

UNION INTERNATIONALE DU NOTARIAT (U.I.N.L)
COMMISSION DES AFFAIRES EUROPEENNES
(C.A.E.)

English version : see below

GROUPE DE TRAVAIL:
**“LA CONTRIBUTION DU NOTARIAT A COTE DE LA MAGISTRATURE POUR LE
FONCTIONNEMENT DE LA JUSTICE CIVILE”**
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INTRODUCTION ET FINALITE DE L'ETUDE

Le but de cette importante étude comparative est d'examiner les différents facteurs qui lient les professions de juges et notaires du point de vue de leurs fonctions respectives dans le cadre des systèmes légaux des différents pays Européens, les critères d'accès à la profession, la formation (inclus la formation continue), la déontologie et, plus important, d'étudier la mesure dans laquelle les notaires exercent des fonctions judiciaires. Cette étude vise à trouver des moyens par lesquels améliorer la compréhension réciproque et la coopération entre les professions, ainsi qu'à identifier des secteurs où le notaire pourrait plus s'engager (comme professionnel désintéressé et impartial) dans l'administration de la justice civile.

Le point de départ de cette étude est le questionnaire annexé que tous les notariats membres sont priés de compléter et de renvoyer au coordinateur de ce groupe de travail **avant le 30 mars 2012.**

Après avoir rassemblé les réponses, le groupe de travail mettra à disposition un rapport initial et des propos aux notariats membres, avant la réunion de la CAE qui aura lieu à Amsterdam en Mai 2012.

QUESTIONNAIRE

A) LA PHASE DE LA FORMATION

- 1) Existe-t-il une formation commune pour l'accès à la magistrature et au notariat?
- 2) En particulier, quelles sont les différences de parcours de la formation des juges/magistrats de celle des notaires?
- 3) Existe-t-il des cours universitaires (degré universitaire) avec une branche spécifique pour les juges/magistrats et pour les notaires?
- 4) Existe-t-il des cours des formations publiques ou privées *post-graduate* (postuniversitaire) pour la profession en magistrature ou pour le notariat?

B) LA PHASE DE L'ACCÈS À LA PROFESSION

- 1) Y a-t-il des examens (concours ou autres) à passer pour devenir magistrat et notaire?
- 2) Dans l'affirmative, le concours ou examen pour devenir magistrat est-il différent de celui pour devenir notaire?
- 3) Est-il prévu une phase de training ou pratique communes avant de passer l'examen ou le concours ?
- 4) Est-ce qu'une période de stage est obligatoire après le passage de l'examen ou du concours avant de commencer à pratiquer ou à assumer les fonctions de magistrat?
- 5) Y a-t-il une limite minimum ou maximum d'âge pour les magistrats ou notaires ?
- 6) Indiquez s'il vous plaît les autres conditions qu'il faut satisfaire pour devenir juge ou notaire, par ex. nationalité, casier judiciaire vierge, solvabilité etc.

C) LA PHASE DE LA FORMATION SUCCESSIVE À LA NOMINATION

- 1) Existe-t-il des cours de formation continue communs pour le juge/magistrat et le notaire?
- 2) Est-il obligatoire pour les magistrats et les notaires participer dans l'année à des cours de formation continue?
- 3) Existe-t-il un système de contrôle disciplinaire et déontologique pour vérifier la mise à jour professionnelle?

- 4) Quel est l'organisme de contrôle qui veille sur le comportement éthique et déontologique des juges/magistrats et des notaires?
- 5) Est-il possible d'exercer la profession à la fois de Magistrat et de Notaire?
- 6) Est-il possible passer de la Magistrature au notariat et vice-versa, et si oui, quelles sont les modalités ?

D) LE CADRE LEGISLATIF ET FUTURS AMENDEMENTS A LA LOI

- 1) Y a-t-il des domaines (par ex. droit de la famille, droit des successions, faillite, procédure d'exécution, droit des sociétés, médiation, division judiciaire, etc.) pour lesquels la loi attribue aux Notaires des fonctions de juge ou des fonctions auxiliaire ou substitut de juge?
- 2) Dans l'affirmative, indiquer les matières spécifiques et les détails sur les lois relatives.
- 3) Lorsque le notaire exerce des fonctions auxiliaires ou de remplacement du Juge, ses activités sont menées dans les procédures judiciaires sous la supervision du Juge ou en toute autonomie par le Notaire?
- 4) Lorsque le notaire exerce un rôle dans le procès civil, est-il protégé contre responsabilité civile ?
- 5) Quels sont les projets de lois en la matière dans votre Pays?
- 6) Existe-t-il des propositions en la matière provenant du Notariat ?
- 7) Quels pourraient être les nouveaux champs dans lesquels les Notaires pourraient collaborer avec les Juges pour contribuer au bon fonctionnement du procès civil?

