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### **Liberalisation of the Dutch notary profession**

Reviewing its scope and impact

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## **Abstract in English**

This study provides an overview of the policy of liberalisation that transformed the Dutch notary profession into one of the least regulated in Europe. We discuss the changes brought with the new Notary Act of 1999, the political debates and lobbying preceding the introduction of the Act, and its impact on the profession. We go into the likely effects on key indicators, including entry, notary fees and the (perceived) quality of service. We place the Dutch experiences in an international context by comparing the Dutch notary profession to the organisation and regulation of the profession in other countries, including the US, Quebec, Germany and Belgium.

*Key words: notary profession, liberalisation*

*JEL code: K23.*

## **Abstract in Dutch**

Deze studie geeft een overzicht van het beleid van liberalisering dat het Nederlandse notariaat tot een van de minst gereguleerde in Europa maakte. We gaan in op de veranderingen als gevolg van de nieuwe Wet op het Notarisambt van 1999, het politieke debat en het lobbywerk dat er aan vooraf ging, en het effect van de Wet op het notariaat. We besteden hierbij aandacht aan de mogelijke invloed op ontwikkelingen in onder meer toetreding, tarieven en de kwaliteit van de dienstverlening. We plaatsen de ervaringen in Nederland in een internationale context door het Nederlandse notariaat te vergelijken met de organisatie en regulering van de beroepsgroep in andere landen, waaronder de Verenigde Staten, Quebec, Duitsland en België.

*Steekwoorden: notariaat, liberalisering*

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## Preface

Unregulated fees and greater freedom of establishment – changes accompanying the introduction of the 1999 Notary Act – are transforming the way Dutch notaries provide their services to the public. The CPB Netherlands Bureau for Economic Policy Analysis is conducting an empirical analysis to identify the impact of this policy of liberalisation on competition between notaries and on the quality of notarial services. As a background report to this CPB research project, the underlying volume documents the organisation and regulation of the profession before and after the introduction of the new Notary Act.

With publication of this report, we also hope to facilitate interaction with policymakers and researchers abroad who are active in this area. To put the Dutch experiences in an international perspective, this study compares the Dutch notary profession with the organisation and regulation of notaries in other countries, including the US, Germany, Belgium and Quebec.

The authors wish to thank the Koninklijke Notariële Beroepsorganisatie (KNB) and Jeroen van den Heuvel Rijnders from the Department of Economic Affairs for their detailed and useful comments on an earlier version. All remaining errors are the responsibility of the authors. We would like to thank Tilburg University for allowing law student Nicole Kuijpers to work with us for a couple of months. Her diligent work proved to be indispensable for the success of this project.

Henk Don, director.





## Summary

The Dutch energetic policy of liberalising the notary profession is unique. Reforming protected professions like the notary and the Bar proves to be a very difficult political process in many countries. Therefore, evaluating the impact of the Dutch liberalisation on the way notaries work is not only highly informative for policy makers within our own borders, but also for policy makers in other countries that may consider similar reforms.

This study provides an overview of the policy of liberalisation that transformed the Dutch notary profession. It is meant as a background report to a research project empirically analyzing price competition and quality of notarial services after the liberalisation, initiated by the CPB Netherlands Bureau for Economic Policy Research.

We start off with a discussion of the changes in the regulatory framework that came with the new Notary Act of 1999. The most important changes included the introduction of competition on fees and greater freedom of establishment. Then, we discuss the political debates and lobbying preceding the introduction of the Act. We pay specific attention to the making of the new Act. As stated above: the Netherlands is a rare example in having been able to reform its notary profession.

Based on empirical research conducted over the last years, we review the impact of the policy of liberalisation on the profession. We go into the likely effects on entry, the geographical distribution of notary offices, notary fees and price consciousness of clients, notaries' earnings and costs, the number of notarial deeds and the (perceived) quality of service. Existing empirical evidence suggests that price competition between notaries is still limited, that the reform did not foster entry to the profession and that compliance with the code of conduct seems to be diminishing.

To place the Dutch experiences in an international context, we conclude with a comparison of the Dutch notary profession with the organisation and regulation of the profession in other countries, including the US, Quebec, Germany and Belgium. Given its Common Law system, the US has a different type of notary: the notary public. The profession is relatively loosely regulated. Within countries with a Latin notary profession, notaries in the Netherlands and Quebec enjoy the greatest freedom in setting fees for service and establishing at the location of choice. The German and Belgian notary profession is tightly regulated, sometimes even stricter than the Dutch profession before the new Notary Act of 1999.



# 1 Introduction

## 1.1 Rationale

With the Notary Act of 1999, the Dutch notary profession has become one of the least regulated in Europe. Its main objective was to achieve acceptable prices and to promote the provision of high-quality notarial services. Two important means of achieving this objective were the end of price regulation and the creation of freedom of establishment of notaries.

