, the testator does not have to be in the Netherlands. Only the physical location of the notary is decisive for this requirement. Thus, apart from the fact that it is difficult for the notary to control where the testator is located, it would make sense to allow the testator to be abroad, especially in the light of the impossibility to appear before the notary, for which the interim measures were made in the first place. The testator may be in Spain and prevented from coming to the Netherlands due to travel restrictions.[52] The notary can also authenticate notarial deeds (other than last wills) on the basis of a power of attorney when the party to the notarial deed is abroad, so why not passing a last will using audio-video technology means when the testator is abroad.

The Netherlands is not unique in requiring that a notary authenticating notarial deeds on the basis of Dutch legislation (1) can only be a notary appointed in the Netherlands in compliance with Dutch requirements (and not a notary in another country), (2) can only be established in the Netherlands and (3) can only provide services on Dutch territory. Other European countries (EU Member States) with civil-law notaries have similar requirements.[53]

Aside from this, these requirements do not only affect the making of notarial wills, but also other deeds which need to be authenticated (as mandatory law) by the notary, ranging from real estate transaction deeds, premarital agreements, establishment, (de)merger and statutes (by-laws) of legal persons and the transfer and encumbrance of limited liability company shares. The subtle difference between those other notarial deeds and notarial wills is that most of these other deeds can be signed by an agent of the party, using a power of attorney, whereas a last will cannot.

Effectively, the physical presence requirement for notarial wills combined with the domestic monopoly of the notary means that anyone who wishes to pass a notarial will before a notary needs to travel to

[50] See for witnessed wills, Purser, Cockburn and Crawford (n35), part IV.

[51] Art. 26 of the Dutch Temporary COVID-19 Justice and Security Act. Disagreeing with this view: Biemans and Kolkman (n24), 91; T.F.H. Reijnen, 'Waar passeert de notaris de akte?' (2020) 7290 WPN 487. 487–490.

[52] Article 13 Dutch Notary Act.

[53] See for example, A.R. Plaggemars, *Is de notaris de markt meester?* (Boom Juridisch 2011), Chapter 3; and with regard to Germany, Reid, de Waal and Zimmerman (n3), 176.

the Member State in which that notary is appointed, has his establishment and provides his services. The question is how this relates to the freedom of establishment and the freedom of services, as laid down in Art. 49-55 of the Treaty on the Functioning of the European Union (TFEU)[54] and Art. 56-62 TFEU,[55] as part of the four freedoms of the European Union.[56]

5.2. Freedom of establishment (Art. 49 TFEU) and the profession of the notary

In 2011 the ECJ had to give its judgment on the freedom of establishment and conditions required by national legislation for access to the profession of notary. The Court gave its judgment in eight cases regarding the European Commission v. Belgium,[57] France,[58] Luxembourg,[59] Portugal,[60] Austria,[61] Germany,[62] Greece,[63] and in the same year on a later date, the Netherlands.[64] In each case, the parties involved were supported by one or more other Member States,[65] showing the overall importance of these cases. These cases contain mainly four elements which are relevant to the profession of the notary within the EU.[66]

First, according to the ECJ, it is clear that national legislation reserving access to the profession of notary to its Member State nationals, by imposing a nationality requirement for access to the profession of notary, enshrines a difference in treatment on the ground of nationality which is prohibited in principle by Art. 43 EC on the freedom of establishment (now Art. 49 TFEU).[67]

Second, according to the ECJ, the activities of notaries are not connected with *the exercise of official authority* within the meaning of the first paragraph of Art. 45 EC (Article 51 TFEU), as an exception to the rule of Art. 43 EC.[68]

According to ECJ case law, the exception must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests it allows the Member States to protect and is restricted to activities which in themselves are directly and specifically connected with the exercise of official authority and does not extend to certain activities that are auxiliary or preparatory to it.[69]

According to the ECJ, taking into account the nature of the activities entrusted to the members of the profession of notary in the Member State legal systems and carried out by them, these activities do not involve a direct and specific connection with the exercise of official authority. The principal activity of notaries in the Member States' legal systems consists of the establishment of authentic instruments in due and proper form. Although the notary must ascertain that all the conditions required by law for drawing up the instrument are satisfied, and although an authentic instrument has probative force and is enforceable, the documents to be authenticated are documents and agreements freely entered into by the parties, deciding for themselves, within the limits laid down by law, the extent of their rights and obligations

[54] The four freedoms are the cornerstones of the European Union and its internal market (Art. 26(2) TFEU). See Catharine Barnard, *The Substantive Law of the EU* (OUP 2020).