INTERNATIONAL UNION OF NOTARIES (U.I.N.L.)

EUROPEAN AFFAIRS COMMISSION (C.A.E.)

WORKING GROUP:

**"THE CONTRIBUTION OF THE NOTARIAT, ALONGSIDE THE JUDICIARY,
TO THE FUNCTIONING OF CIVIL JUSTICE"**

Coordinator : Mr Giovanni Aricò (Italy)

Member : Mr Juan García (Spain)
Member : Mr N.P. Ready (London)

INTRODUCTION AND PURPOSE OF THE STUDY

The purpose of this important comparative study is to explore the various factors which link the professions of judge and notary in terms of their respective functions within the legal systems of the various European countries, the criteria for entry to the professions, training (including continuing professional development), deontology and, perhaps most significantly, to examine the extent to which notaries exercise judicial functions. The study will also look at ways in which mutual understanding and cooperation between the professions may be enhanced and identify areas where there may be scope for greater involvement of the notary (as a disinterested and impartial professional) in the administration of civil justice.

The study takes as its starting point the attached questionnaire which all member notariats are requested to complete and return to the working group coordinator **by no later than 30 March 2012**.

After collating the responses, the working group will make available an initial report and proposals to member notariats prior to the meeting of the CAE in Amsterdam in May 2012

QUESTIONNAIRE

A) TRAINING

- 1) Are there any common elements in the training to become a judge or a notary?

Yes, bar exam is common element for different legal professions: judges, lawyers, prosecutors and notaries.

- 2) How does the training to become a judge differ from that of a notary?

After passing bar exam a certain professional experience and attendance at a preparatory seminary by candidates constitutes a condition to take the notary exam. Generally speaking a notary has one exam more than a judge.

After passing bar exam a certain period of the professional experience is precondition to become a judge.

- 3) Are there university courses specifically designed for judges and notaries?

No.

- 4) Are there public or private post-graduate courses to become a judge or a notary?

Yes, preparatory seminary organized by relevant Ministry of Justice for notaries and for judges and prosecutors initial training organized by relevant Judicial and Prosecutorial Training Centre under auspices of High Judicial and Prosecutorial Council of Bosnia and Herzegovina (further: HJPC).

B) ENTRY TO THE PROFESSION

- 1) Are there examinations (competitive or otherwise) which must be taken in order to become a judge or a notary?

Yes, for notaries notary exam and for judges interview.

- 2) If so, are the professional examinations to become a judge different from those to become a notary?

The notary exam is organized by relevant Ministry of Justice and it is obligatory. Notary exam is taken before the Notary Examination Committee composed of five members, appointed by relevant Minister of Justice. Notary exam consists of a written and the oral part. Written part is composed of three assignments. Two out of four assignments are designed to test whether candidates are capable to draw up notary documents in the following legal areas: 1. Law of Obligations and Property Law, 2. Family and Inheritance Law, 3. Business Law, 4. Execution Procedure. Each written paper is evaluated by two members of the Notary Examination Committee independently one from another, where the member who has given the written assignment must participate. The written papers are marked anonymously, and for that purpose, the evaluation is done by the number assigned by the Ministry, without stating any names of the candidates.

Oral part of the exam is consisted of reasoning the written part and on regulations of notarial service.

HJPC nominate judge, reserve judge or prosecutor. No person is eligible for appointment to judicial or prosecutorial office without having been interviewed.

A public announcement of vacant positions, conducted by the Council, precedes the appointment of judges, including Court presidents, reserve judges, Chief Prosecutors, Deputy Chief Prosecutors, and prosecutors. In the Law on HJPC is prescribed that the competitive examination may be in the form of a written and/or an oral examination but it is done on the basis of interviews. Interviews assist in determining an applicant's ability to perform judicial functions.