The impact of this unique and far reaching policy initiative has been followed with great interest by practitioners, policy makers and the public. In particular, since the Netherlands is a frontrunner in liberalising the notary profession, there is a great deal of uncertainty about the actual impact of the new Act. Therefore, the developments in the market for notarial services have been subject of several evaluation studies. One of the most important studies to date was the final report of the Commission Monitoring of the Notary Profession (Commissie Monitoring Notariaat, 2003). This Commission was established by the Department of Justice and the Department of Economic Affairs to monitor changes in the notary profession after the passing of the new Notary Act. In writing their report, the Commission could build on an evaluation study conducted by the EIM research institute. Based on surveys among notaries and their customers, Vogels et al. (2002) analyzed changes in the accessibility of notarial services to the public, the fees, quality of services, and the continuity of the profession. Another source of information for the Commission was a study into the notary profession by SEOR and OCfEB commissioned under auspices of the Minister of Justice (Dijkstra and Aalbers, 2002). The main focus of this study was on fees for family-related notarial services. Two other studies into the profession worthy of mention are the evaluation by Berenschot and SEO (Plug et al., 2003) and the first 'Trendrapportage Notariaat' (Ter Voert and Van Ewijk, 2004). The latter report is the first of a series of periodical updates on developments in the market for notarial services as commissioned by the Minister of Justice. A new milestone in the evaluation of the new Notary Act is the forthcoming report by the Hammerstein Commission, to be published in September 2005.

To contribute to the insights into the workings of the new Act six years after its introduction, the CPB has started a research project under the heading 'Competition and quality in the Dutch notary profession'. The objective of this research project is to empirically assess the effects of the new Notary Act on the level of competition and quality of services provided.

## 1.2 Purpose of this study

The purpose of the present study is to present an overview of the recent liberalisation of the Dutch notary profession. This survey of changes in the institutional structure serves as a background document for the above-mentioned CPB project. We aim to answer the following questions:

- How did the legal framework of the notary profession change over the last years?
- In what ways did changes in the legal framework affect the market for notarial services?

Since the Netherlands is a frontrunner in liberalising its notary profession, this study should also be of interest to foreign researchers and policy makers active in this field.

## 1.3 Approach

This study is based on a review of the juristic and economic literature on developments in the notary profession in the Netherlands. In order to obtain a practical understanding of the issues, we conducted open interviews with two practitioners: a notary established in The Hague and a junior notary established in Geertruidenberg.

## 1.4 Structure

The rest of the study is structured as follows. In chapter 2, we discuss the main characteristics of the Latin notary profession on which the Dutch profession is based. This chapter also provides an overview of the actual activities of Dutch notaries and it introduces the *Koninklijke Notariële Beroepsorganisatie* (KNB), the public body governing the notary profession. Chapter 3 presents the regulatory framework of the notary profession, and the changes in the framework with the introduction of the new Notary Act. In chapter 4, we discuss the making of the Notary Act in more detail. This chapter also reviews the opinions about the Act of the diverse set of actors involved in the notary profession. Chapter 5 provides an overview of the developments in the market for notarial services since 1999. In this chapter, we also discuss which developments are likely to be attributable to the new Act. Chapter 6 presents the conclusions and recommendations of the 2003 evaluation of the Act, and the results of the two interviews we conducted as part of this study. Finally, chapter 7 compares the Dutch notary profession with the organisation and regulation of the profession in the United States, Belgium, Germany and Quebec.

## 2 Organisation of the profession

In this chapter, we present the foundations of the Dutch notary profession. First, we examine the characteristics of the Latin notary profession on which the Dutch notary profession is based. Next, we survey the notary's duties and the development of the professional association of notaries.

### 2.1 The Latin notary

The Dutch notary profession is a typical example of the Latin notary system. The Latin notary is 'a private legal professional, who advises and drafts legal documents for private parties, maintains a permanent record of the transaction and has the authentication power of the state delegated to him' (Malavet, 1996). Certain legal acts require notarisation by law. The notary is granted a professional monopoly to provide these services (*domeinmonopolie*). When performing his duties the notary must be independent and impartial. He has to balance the interests of all parties involved in a legal transaction. The notary is appointed by the authorities, but receives his fee from his clients. Therefore, he is not only a public servant, but also an entrepreneur. Generally, the authorities regulate the number of notaries, their location of establishment and also the fee they can charge for their services. Moreover, a Latin notary is obliged to offer the full range of legal services that fall under his jurisdiction and cannot withhold his services from anyone, unless there is a sound reason to do so (*ministerieplicht*).

The Latin notary arose in Northern Italy during the eleventh or twelfth century. Most countries with a Latin notary are organised under a system of Civil Law, which was originally based on the French 'code civil'. At this moment, 80 percent of the member states of the European Union have a Latin notary.

Counterpart of the Latin notary is the Anglo-Saxon notary that can be found mostly in countries with a system of Common Law, including the United Kingdom, most of the Scandinavian countries, and the United States. We will discuss the American notary profession in more detail in chapter 6. In the remainder of this study, we use the term 'notary' to refer to the Latin notary, respectively the term 'notary public' to refer to the Anglo-Saxon notary.

### 2.2 The notary's duties

The notary's duties can be divided into legal and extralegal duties. We can also make a distinction between family services, real property services and corporate services.

### Legal duties

Certain legal transactions require a notarial deed; people have no choice but to go to the notary. A notarial deed is an authentic document, drawn up by a notary. The difference with other official documents is that only a notary has the authority to draw up a notarial deed. A notary is also allowed to draw up other official documents, except if a public servant has the exclusive authority to do so.

Table 2.1 provides an overview of the most important transactions for which a notarial deed is required.