[55] According to Art. 56 (1) first sentence TFEU, restrictions on the freedom to provide services within the European Union shall, in principle, be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

[56] According to Art. 49 (1) first sentence TFEU, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall, in principle, be prohibited.

[57] Case 47/08 *Commission v Belgium* ECLI:EU:C:2011:334, [2011] ECR I-4105.

[58] Case 50/08 *Commission v France* ECLI:EU:C:2011:335, [2011] ECR I-4195.

[59] Case 51/08 *Commission v Luxembourg* ECLI:EU:C:2011:336, [2011] ECR I-4231.

[60] Case 52/08 *Commission v Portugal* ECLI:EU:C:2011:337, [2011] ECR I-4275.

[61] Case 53/08 *Commission v Austria* ECLI:EU:C:2011:338, [2011] ECR I-4309.

[62] Case 54/08 *Commission v Germany* ECLI:EU:C:2011:339, [2011] ECR I-4355.

[63] Case 61/08 *Commission v Greece* ECLI:EU:C:2011:340, [2011] ECR I-4399.

[64] Case 157/09 *Commission v the Netherlands* ECLI:EU:C:2011:794, [2011] ECR I-0187. See on these cases also Barnard (n54), 501–502; and J.W. van de Gronden, 'De notarissen en de vrijheid van vestiging: het notarisambt is niet verbonden met het openbaar gezag maar valt onder de EU-regels voor de interne markt' (2012) 2012(5) Nederlands Tijdschrift voor Burgerlijk Recht 21.

[65] The European Commission was supported by the United Kingdom of Great Britain and Northern Ireland, and the Member State by one or more other Member States (Republic of Bulgaria, the Czech Republic, Republic of Estonia, Republic of Latvia, Republic of Lithuania, Republic of Hungary, Republic of Poland, Romania, Republic of Slovenia and the Slovak Republic).

[66] See also, B.C.M. Waaijer and J.C.H. Melis, *De Notariswet* (Wolters Kluwer 2020), para 5.1.1.

[67] Case 47/08 (n57), sub 77–81. According to the Commission, the profession of notary was not subject to any nationality condition in some other Member States (not involved in the proceedings) and that condition had been abolished in other Member States, such as the Kingdom of Spain, the Italian Republic and the Portuguese Republic (see for example, ibid, Sub 37). However, most other Member States seemed to have it.

[68] ibid, para 82–116. See on the public-service exception, Barnard (n54), 497 ff.

[69] ibid, para 84–86; see also on Art. 51 TFEU, Case C-392/14 *Commission v Hungary* ECLI:EU:C:2017:73, para 108.

and freely choosing the conditions which they wish to be subject to when they produce a document or agreement to the notary for authentication. The notary's intervention thus presupposes the prior existence of an agreement or consensus of the parties and he cannot unilaterally alter the agreement he is called on to authenticate without first obtaining the consent of the parties.[70]

In addition to the nature of the *activities* (see the wording of Art. 51 TFEU), the ECJ also observes that (1) notaries practise their profession in conditions of competition (as every party can choose a notary freely and the quality of the services provided may vary from one notary to another, depending on their professional capabilities), which is not characteristic of the exercise of official authority, and (2) notaries are directly and personally liable to their clients for loss arising from any default in the exercise of their activities.[71]

Third, although the claim of the Commission did not relate to the status and organisation of notaries in the particular Member State legal system, nor to the conditions of access (other than that of nationality) to the profession of notary in that Member State,[72] the ECJ has also given its views on these aspects of the profession of notary. It did so in response to the Member States' argument in favour of the exception to the exercise of official authority that the notary's authentication of documents pursues *an objective in the public interest*, namely to guarantee the lawfulness and legal certainty of documents entered into by individuals.[73]

According to the ECJ, acting in pursuit of an objective in the public interest is not, in itself, sufficient for a particular activity to be regarded as directly and specifically connected with the exercise of official authority.[74] However, the fact that notaries pursue objectives in the public interest allows Member States to impose *other* conditions of access (other than the condition of nationality) to the profession of notary. The ECJ declared:[75]

> However, the fact that notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into by individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article 43 EC deriving from the particular features of the activities of notaries, such as the restrictions which derive from the procedures by which they are appointed, the limitation of their numbers and their territorial jurisdiction, or the rules governing their remuneration, independence, disqualification from other offices and protection against removal, provided that those restrictions enable those objectives to be attained and are necessary for that purpose.

