

Study JuWiLi 2022 – Legal Part

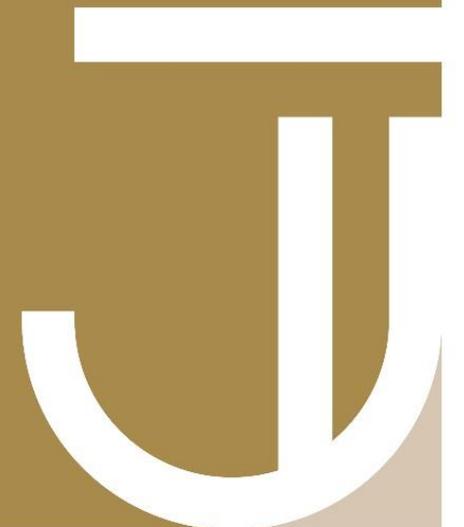
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Based on the country reports

A, CZ, HR, HU, SK, SLO + A.M.



Overview of Presentation

1. National Law: Status Quo
2. EU Law: Cross-Border Cases
3. Policy Recommendations - EU Law
4. Fundamental Rights and National Constitutions
5. Policy Recommendations – Fundamental Rights and National Law



Working Definition of „Non-Contentious Proceedings“

- **Form:** “application” **NOT** “action”
- **Absence of unsettled dispute:** present disputes are settled amicably
- issues of **family law** despite dispute
- **Less formal, less costly**
- **One-party** proceedings are possible.

National Legal Rules of Participating Member States

- In **A, CZ, HR, HU, SK**, and **A.M.** notaries act as “**courts**” or “**courts commissioners**” in non-contentious proceedings
- main area of activity: **succession law**
- Fully fledged proceeding including final decision: CZ, HR, HU, SK; no final decision in A and A.M.
- Court commissioners also in **other fields** of law: out-of-court **divorces**; **execution** of claims; access/entry into **public registers**; division of **matrimonial**/partnership **property**; **recognition** of maternity or paternity to a child; taking of evidence and service of documents abroad.

National Legal Rules of Participating Member States

Arguments for notaries

- Reduce workload of courts
- Better coverage of rural regions
- Less formal, less time-consuming
- Lower costs (for state, for parties)
- Approachability, privacy, intimacy
- Smoothness, reduction of conflict
- Independence, Impartiality
- Expertise in future provision, advice

Arguments for courts

- Better legal training and expertise in judges
- Stricter control by state institutions
- Stronger procedural and institutional guaranties in favor of parties
- State liability for damages incurred by the parties

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EU Law: Cross-Border Cases

Art. 81 TFEU:

free circulation of public legal acts = judgements, certificates, authentic instruments

A well-justified differentiation in tracks:

- “**authentic instruments**” (CJEU *Unibank*) are **accepted**

no international jurisdiction, no force of law, no lis pendens

- “**court decisions**”: are recognized (Int’l jurisdiction)

Track 2

Track 1

EU Law: Cross-Border Cases

An extremely incoherent notion of court

older Regulations like Brussels I (*bis*): **most**

notaries excluded

Succession R. + Matrimonial Property R.: **n**

notaries partially included

Brussels II *ter* (and *bis*?): **very broad**

all notaries included

EU Law: Cross-Border Cases

Incoherent notion of court: Art. 3 No. 2 Succession Regulation

Similar non-contentious proceeding by notaries (e.g. succession):

Parties A from MS A where notary meets the requirements of „court“ definition are in **Track 1**

Parties B from MS B where notary does not fit in the „court“ definition of a regulation are in **Track 2**

Turning on Art. 3/2 SR: „delegation of power or control by a court“ (Track 1) or directly authorized by a statute without **specific link to a court**

EU Law: Cross-Border Cases

Problems

- Parties and practitioners seeking cross-border recognition encounter obstacles
- Parties are treated inequally without sound justification
- Infringement of Art. 21 TFEU (EU citizenship) in family law cases (recognition of family status)

Solution: same function + same quality = same legal consequences
both for courts and (all) notaries under EU law

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Policy Recommendations – EU Law