Real property services	Family services	Corporate services	Other legal duties (not involving a notarial deed)
Conveying real property;	Drawing up or amending marriage contracts and domestic partnership agreements;	Incorporating public and private limited liability companies;	Issuing certificates of succession;
Creating or cancelling mortgages	Drawing up or altering wills;	Establishing foundations and associations	Partition of joint property;
	Providing for gifts and donations in a notarial deed		Legalising signatures;
			Administer inheritances

### Extralegal duties

There are some legal transactions for which a notarial deed is not officially required to make it legally valid. People are free to lay down their agreement in a notarial deed rather than in a private document. Doing so has a number of benefits:

- After the notary has signed the document, the date of the document is definite for all parties. It becomes also a fact that the persons mentioned are indeed the signers of the document.
- A certified copy can be drawn from a notarial deed. If someone has acknowledged in a notarial deed that he has a debt, and he does not fulfil his obligations, the party in possession of the certified copy can turn to sale under distress without judicial intervention.
- A notary is an impartial expert in legal transactions, who represents all parties involved in the making of the notarial deed.

Examples of extralegal duties include providing legal advice (for example in the case of rental agreements or shareholder agreements), estate planning (legal and fiscal counselling of the transfer and the preservation of (family) property), mediating between parties with a legal conflict so as to avoid a court procedure, and guaranteeing the identity of trading partners on the Internet by giving them a digital signature.

Regulation by the Notary Act applies to all legal duties, and also to notarial deeds that are not required by law. Other extralegal duties are only partly covered by the Notary Act. Only the rules about confidentiality, financial control and the disciplinary rules apply to these extralegal duties (Blokland, 2001). Under the 1999 Notary Act, a notary can be held responsible for (intentional) mistakes. The same applies in the case of extralegal duties, as ruled by the Supreme Court of the Netherlands.

### **2.3 The professional association**

In 1843, an association of notaries was founded; the fraternity of notaries (*Broederschap der notarissen*). In 1851, another association was founded; the fraternity of junior notaries. The purpose of the fraternity was to provide a platform for interaction between notaries and to promote the interests of the notary profession (De Jong, 2002). Membership of the fraternity grew from 36 percent in 1844 to almost 100 percent in 1970. Membership became mandatory with the introduction of the 1999 Notary Act.

In 1904, Supervisory Chambers were founded. They assumed supervision of the notary profession from the public prosecutor. They also played an important role in appointing notaries and kept a register on notary's compliance with the code of conduct.

In 1928, the subdivisions of the fraternity received the authority to set fees for notarial services in their district. A special commission was created to advise the subdivisions on the fees. Because the subdivisions usually adopted the advised fees, uniform fees arose (De Jong, 2002). From 1968 on the fraternity for notaries was called the *Koninklijke Notariële Broederschap* (KNB). In 1974 the fraternity of notaries and the fraternity of junior notaries merged.

With the introduction of the 1999 Notary Act, the position of the KNB changed. The KNB was changed from a fraternity into a public body. In line with this change in status, the organisation was renamed *Koninklijke Notariële Beroepsorganisatie*. The activities of the KNB under the old and the new act are discussed in greater detail in chapter 3. The KNB's influence on the legislative process is discussed in chapter 4





### **3 Regulation of the notary profession**

In this chapter, we discuss how the Dutch notary profession is regulated – with special attention to the changes in the regulatory framework with the introduction of the new Notary Act. We show that self-regulation plays an important role.

#### **3.1 Regulatory powers of the KNB**

Under the old Act, the KNB was a private business association. Its main role was to promote the interests of the notary profession. Membership was not mandatory. The KNB was responsible for the practical implementation of the Notary Act. As discussed below, the KNB prescribed the fees for notarial services and played an important role in regulating entry. The KNB also had a role in organising professional training and setting the requirements a junior notary had to meet after completing his work placement.

The KNB also drafted regulation on conduct with the aim of promoting the provision of high-quality services. Regulation related to education, impartiality, confidentiality, the information provided to clients, and handling funds from third parties.

With the introduction of the new Notary Act the KNB became a public body. For notaries and junior notaries, membership of the KNB became mandatory. Article 134 of the Constitution determines that the organisation and the tasks of a public body have to be laid down in the law. A public body has to serve the public interest, so the KNB can no longer just promote the interest of the notary profession. A public body has statutory powers; this means that the KNB can set binding rules for the notary profession. The KNB's new task is to promote good practice of the notary's duties by setting a code of conduct and to promote the notary's professional skills. The KNB regulates professional training, and looks after the quality of training. Since the fees are liberalised and establishment policy as well, the KNB's involvement in these areas has ended. The Minister of Justice also tasked the KNB to implement a system of quality control.

#### **3.2 Regulation of professional standards**

The Crown appoints a notary, under the responsibility of the Minister of Justice. Before someone can be appointed as notary, he has to meet a number of requirements. Besides being of Dutch nationality, having full use of his citizen rights (a candidate who went bankrupt could not be appointed, for instance) and being between 25 and 65 years old, someone needs to become a junior notary and complete a three-work placement in a notary office first. Under the old Act, it took some ten years before a junior notary was appointed to a notary position (Kamerstukken II 1996-1997, nr. 10).

In the new Notary Act, the work placement has been extended to six years, mandatory professional training for junior notaries has been introduced, and junior notaries need to have a business plan approved before they can be appointed. Before an appointment can be legitimate, the appointed notary has to take an oath.

### **Education and training**

To become a junior notary, one has to be a law graduate, specialised in notary law. In 1959 university education became mandatory. Before 1959 it was also possible to become a junior notary by passing the notary state exam. This made the notary profession more accessible to candidates from the middle class, who could not afford university expenses. Law graduates who were not specialised in notary law used the possibility of the state exam as well.