Fourth, the Commission had also claimed with regard to certain Member States that by failing to transpose,[76] for the profession of notary, Directive 89/48,[77] and/or Directive 2005/36,[78] both on the recognition of professional qualifications, they had failed to fulfil their obligations under Arts. 43 EC and 45 EC (Art. 51 TFEU). The ECJ rejected these claims. According to the ECJ, in view of the particular circumstances of the legislative procedure and the situation of uncertainty which resulted, no sufficiently clear obligation existed for the Member States to transpose Directive 89/48 and/or Directive 2005/36 with respect to the profession of notary.[79] In 2013, Directive 2005/36/EC was amended,[80] by adding a new paragraph 4 to Art.

[70] Case 47/08 (n57), sub 87–92. Discussing the particularities of the various other, specific activities performed by notaries does not lead to a different conclusion (ibid, para 93–94, 98–116). In *Piringer*, the Court decided that the activity of the authentication of signatures does not fall within Article 51 TFEU. See also Barnard (n54), 502; and Case C-342/15 *Piringer* ECLI:EU:C:2017:196, para 54.

[71] Case 47/08 (n57), sub 117–118. Apart from Member States (such as Austria) where a notary engages the liability of the State, and where, outside that particular case, the notary is solely liable for the actions carried out in his professional activity. See C-53/08 (n61), Sub 113. In *Commission v Latvia* the Court emphasized that notaries practise their profession in conditions of competition, which is not characteristic of the exercise of official authority. See Case C-151/14 Commission v Latvia ECLI:EU:C:2015:577, para 74.

[72] Case 47/08 (n57), sub 73–75, and nor to the freedom of services, ibid, Sub 76.

[73] See Barnard (n54), 503 ff.

[74] Case 47/08 (n57), sub 95–96.

[75] ibid, Sub 97. See also Case C-342/15 (n70).

[76] Belgium, Luxembourg, Portugal, Germany, Austria; not France, Greece, the Netherlands.

[77] Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration [1989] OJ L 19, 16, as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 [2001] OJ L 206, 1, as later repealed by Directive 2005/36.

[78] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, [2005] OJ L 255/22.

[79] Case 47/08 (n57), sub 142–144. See on Recital 41, the Preamble to the Services Directive 2005/36/EC, ibid Sub 119, 139–141.

[80] Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the

2 Directive 2005/36, stating that 'this Directive shall not apply to notaries who are appointed by an official act of government.'[81]

5.3. Freedom of notarial services (Art. 56 TFEU) and notarial services

Art. 2(2)(j) Services Directive 2006/123 excludes from the scope of the directive (among others) services provided by notaries who are appointed by an official act of government.[82] The same holds true for the establishment of notarial offices by notaries. The Services Directive 2006/123 only explains in general terms in its preambule what the reasons for this could be.[83] As discussed above, the activities of notaries do not fall within the concept of the exercise of official authority. As a consequence, the exceptions with regard to the freedom of services deriving from Art. 62 in conjunction with Art. 51 TFEU (or the freedom of establishment deriving from Art. 51 TFEU) do not apply to services provided by a notary.

However, looking at the ECJ case law discussed above, the fact that notarial activities pursue 'objectives in the public interest' may constitute an overriding reason in the public interest capable of justifying restrictions of Art. 56 TFEU (freedom of services) deriving from the particular features of the activities of notaries.[84] The nature of the examples mentioned by the ECJ – such as restrictions deriving from the procedures by which notaries are appointed, the limitation of their numbers and their territorial jurisdiction – seem to underpin the point of view taken in Art. 2(2)(j) Services Directive 2006/123. The examples in the ECJ case law indicate that restrictions on the freedom of services are justified in such a manner that notarial activities in the Member State legal system are to be performed exclusively by notaries appointed in that Member State, provided of course that those restrictions enable the objectives in the public interest to be attained and are necessary for that purpose.[85]