Based on the ranking of the interview panel present a list of ranked candidates to the HJPC who make the final decision on all appointments.

- 3) Is there a common period of practical training or apprenticeship prior to taking the examinations/entering the competition?

Yes, the certain period of work on legal affairs.

Laws on notaries

In the article 5 of the Law on Notaries in Federation of Bosnia is prescribed:

“(1) During the transition period of eight years since entry into force of this Law,¹ a person may take notary exam who has, after passing the bar examination as described under Art 26 Nr. 4, worked at least five years on legal affairs, as well as a person who meets the preconditions from paragraph 2 of this Article.

(2) After the termination of the transition period specified under paragraph 1 of this Article, only a person who has spent at least three years working as a notary assistant as understood under this Law may take the notary exam.”

In the article 6 of the Law on Notaries in Republika Srpska² is prescribed that a person may take notary exam who has, after passing the bar examination worked at least five years on legal affairs.

Law on HJPC BiH

Judges of the Entity Supreme Courts, Judges of the Court of Bosnia and Herzegovina have to have a minimum of eight (8) years of experience, Judges of the district courts of Republika Srpska and the cantonal courts of the Federation of Bosnia and Herzegovina have to have a minimum of five (5) years of practical as a judge, prosecutor, attorney, or other relevant legal experience after having passed the bar examination.

- 4) After passing the examinations, is a traineeship compulsory before being able properly to assume the role and perform all the duties of a judge or notary?

See answer under B 3).

- 5) Are there minimum or maximum age-limits which apply to judges or notaries?

There are no prescribed age-limits but practically after finishing law faculty certain period of work on legal affairs is precondition for bar exam. After passing bar exam person who wants to become notary or judge have to have a period of further on legal affairs.

- 6) Please indicate any other conditions which must be met in order to qualify as a judge or notary – e.g. nationality, absence of criminal record, solvency etc.

Selection of a notary is done by means of a competition organised and conducted by the relevant Ministry of Justice (e.g. Ministry of Justice of the Republika Srpska or Ministry of Justice of the Federation of Bosnia and Herzegovina).

Only candidates who have professional and moral reputation worthy of notary service may be selected as notaries. A person who meets cumulatively the following conditions may be appointed as a notary:

- 1. must be a citizen of Bosnia and Herzegovina,**
- 2. must have business competence and meet general health conditions,**
- 3. must have graduated from a law faculty in Bosnia and Herzegovina or prior to 06.04.1992 from a law faculty of the former Yugoslavia. If a law degree was**

¹ “Official Gazette of the Federation of Bosnia and Herzegovina“ no 45/2002 from 20th September 2002. Law on Notaries of the Federation of Bosnia and Herzegovina entered into force on the eighth day from its publication in the “Official Gazette of the Federation BiH”, and started to be implemented after the lapse of 18 months deadline from the day of its entry into force.

² „Official Gazette of the Republika Srpska“ no 86/2004,2/05, 74/05, 91/06, 37/07, 50/10 i 78/11).

earned in another state, the said condition shall be met after verification of a diploma degree by a competent body.

4. must have passed a bar exam in Bosnia and Herzegovina or prior to 06.04.1992 in the former Yugoslavia. If a bar exam was taken in another state, the said condition shall be met after recognition of the exam by the Ministry.
5. that the person in question has not been sentenced to a prison sentences for crimes against humanity and of international law, violation of official or other duties or a crime of a premeditated offence, which was not deleted from criminal records by a competent body at the time of appointment and
6. must have passed the notary examination.

In the Law on Notaries of the Federation of Bosnia and Herzegovina is prescribed as an additional condition that candidate for notary is not a member of a political party.

When making selection between several candidates who meet before mentioned conditions and terms, candidate's success at the notary examination shall be given primacy, whereas when selecting between candidates of equal rates national representation of constitutive peoples and others in the seat of the notary shall be taken into account as well.