Under the new Act a candidate may only call himself a junior notary if he works at a notary office after completing his university education. If the candidate works in another legal profession he is not allowed to call himself a junior notary (Huijgen and Pleysier, 2001). The junior notary performs the same tasks as the notary, but is not allowed to execute deeds and to be part of the management of the office. The junior notary can replace the notary in his absence. Other Dutch law professionals can also become a notary, but they need to complete six years of work placement as a junior notary (see below).

In addition to university education, the KNB offers professional training for junior notaries. Under the old Act this training was optional, but in practice most of the junior notaries received it. Under the new Act this professional training became mandatory. A junior notary can start with the training when he has work experience of at least half a year. The training takes three years and is offered by the KNB in cooperation with several universities.

There is also a sort of permanent education; the KNB provides for mandatory post-graduate courses. Every notary and junior notary has to earn a number of credits each year.

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### **Foreign candidates**

Under the new Act, it is also possible for law graduates from other EU-countries to become a junior notary in the Netherlands. The foreign candidate has to prove that he has sufficient knowledge of the most important fields of the Dutch notary profession. Upon sufficient proof, he will get an EU-certificate, which provides the candidate with access to the position of junior notary. The foreign candidate has to adopt the Dutch nationality as well. Between 1999 and 2004, only one candidate from another EU-country became a junior notary (Ter Voert and Van Ewijk, 2004).

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### **On the job training**

The junior notary needs to complete a work placement at one or more notary offices in the Netherlands. Under the old Act, the mandatory work placement took three years, under the new

Act the duration of the work placement has been extended to six years (on a full time basis). During his work placement the junior notary has to work in all three notary service-areas. He must also follow several courses involving office- and staff management, financial administration etc.

The new Act also requires the junior notary to proof that he obtained two years of practical experience in the three years preceding his application. This requirement is unrelated to the six year-work placement. The underlying idea is that the applicant needs fresh experience before he is appointed.

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### **The salaried notary**

In contrast to Quebec and France, the Netherlands only recently decided to allow notaries to be employed by another notary. June 2005, the Balkenende administration announced that it will follow the recommendation of the Salaried Notary Working Group to create this position. The Working Group had been established in 2003 to examine the possibility of a salaried notary within the Dutch context. The group consisted of a notary, a junior notary and several representatives of the KNB and the Department of Justice. The working group presented 32 recommendations (see Werkgroep notaris in loondienst, 2004). One of the main recommendations is that the salaried notary should receive the same rights and obligations as the notary entrepreneur. The working group also made an inventory of the required changes in the Notary Act.

The introduction of a salaried notary provides great opportunities for junior notaries who would like to become a notary, but who do not wish to bear great commercial risks early in their career. The salaried notary could be a way to stop the increasing outflow from junior notaries out of the notary profession. It also allows for more possibilities to work part-time. Moreover, the introduction of the salaried notary can have a positive effect on the notary-entrepreneur. After all, he can spend more time on management of the office, since the salaried notary is allowed to execute deeds.

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## **3.3 Regulation of entry**

With the introduction of the new Act, freedom of establishment for notaries greatly increased. Some restrictions still exist, which we discuss below.

### **Old Act: *numerus clausus***

Under the old Notary Act, the total number of notaries per district was capped at a maximum. The absolute maximum was one notary per 4,000 inhabitants, with at least two notaries in every canton. Every district consisted of several cantons. In a period during which people were not very mobile, these conditions aimed to prevent a surplus of notaries in the big cities and a shortage in the countryside. Since the notary fulfils an important public task, he has to be accessible for everyone.

Given the *numerus clausus*, a junior notary could only be appointed if there was a vacancy. A vacancy could only occur if a notary ceased his activities or if there was a need for an additional

notary at a certain locality or office (Plug et al., 2003). A special committee ('Centrale Standplaatsen Commissie', created by the KNB in 1962) evaluated whether it was necessary to create a new post. Criteria included the number of inhabitants of the location, the number of notarial deeds that was drawn up in a certain place or region, and the returns that were made by notaries already active in the market. The committee sent its advice to the KNB, which in turn informed the Minister of Justice. After reporting to the Supervisory Chamber of the district concerned, the Minister decided whether or not to open the post. Until 1985 few new posts were created (De Jong, 2002).

When a post became vacant, applications needed to be sent to the Minister of Justice. He passed them on to the Supervisory Chamber of the involved district. The chamber made a list of potential candidates, after gathering information about the candidates from the chief district attorney, the procurator-general at the court of justice and the Royal Commissioner. Then the chosen candidates were invited to visit the Minister of Justice for an interview. Eventually, the Crown appointed the candidate of choice.

In practice it made a difference if the vacant post was an associative or a solitary post. In the case of an associative post, it was in fact the associate who decided which junior notary should be appointed. The Minister could not appoint a junior notary who was not welcome in the practice. However, it was to the Minister to evaluate whether to create a post or not.

#### **New Act: approval of business plan and restrictions on branching out**

Under the new Act, the total number of notaries is no longer capped. In the first four years after the introduction of the new Act, the increase in the number of notaries was limited to a maximum of 10 percent per year. As of 2003, the total number of notaries is unrestricted.

Although the policy of establishment has been liberalised, establishment of new notaries remains regulated. First of all, a junior notary needs to submit a business plan to a committee for approval. A committee of financial, economic and notary experts is involved in evaluating the business plan. Notaries constitute a minority in the committee in order to safeguard the impartiality of the committee. Instituting a mandatory business plan has been motivated as a way to limit the number of bankruptcies of notaries.