5.4. The physical presence requirement in the light of Art. 56 TFEU

If the freedom of establishment and the freedom of services of the profession of the notary can *as such* be restricted as above, the question remains whether the physical presence requirement does not unnecessarily restrict the freedom of services in cross border cases under Art. 56 TFEU.[86] In the aforementioned case law (as discussed in section 5.2 above), the ECJ has not given its judgment on the application of the provisions of the EC Treaty (now TFEU) on the freedom to provide services.[87]

It is clear that the physical presence requirement deprives the notary and the testator of a rapid and direct technique for passing notarial deeds, in particular notarial wills. Looking at *Alpine Investments*,[88] one could argue that the (implicit) prohibition for notaries to authenticate notarial deeds using audio-video technology means that it 'directly affects access to the markets in services in the other Member States and is thus capable of hindering intra-Union trade in services,' especially in times of COVID-19 and travel restrictions. Art. 56 TFEU also applies where neither the provider nor the recipient of the service travels, but the service itself moves (e.g. by phone, email, the internet or cable).[89] It may all lead to the obvious conclusion that the physical presence requirement is an impediment to the freedom to receive and provide notarial services. If there is a breach of Art. 56 TFEU, the question remains whether the physical presence requirement for notarial deeds in general and notarial wills in particular is objectively justified and proportionate to restrict the freedom of notarial services.

Internal Market Information System ('the IMI Regulation') [2013] OJ L 354/132.

[81] The amendment implies that the Services Directive 2005/36/EC applies to notary candidates, as they are not yet appointed. See R.V.A. Bishoen and I.M. Welbergen, 'Herziening richtlijn erkenning beroepskwalificaties' (2014) 2014(01) Nederlands tijdschrift voor Europees recht 8, 14; and J.W.A. Biemans, 'De Europese Unie en de Nederlandse studie Notarieel recht' (2014) 7028 Weekblad voor Privaatrecht, Notariaat en Registratie 711, 711–713.

[82] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

[83] See for example Recitals 7, 8 and 40 of the Services Directive 2006/123.

[84] See also Consideration 40: The concept of 'overriding reasons relating to the public interest' to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Art. 43 and 49 TFEU […], also referring to 'the safeguarding the sound administration of justice.'

[85] To guarantee the lawfulness and legal certainty of documents entered into by individuals.

[86] Art. 49 TFEU (freedom of establishment) will not be included in this analysis. Although a notary of another Member State may be put off from opening an office in a Member State, where the use of audio-video technology is not permitted, the main question is whether such use should be permitted in the first place. This article primarily deals with the perspective of the 'recipient' (as opposed to that of the 'service provider').

[87] Case 47/08 (n57), Sub 75.

[88] See Case C-384/93 *Alpine Investments* ECLI:EU:C:1995:126, [1995], ECRI-1141. See Barnard (n54), 217–218, 289, 505. See also Case C-352/85 *Bond van Adverteerders* ECLI:EU:C:1998:196.

[89] See Barnard (n54), 289.

5.5. The physical presence requirement and the public-interest justification

If there are national measures which hinder or make less attractive the exercise of the fundamental freedoms, including the freedom of services, there is nevertheless no breach if there is a public-interest justification, also referred to as the 'Rule of Reason.'[90] In its case law (as mentioned in section 5.2 above), the ECJ identified as the relevant 'overriding requirements of general interest' (the pubic-interest justification) that notarial activities 'pursue to guarantee the lawfulness and legal certainty of documents entered into by individuals.' The next question is thus whether the physical presence requirement is objectively justified to guarantee the lawfulness and legal certainty of notarial deeds.

For several reasons the physical presence of the party to a notarial deed is objectively justified by the notary's pursuit to guarantee the lawfulness and legal certainty of his notarial deed. The following reasons can be distinguished: (1) verifying the parties' identity,[91] (2) assessing the will of the parties, which will be laid down in the notarial deed;[92] and (3) signing the (exact) same notarial deed as the parties have done.[93] Assessing the will of the parties includes: (a) (timely) informing the parties about the content of the notarial deed and (if necessary) its legal consequences; (b) (if necessary) establishing that the parties to the notarial deed are acting of their own free will, thus establishing that there is no undue influence by third parties, and (c) (if necessary) forming a view as to the mental capacity of the party.