In making decisions on appointment, the HJPC take into account, amongst others, the following criteria: (a) Professional knowledge, work experience and performance; (b) Capacity through academic written works and other professional activities; (c) Professional ability based on previous career results, including participation in organized forms of training; d) Work capability and capacity for analysing legal problems; (e) Ability to perform impartially, conscientiously, diligently, decisively, and responsibly the duties of the office for which he or she is being considered; (f) Communication abilities; (g) Relations with colleagues, conduct out of office, integrity and reputation; and (h) Managerial experience and qualifications, in relation to the positions of Court President, Chief Prosecutor and Deputy Chief Prosecutor.

The HJPC implements relevant Constitutional provisions regulating the equal rights and representation of constituent peoples and others. Appointments to all levels of the judiciary also have, as an objective, the achievement of equality between women and men.

C) TRAINING SUBSEQUENT TO APPOINTMENT

- 1) Are there common training courses for judges and notaries?

Judicial and Prosecutorial Training Centers of both entities in Bosnia and Herzegovina and Notary Chambers of Federation of Bosnia and Herzegovina organize from time to time common training courses.

- 2) Are judges and notaries required to undertake continuing professional education?

Yes they are.

Notary shall be dismissed if he/she has not attended at least two courses for professional development of notaries per year, which courses are recognized by the Ministry of Justice of each entity in Bosnia and Herzegovina.

Judge's failure to fulfil any mandatory training obligations is disciplinary offence. According to the decision of HJPC minimum of mandatory training is four days per year.

- 3) Is there a system in place to check that professional codes of conduct and ethics are adhered to?

Yes there is.

- 4) Which organisation is responsible for ensuring the professional codes of conduct and ethics are adhered to by judges and notaries?

HJPC BiH is responsible for ensuring that professional codes of conduct and ethics are adhered to by judges. Standing Committee on Ethics, Independence and Incompatibility within the HJPC has been tasked to offer advice to judges and prosecutors seeking counsel on the application of the codes as to specific problems which they may face.

Notary Chamber of Federation in Bosnia and Herzegovina and cantonal administration agency are responsible for ensuring the professional codes of conduct and ethics are adhered to by notaries. For notaries in Federation of Bosnia and Herzegovina .

For notaries in Republika Srpska Notary Chamber of Republika Srpska and Ministry of Justice of the Republika Srpska are responsible for ensuring that the professional codes of conduct and ethics are adhered to by notaries.

In both Notary Chambers in Bosnia and Herzegovina exist Standing Committee on Ethics that have advisory role.

- 5) Is it possible to be both a judge and a notary at the same time?

No it is not possible.

- 6) Is it possible to transfer from the profession of a judge to that of a notary and vice versa, and if so, how?

Judge has to pass notary exam and to apply on a basis of a public announcement of vacant notary position.

Notary can apply on a basis of a public announcement of vacant judicial positions, conducted by the HJPC that precede the appointment of judges and on the basis of the result of interview be nominated as a judge.

D) THE LEGISLATIVE FRAMEWORK AND PROSPECTIVE CHANGES TO THE LAW

- 1) Are there areas of law (e.g. family law, succession law, insolvency law, enforcement proceedings, company law, mediation, judicial divisions etc.) where notaries are given judicial functions, functions auxiliary to the judge or functions in substitution for the judge?

Such possibility exists in the laws, however it is not commonly used in practice (court trustee in succession law).

- 2) If so, please specify the relevant areas and provide details of the applicable legal provisions.

Law on Successions and the Law on Noncontentious Procedures in the Republika Srpska give possibility that a court president, upon request of parties, decides that certain noncontentious successions case could be transferred from a court to a notary but there is still missing detailed procedure for such transfer.

- 2) When a notary exercises judicial functions, does he do so independently or as delegate of the judge?

Notary does so as delegate of the judge (court trustee).

- 4) When a notary performs a role in civil proceedings, is he protected against civil liability?

No he is not protected against civil liability.

- 5) Please indicate any legislative proposals relevant to the matters raised in this questionnaire.

It should be regulated in the bylaws in accordance with the positive Law on Succession in Republika Srpska. Law on Succession in Federation of Bosnia and Herzegovina that allow transfer of noncontentious procedure from courts to notaries should be adopted.

- 6) Has your notariat sought the introduction of any such proposals ?

Notary Chambers lodge strong efforts to define and regulate such issues.

- 7) In what areas could notaries collaborate with judges to contribute to the conduct of civil proceedings?

In the process off succession and securing and acquiring preliminary court evidence.