In the business plan, the junior notary needs to show that he can break even within three years. A business plan needs to contain the following elements:

- The city or town of establishment
- Whether the post is new or an existing vacancy
- Whether the post is solitary or in an association

- A market survey
- A description of the organisation of the practice
- A forecast of expected earnings
- The financial basis

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### **The business plan in practice**

In 2003, 116 business plans were submitted, of which 111 were approved. Only one business plan was disapproved, the other four were withdrawn. Vogels et al. (2002) surveyed 69 recently appointed notaries about the problems they had experienced in getting their business plan approved. Half of the surveyed notaries encountered some difficulties. The following problems were mentioned:

- It takes too much time for the committee to evaluate a business plan, sometimes more than six months
  - The costs for evaluating a business plan are too high
  - The system is paternalistic
  - Regulation on the business plan is too detailed and fragmented
  - The committee demands documents that notaries are not obliged to provide
  - The Supervisory Chamber takes too much time for the delivery of the required certificates
  - The procedure is vague
  - The evaluation procedure constitutes a high administrative burden
  - The value added of a business plan in the case of a succession or the entry into an existing office is unclear
  - The Office for Financial Oversight (Bureau Financieel Toezicht) has too big a role, whereas the role of the Supervisory Chamber is too limited
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Under the old Act, a notary could only offer his services in his own district. Under the new Act, a notary is allowed to offer his services outside his district, provided that these activities have an incidental character. A notary is still not allowed to have a branch office outside his place of establishment; he can only have a branch office in the same locality. The Supervisory Chamber of Almelo also ruled that a notary is not allowed to branch out, neither outside nor inside his locality of establishment.

### **Residential address and relocation of the post**

Under the old Act the notary was obliged to live, run his office and keep his notarial deeds at the same address. Under the new Act the notary is no longer obliged to live in the place of establishment. This means that the attractiveness of a locality as a place of residence no longer plays a role in the decision to establish an office in that locality. The notary still has to keep his notarial deeds in his office.

Under the old Act the notary had to send a request to the Minister of Justice if he wanted to relocate his post. After the approval of his request and a new appointment he could establish himself in a new location. This procedure is changed in the new Act. The notary still has to send a request to the Minister, but in addition he has to present a business plan for the new place of

establishment. After the committee of experts has approved the plan, the KNB and the Supervisory Chamber of the district advise the Minister. If the Minister complies with the request, no new appointment is needed.

### **3.4 Regulation of fees**

In this section, we discuss the most innovative element of the new Notary Act: the change from fixed to unregulated notary fees.

#### **Fixed fees under the old Act**

Formally, a notary had to stick to the fees that were laid down in the Tariff Act of 1847. In practice, the Tariff Act had had little impact. In 1916, the Supreme Court already allowed notaries to deviate from the legally determined fees under certain conditions. The conditions held that a notary could not decide by himself which fees to charge: an organisation like the KNB was allowed to set fees for her members. In 1932, the Supreme Court decided that it was customary to differ from the legal fees, so the Tariff Act was put aside (Melis et al., 1991).

In practice, the KNB assumed the authority to set national fees for notarial services. All notaries were bound by these fees. In a ruling in 1995, the court of Amsterdam determined that the public interest was served best with a strict observance of the prescribed fees by every notary (Plug et al., 2003). The fees were laid down in article 59 of the KNB's articles of association:

- Fees for family services were fixed to guarantee reasonable prices for these services.
- Fees for real property services were a percentage of the purchase price (the higher the purchase price, the lower the percentage). When housing prices increased, fees for real property services – and therefore notaries' earnings – also went up. The relatively high prices for real property services were used to cross-subsidise family services.
- For corporate services the KNB set recommended fees.
- Fees for other (extra-legal) services were either recommended by the KNB or unregulated.

The fixed fees were seen as a way of reconciling the position of notaries as both public servants and entrepreneurs. On the one hand, a certain degree of financial security was seen as a guarantee for the impartiality of the notary. On the other hand, equitable access to the notarial services had to be guaranteed, so the fees could not be set too high. The notaries were expected to compete on quality, not price.

#### **Price competition under the new Act**

With the new Notary Act, price competition was introduced. The rates for family services and corporate services became free immediately after the enforcement of the new Act. The fees for

real property services were gradually liberalised through a transitional arrangement. In this transitional agreement, fees for real property services could vary within ranges. Gradually, these ranges grew wider.

As of July 2003, all notary fees are free. There are only two exceptions for which the fees remain regulated:

- In case of family services for low-income households.
- Whenever necessary to guarantee accessibility of notarial services. This legal provision gives the Minister the possibility to intervene, for example if fees become extremely high.

Under the new Act, a notary is still obliged to offer the full range of notarial services and to accept all customers ('ministerieplicht'). With unregulated fees it is possible not to offer certain notarial services. By charging a very high fee for a certain service a notary can discourage his clients to consume that service.

Recently, a code on notary fees and price quotes has been developed ('Code Notarieel Helder Offreren en Tarifiëren'). The code states that the fee should be based on the usual work involved. The notary should be clear on the financial consequences of possible extra work (Notariaat Magazine, March 2004).

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#### **Notary fees on the internet**

With the introduction of price competition, several websites have been launched to inform consumers on fees for notarial services. This way, the market for notarial services has become more transparent for consumers. Two well-known websites for notary rates are: [www.notaristarieven.nl](http://www.notaristarieven.nl) and [www.degoedkoopstenotaris.nl](http://www.degoedkoopstenotaris.nl) ('the cheapest notary').