5.6. The proportionality of the physical presence requirement

In addition to the public interest justification, the measures taken by the member state have to be proportionate, meaning that they are suitable for securing the attainment of the objective (the test of suitability) and not going beyond what is necessary in order to attain it (the test of less restrictive means).[94] The last question is whether a full prohibition of the use of audio-visual technology means in authenticating notarial deeds (especially notarial wills) is proportionate to achieve that the lawfulness and legal certainty of documents entered into by individuals is guaranteed. It seems that this question should be answered in the negative for mainly two reasons.

First, the making of a notarial last will requires personal contact between the notary (and/or the witnesses) on the one hand and the testator on the other hand, meaning that a last will cannot be made using a power of attorney. Although the physical presence of the testator seems to be logical, the same personal contact (as opposed to using a power of attorney) can also be achieved by (secured) audio-video technology means. After all, the implied physical presence requirement dates from a time when this technology was not available. The party is present; the notary can hear and see the party; the notary can communicate one-on-one with the party. Audio-video technology fundamentally differs from a power of attorney. Therefore, although the physical present requirement is suitable for securing the attainment of the lawfulness and legal certainty of a notarial last will, it is not indispensable for it, as in the 21st century the goal can also be achieved by using audio-video technology means. It is reasonable to demand that these means meet certain technological standards necessary to ensure their security and confidentiality if used for the identification of the testator, the communication between the notary and the testator and the signing of the notarial deed.

Second, the main argument against remote notarial wills put forward, for example by notaries, is that a notary cannot correctly assess whether a third party outside the view of the camera may put unacceptable pressure on the testator.[95] Also, in difficult cases, a notary needs to have a personal perception of the testator, including non-verbal communication, in order to truly assess his or her will, let alone his or her mental capacity.[96] Although these aspects of the notarial profession should be taken extremely serious, they cannot be the reason for a complete prohibition of remote notarial deeds. Apart from the fact that professional conduct and liability cases show that the physical presence requirement may *reduce* such risks, but will never fully eliminate them,[97] most importantly, a notary has the *discretion* to authenticate a remote notarial deed using audio visual technology means. Meaning, the notary has the duty to only use

[90] See Barnard (n54), 503 et seq.

[91] For the Netherlands, Art. 39 (1) and (2) Dutch Notary Act.

[92] Art. 43 (1) Dutch Notary Act.

[93] Art. 43 (4) Dutch Notary Act and, for last wills, Article 4:109 (1) DCC.

[94] See Barnard (n54), 510.

[95] See for example, in the Netherlands, Blokland et al. (n41), 9.

[96] See for example, the opinion of the notary João Ricardo Menezes, <https://www.jornaldenegocios.pt/opiniao/detalhe/gato-por-lebre---even-better-than-the-real-thing> accessed 5 July 2021.

[97] For example, a third party may also put this pressure on the testator without being physically present in the same room as the testator. See Biemans and Kolkman (n24), 91.

audio-visual technology when it is wise to do so in the particular case. If the circumstances of the case – such as (the suspicion of) mental incapacity of the testator or undue influence by a third party – ask for this, the notary should demand the physical presence of the testator and refuse authenticating a remote notarial will for such 'vulnerable' testators, among other thinkable safeguards.[98] Given this discretion of the notary to use audio-visual technology means, a complete prohibition of remote notarial deeds goes beyond what is necessary in order to attain the goal of legal certainty in difficult cases, as the notary is not *obliged* to *always* use the remote notarial will, since he is bound by a (professional) duty of care. There will also be *easy* cases in which a notary can guarantee the lawfulness and legal certainty of a notarial will having used audio-visual technology means. The COVID-19 interim measures, making remote authentication possible, while requiring the use of (secure) audio-visual technology means and stressing the duty of care of the notary, underline this.

To elaborate on this, 'open' norms, such as the duty of care of the notary, already fill in the requirements for notarial deeds. For example, most statutes require the physical presence of the party and the notary when it comes to signing the notarial deed. However, most notarial deeds can also be signed using a power of attorney. Such power of attorney will generally be given to an office worker of the notary, meaning that an employee of the notary will sign on behalf of the party.[99] There is a certain room for judgement when to use such power of attorney: it is up to the notary to decide whether to allow for the use of it. If a client prefers to come to the office of the notary or if the notary has his own good reasons to meet physically with the client in person, a power of attorney will not be used. The way in which the notary will exercise his discretion will depend on the circumstances of the case. For example, with regular business clients, it will generally be easy to communicate using phone, e-mail and/or the internet and to use a power of attorney; there will be no 'physical presence' of the client. With consumer clients, cases may range from a young couple (selling and) transferring their house, using a power of attorney, where a notary may not see the couple at all, to an elderly person, possibly facing dementia, willing to sell his or her house for a low price to a stranger, which requires all the attention of the notary and the physical presence of this elderly person at the notary's office and especially not the use of a power of attorney.