Uniform definition of court

Advantages

- treats the **citizens** of all Member States **equally**
- **EU respects** the decisions of the legislatures of the **Member States** to endow courts or notaries with proceedings
- **free circulation of public acts Art. 81 TFEU**
- **free movement EU citizens Art. 21 TFEU: CJEU *Coman et al.***

Policy Recommendations – EU Law

Uniform definition of court

For the purposes of this Regulation the term ‘court’ means any authority with competence in matters falling within the scope of this Regulation, provided that such authority offers guarantees with regard to independence and impartiality and the right of all parties to be heard and provided that their acts under the law of the Member State in which they operate:

- (a) may be made the subject of an appeal or review by a judicial authority; and
- (b) have a similar force and effect as an act of a judicial authority on the same matter would have.

Policy Recommendations – EU Law

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Brussels II *bis* and *ter* et al. have only this part of the definition.

It might, however, be better to add parts about procedural guarantees and judicial review as found in Art. 3 No. 2 SR.

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National Constitutional Law

Main findings: Notaries acting in non-contentious proceedings meet constitutional requirements of independence and could in most states engage in new tasks

- Notaries of the participating Member States acting in the service of the judiciary – as “**courts**” or “**court commissioners**” – meet **guarantees of independence** (including protection against removal from office) and are under an **obligation to hear** all parties in cases before them.
- **Institutional requirements of a fair trial (Art. 6 ECHR, Art. 47 EU-CFR) are met** even in cases which fall outside the scope of these provisions as they do not concern the settlement of a “**dispute**”.
- National constitutional law in most analyzed Member States does **not prescribe any strict limits to the transfer of judicial tasks to notaries**, with the exception of **Austria** (due to a very narrow and **debatable** interpretation of the Federal Constitution) and **Hungary** (which is **more generous** as it allows for the transfer of “non-substantive adjudicating activities”; which is the case for non-contentious proceedings). **These provisions can no longer be justified on substantive grounds and should be amended.**

Primary EU Law

Main findings: EU primary law (in part. Art. 19 TEU and Art. 47 EU-CFR) does not form an obstacle for the national legislator to endow notaries with tasks and functions in the national justice system which would otherwise be fulfilled by traditional courts.

- Notaries can fulfil the **main requirements of Art. 6 ECHR and Art. 47 EU-CFR**, namely **impartiality** and the **hearing of all parties**, by acting as “courts” or “court commissioners” if national law is designed accordingly.
- However, they will regularly **not** meet the definition of a “court” under EU primary law (and ECHR / ECJ case-law) as they are not settling “disputes”
- However, while the definition of court is important in the context of **secondary law**, the main question on primary law is whether it forms an obstacle for the national legislator to endow notaries with tasks and functions in the national justice system which would otherwise be fulfilled by traditional courts. **This is not the case.**

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Policy Recommendations – Fundamental Rights

- Notaries acting as “courts” or “court commissioners” already meet the **main requirements of Art. 6 ECHR and Art. 47 EU-CFR**, namely **impartiality** and the **hearing of all parties** in the States that were analyzed in the project. These requirements should, as presented above (3. Policy Recommendations – EU Law) **also be enshrined in secondary EU law in a more comprising definition of “court”**.
- However, it should always be verified that national legislation **clearly spells out** these guarantees (not only implicitly). If this is not the case, amendments are useful.
- As soon as notaries meet the requirements of “fair trial” (as is already the case in the States analyzed), any **constitutional provision prescribing strict limits** to the transfer of judicial tasks to notaries **should be repealed**. This would contribute to unburdening courts and to allow for a stronger role of notaries in non-contentious proceedings (in particular is this is realized in conformity with a new court definition in EU secondary law).

Policy Recommendations – National Law

In case EU law remains unchanged, introducing the “court commissioner” model for notaries at the national level is the essential tool to extend their competences effectively.

This ensures in particular their inclusion as “courts” under the **Succession Regulation** and the two **Matrimonial/Partnership Property R.**

Policy Recommendations – National Law

Best Practices found in participating states

- Succession law
- Out-of-court divorces
- Execution of claims
- Entry into public registers
- Division of matrimonial/partnership property
- Recognition of maternity or paternity to a child
- Taking of evidence and service of documents

End

Thank you very much

for your attention !!!