[www.notaristarieven.nl](http://www.notaristarieven.nl) contains consumer information on all notary activities and the new Notary's Act. A consumer can compare the notary rates through selecting different offices in the Netherlands. The website also contains the addresses of all notaries' offices in the Netherlands and links to related subjects.

[www.degoedkoopstenotaris.nl](http://www.degoedkoopstenotaris.nl) also contains general information on the notary profession. The consumer can compare standard rates for several notarial services of more than 500 notaries' offices that support this website. The consumer can also freely request a quote for a specific notarial deed. Any of the supporting offices are free to respond to their request for a quote.

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### **3.5 Regulation of advertising**

Regulation of advertising by notaries is not included in the Notary Act; it is part of the regulatory authority of the KNB. Until halfway through the 1980s, individual notaries were strictly forbidden to advertise. Only the KNB did some advertising on the notary profession in general.

After the prohibition was abolished, advertising was tightly regulated. An advertisement could only contain the notary's name, address information, a concise description of the notarial services and the division of tasks within the office (Plug et al., 2003). Other publicity was only allowed if it was functional and not meant to solicit costumers. The advertisement had to aim at the local market, so other notaries would not be affected. Advertising brochures soliciting customers remained a rarity. In particular large notary offices sought publicity through seminars, advertisements and books. The KNB remained active in promoting the notary profession by way of brochures, the KNB's website, active participation in television programmes and cooperation with newspapers and journals.

Currently, advertising by notaries is still bound to a number of rules set by the KNB, including the following:

- Comparisons with fees and quality of other notaries should be based on representative and verifiable data.
- It is not allowed to state functions held in the judiciary or in the KNB.
- Statement of fees should be complete and clear and should not include minimum-fees only. The notary is bound to the fees and conditions published.
- A notary is not allowed to approach potential customers directly by telephone or in person.

### **3.6 Regulation of specialisation and cooperation**

Over the last decades, the KNB stimulated the trend towards more associated posts. Specialisation and cooperation were thought to be indispensable for guaranteeing the quality of notary service in an increasingly complex society. Increasingly, notaries work together with other legal professions in one organisation. These practices are called 'interdisciplinary offices'. In this section, we review regulations related to specialisation and cooperation.

#### **Specialisation**

Notaries are legally obliged to offer the full range of services to the public ('ministerieplicht'). Consequently, a notary office cannot specialise in a subset of services. Within the office, notaries do specialise, however. Besides the 'ministerieplicht', there are no other rules that limit the possibilities for specialisation. As discussed earlier, pricing policy allows notaries to work around the obligation to offer the full range of services. To support specialisation, several professional associations have been founded in the area of the extra-legal duties. There is an association for mediators, for estate planners, for agricultural specialists and for notaries active in the area of information technology.



A positive effect of specialisation is not only higher productivity; specialisation can also lower barriers to entry. Junior notaries often see the obligation to offer the full range of services as a major entry-barrier for starting a solitary office (Plug et al., 2003). On the down side, specialisation could also undermine the broad provision of not-so-profitable notarial services, in particular family services.

### **Cooperation**

There are several forms of cooperation in the notary profession:

- Cooperation between notaries
- Cooperation between notaries and other legal professions
- Cooperation between notaries and other professions

In recent years, many collaborations between notaries' offices have been founded. For instance, *Netwerk Notarissen* grew out of eight regional collaborations, which had worked together since the end of the 1980s. The purpose of this organisation is to compete more effectively by working together and establishing a brand name. The participating notaries of the *Netwerk Notarissen* mainly consist of small offices. The big and medium-sized offices participate in *Formaat Notarissen*, a kind of franchise organisation. Joint marketing is an important activity of this organisation.

In 1970, the first offices in which notaries and lawyers worked together were founded (Van Velten, 2000). To notaries, lawyers were attractive business partners, because they create a lot of notary work. Moreover, interdisciplinary cooperation could provide value added to customers by offering a broad range of related services. The large interdisciplinary offices mainly focus on corporate services. Initially, interdisciplinary offices were concentrated in the highly urbanised regions comprising the 'Randstad'. After 1985, they can also be found in other parts of the country.

Initially, the KNB did not develop a specific policy for interdisciplinary offices. In 1971, the KNB simply adopted the directives for interdisciplinary cooperation from the Bar. These directives stated that cooperation between legal professionals was allowed if they had a university education and if they were governed by disciplinary rules similar to the ones for lawyers. In the 1990s, when the number of interdisciplinary offices increased, the KNB reacted more alert. In that time there also was some talking about cooperation with other professions like tax consultants and accountants. In 1993 the KNB laid down rules of conduct on interdisciplinary cooperation. These rules only allowed for cooperation with lawyers. Cooperation with tax consultants and accountants was rejected (De Jong, 2002).

The new Notary Act includes some regulation on interdisciplinary cooperation. Under the old Notary Act, there was no legal ground for interdisciplinary cooperation. The new Act stipulates that cooperation with other professions should not undermine the impartiality and independence of the notary. In 2003, the KNB presented further regulation to guarantee these two qualities of notaries. This regulation allows cooperation with lawyers and tax consultants, in which the profits and the control over the office are shared. Cooperation with other professions, for example accountants, is only permitted if profits and overall management are not shared. A notary is only allowed to cooperate with another profession if he has received special permission from the KNB.