Following his duty of care, just as a notary can refuse to allow the use of a power of attorney when authenticating a notarial deed or require additional examination suspecting mental incapacity, a notary can refuse to authenticate a remote notarial deed using audio-visual technology means. It makes this approach to remote notarial wills coherent and consistent with existing notarial services.[100] Because the personal contact that can be established between the testator and the notary by using (secure) audio-visual technology means combined with the professional discretion of the notary to not use these means if he cannot guarantee the lawfulness and legal certainty of the last will depending on the circumstances of the case, there are no overriding requirements of general interest for a complete prohibition of remote notarial wills.[101]

6. Conclusion

Looking at the similar responses to COVID-19 in many countries and jurisdictions –witnessed wills: Australia, Canada, England and Wales, New Zealand, the United States (Connecticut, Illinois, Kansas, Michigan, New York, and Tennessee) and notarial wills: the Netherlands, Portugal, Canada (Quebec), the United States (Colorado, North Dakota) – to make possible witnessed wills and notarial wills, the outcomes are both overwhelming and logical. The requirement of the physical presence of a notary and/or witnesses has been replaced by using audio-visual technology means to authenticate and/or to attest to the last will of the testator.

Although the measures are temporary, they may speed up the modernization of the role of the notary and the witness in making last wills, adjusting these roles to the standards of the 21st century. Solutions introducing audio-video technology as an alternative for physical presence are more favourable than the two other solutions: the introduction of the holographic will and the adoption of doctrines such as the harmless-error doctrine or substantial compliance doctrine. Introducing remote authentication and remote

[98] See also, Hirsch and Kelety (n5), 5.

[99] As stated before, only when it comes to signing last wills is the use of a power of attorney not allowed.

[100] See on the requirement of coherency and consistency as part of the proportionality principle, Sacha Prechal, 'Topic One: National Applications of the Proportionality Principle – Free movement and procedural requirements: proportionality reconsidered' (2008) 35(3) *Legal issues of economic integration* 201, 201–216; and Case C-28/09 *Commission v Republic of Austria* ECLI:C:2011:854.

[101] Although other notarial deeds can be executed using a power of attorney, the same could be said of these deeds – ranging from real estate transaction deeds, premarital agreements, establishment, (de)merger and statutes (by-laws) of legal persons and the transfer and encumbrance of limited liability company shares.

witnessing leaves intact the existing will types of the particular jurisdiction as they are, while at the same time preserving legal certainty by anchoring these possibilities in legislation. Moreover, introducing audio-video technology in making last wills seems a logical step forward in the 21st century, given the possibilities at hand.

The advocated introduction of the use of audio-visual technology is boosted within the EU by the freedom of services in Art. 56 TFEU. From ECJ case law and directives, it follows that Member State are allowed to restrict the freedom of establishment of notaries and the freedom to provide notarial services. These restrictions often lead to a domestic monopoly of notaries, where notaries appointed in the Member State offer exclusively notarial services under the legislation of that Member State, with the requirement that these notaries can only be established and only offer their services in that Member State. Combined with the physical presence requirement, these restrictions to the freedom of establishment and the freedom of services effectively force a testator desiring to make his or her last will before a notary to travel to the Member State of that notary. It can be argued that also without COVID-19 the physical presence requirement unnecessarily restricts the freedom of services under Art. 56 TFEU, as it deprives the notary and the testator of a rapid and direct technique for passing notarial wills. The possibility of remote authentication under interim legislation raises the question whether the physical presence requirement is objectively justified and proportionate to restrict the freedom of notarial services when it comes to last wills. This does not seem to be the case, as the required personal contact between the notary and testator can also be achieved by using (secured) audio-video technology means, whereas the notary has the discretion (and the duty) to refuse to use a remote last will and require the physical presence of the testator if he cannot guarantee the lawfulness and legal certainty of the last will (depending on the circumstances of the case, such as [the suspicion of] mental incapacity of the testator or undue influence by a third party).

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Competing Interests

The author has no competing interests to declare.

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