In the 1990s cross-border collaborations with lawyer's offices were founded (Van Velten, 2000). In the beginning, collaborating lawyer's offices were primarily French and Belgian. Recently, collaborations with American and British law offices were founded. Remarkable about these collaborations is that these two countries do not know the Latin type of notary (see also chapter 7).

Cooperation between notaries and non-legal professions is relatively rare. An example is the cooperation between the Actus Notarissen with credit company Frisia Financieringen and the Home Owners Association (*Vereniging Eigen Huis*). Members of the Association receive a 10 to 15 percent discount on mortgages financed through Frisia when the notarial deed is drawn up by an Actus notary.

### **3.7 Regulation of quality**

Quality of notarial services has three dimensions (Plug et al., 2003):

- Integrity: the independence, impartiality and trustworthiness of the notary
- Legal quality: the quality of the contents of the notarial deeds
- Service or commercial quality: how the notary treats his clients

In this section, we discuss the rationale behind regulation of quality and the actual regulation.

#### **Rationale behind quality regulation**

Clients have difficulty assessing the quality of notarial services. Clearly, notaries have an information advantage over their clients. Most clients have little to no legal knowledge. If they discover mistakes in a notarial deed at all, they often do so only after a long period of time. Moreover, most people cannot build up experience with notarial services since most people visit a notary only a few times in their life. The information asymmetry between notaries and their clients brings two problems with it (Plug et al., 2003 and Ter Voert and Van Ewijk, 2004). First,

notaries could have an incentive to lower their quality, since doing so may lower costs and not get penalised by customers ('moral hazard'). Second, notaries that provide high quality services may be driven out of the market, because they cannot sell their services at a price that reflects their value ('adverse selection').

### **Instruments for enhancing integrity and legal quality**

Several policy instruments are aimed to support the provision of high-quality notarial services. First of all, there are a number of rules related to entry to the profession:

- The required university education
- The required on the job training (work placement)
- The professional training
- The oath that every notary has to take upon his appointment

With the introduction of the new Notary Act, mandatory post-graduate courses were introduced and the notary's impartiality and independence were formally laid down in the law.

Next to regulation of entry to the profession, regulatory oversight should guarantee compliance with the Notary Act and other regulation. Under the old Act, oversight was in the hands of the Supervisory Chambers. Currently, next to the Supervisory Chambers, the Office for Financial Oversight (BFT) and the KNB are directly involved in oversight as well (Ter Voert and Van Ewijk, 2004):

- *Supervisory Chambers.* Each of the 19 districts has its own Supervisory Chamber. The Chambers are commissioned with regulatory oversight of legal and extra-legal activities of notaries and with disciplinary jurisdiction. The Supervisory Chamber processes customer complaints and can open an investigation. The Supervisory Chamber has to open an investigation if asked to do so by the KNB or the Office for Financial Oversight (BFT, see below). The chairman of the Chamber has the authority to ask notaries for an explanation of their conduct and to search the private and non-private administrative systems of the notary. The Chamber has the authority to pass first judgement in a disciplinary case.
- *Office for Financial Oversight (Bureau Financieel Toezicht, BFT).* The BFT periodically investigates the notaries' compliance with all financial regulations, including the regulation on solvency and liquidity. It also oversees the safety of the clients' funds entrusted to the notary. Notaries are obliged to provide the BFT with all information that is necessary for effective oversight. If the BFT discovers shortcomings, it has to report the findings to the Supervisor Chamber. The BFT can also file a complaint at the Supervisory Chamber, depending on the seriousness of the situation.

- *KNB*. The KNB is tasked to promote professional standards with the notary profession. The KNB oversees compliance with its regulations. It can file a complaint with the Supervisory Chamber and ask its chairman to conduct an investigation. The KNB also acts as a mediator in the case of complaints and it refers consumers with complaints to other supervisory authorities.

Next to these three authorities, there are five authorities who are indirectly involved in oversight of the quality of services provided (Ter Voert and Van Ewijk, 2004);

- *Minister of Justice*. The Minister of Justice provides oversight since KNB regulations are subject to his approval. The Minister can also regulate BFT's activities. The BFT has to forward its annual planning and budget to the Minister for approval.
- *The Crown*. The Crown has the authority to reverse decisions from the KNB.
- *Chairmen of the districts (Ringvoorzitters)*. The Chairmen of the 19 districts deals with complaints on fees for notarial services.
- *Inspection of Registration and Succession (Inspectie van Registratie en Successie)*. This Inspection forms part of the Tax Authority. It oversees compliance with the obligation to file the abstract of all notarial deeds in registers. Inspection officials have to inform the Supervisory Chamber on any shortcomings that could lead to a disciplinary action.
- *Ombudsman (Nationale Ombudsman)*. The Ombudsman's role is laid down in the Ombudsman Act. The Ombudsman oversees whether notaries comply with the norms of 'decent behavior' as described in the Ombudsman Act. The Ombudsman also has the authority to handle complaints if direct interaction between clients and the office did not solve the issue at hand.

In 1999, a special working group examined the effectiveness of the oversight of the notary profession. The working group concluded that there are several obstacles to effective oversight (Ter Voert and Van Ewijk, 2004):

- Oversight is too fragmented; there is no central point where all information is collected.
- The Supervisory Chambers are too dependent on information provided by other authorities.
- Oversight is too much focused on repression, preventative activities receive too little attention.
- The great number of Supervisory Chambers results in a lack of uniformity in oversight.
- The great number of authorities that can handle complaints declines uniformity in judgement.

The working group advised to introduce a special Inspection for the notary profession. This Inspection should be an independent national authority, exercising oversight of the legal quality and integrity of the notary profession. The Minister of Justice and KNB do not see a separate Inspection as the solution to the abovementioned problems. In response to the findings of the working group, they tasked the BFT with the authority to conduct investigations. In the future, the BFT should also supervise the whole system of quality assurance, to be discussed below.

### **Disciplinary jurisdiction**

Under the old Act there were two disciplinary jurisdiction systems; the Supervisory Chambers and the arbitration boards.<sup>1</sup> Both systems held the legal and extra-legal activities of notaries to the same standards. Under the new Act the arbitration boards are abolished. Disciplinary jurisdiction has been extended to junior notaries. The new Act states that notaries and junior notaries are subject to the disciplinary intervention when they act in violation with (Huijgen and Pleysier, 2001):

- The Notary Act or related regulation
- The notary's responsibility towards clients
- Other standards that belong to the notary profession

Before a disciplinary procedure can start, an admissible, legitimate and significant complaint needs to be filed. Both customers and the oversight authorities can file a complaint with the Supervisory Chamber of the district. A complaint about the fee can be filed with the chairman of the Supervisory Chamber. Upon receiving the complaint, the chairman assesses whether the complaint is admissible, legitimate and significant and whether the situation can be brought to a settlement between the parties. If the chairman decides to go forward with the complaint, an investigation is opened to see whether the notary acted in violation with the regulatory standards. If so, the Supervisory Chamber can take the following measures:

- Give the notary a warning
- Reprimand the notary
- Suspend the notary for a maximum of six months
- Dismiss the notary

The Supervisory Chamber cannot take the last two measures against a junior notary. Notaries can appeal to the Court of Amsterdam against the judgement of the Supervisory Chamber within thirty days after the first judgement. Both the dealings with the Supervisory Chamber and the appeal procedure at the Court of Amsterdam are free of charge.

### **The KNB's system of quality assurance**

The KNB has an active role in implementing a system of quality assurance for notaries. These activities started already before the introduction of the new Notary Act. The system of quality assurance consists of five elements (Plug et al., 2003);

<sup>1</sup> Under the old Act, the arbitration boards had the task to handle complaints on the notary's fees. After the introduction of the new Notary Act this has become the task of the Chairmen of the districts.

- Mandatory post-graduate education
- Surveying customer satisfaction
- The development of a system of inter-fraternal verification
- The development of career planning
- The introduction of a handbook on quality in order to stimulate the development of quality guidelines in notaries' offices. The handbook contains minimum quality standards related to organisation of the office, guidance of clients, execution of notarial deeds, and accepting financial commissions (Notariaat Magazine, January 2005).

Spring 2004, the KNB started experimenting with voluntary audits on quality of services. Specially trained notaries conduct these audits. They check whether a notary office complies with the quality standards. If so, the office receives a certificate of compliance. These audits are a form of preventive oversight conducted by peers. The KNB considered to make the audits mandatory, and making the audits the basis for the work of BFT inspectors (Notariaat Magazine, June 2004). In a general meeting of the KNB in November 2005, many notaries voiced their concerns about this proposal. They argued that compliance with the standards does not guarantee a good product and that notaries do not only perform standard activities. Consequently, the KNB decided not to make implementation of a quality assurance system mandatory.

## **4 The making of the 1999 Notary Act**

Preliminary discussions about the necessity and the outlines of a new Act started as early as 1971 (Blokland, 1999). The legislative process behind the 1999 Notary Act took some ten years to come to a conclusion. In this chapter, we review the making of the new Notary Act: the discontent with the old Act, the draft Bill, the political debate in Parliament and the role of third parties in the legislative process.

### **4.1 Discontent with the existing Notary Act**

The main issues of discontent with the existing Notary Act included (Plug et al., 2003):

- The fixed fees were not cost-based (fees for real property services were a percentage of the purchase price of the property, for instance)
- Notaries' profits were thought to be excessive
- Notaries had little incentive to innovate and work more efficiently
- Consumers had little to choose: fees were fixed and there was little to no information available on quality
- Entry to the profession was tightly regulated
- Incumbent notaries were excessively protected
- There was a surplus of junior notaries

### **4.2 The draft Notary Bill**

To comply with European regulation, the Netherlands changed its Competition Act. In line with the change in competition policy, it was decided that horizontal price controls would no longer be allowed as of July 1993 (horizontal price controls entails price fixing between two or more providers in the same market). Clearly, the KNB rates for the notary profession conflicted with this policy. Therefore, the Minister of Justice started to draft a Notary Bill in 1990 to replace the old Notary Act. The preliminary bill contained legal price controls implying that the authorities would set the notary fees (the Competition Act allowed legal price controls). Soon, a debate started whether the government should exempt the notary profession from price competition. After some debate, to be discussed later in this chapter, price competition was favoured above price regulation.

Another important issue in the Bill was regulation of entry. There was a surplus of junior notaries; a new Act should provide a push for the appointment of junior notaries into notary positions. The preliminary Bill of 1990 stated that regulation of entry would be limited to the professional skills of applicants (educational requirements, etc.). Thus, the number of notaries

would no longer be capped, and notaries would have complete freedom to establish wherever they want to. Many people in the profession liked to see this part of the Bill amended. The KNB feared that the growth in the number of notary offices would become uncontrollable and would lead to financially unhealthy offices. Such developments could undermine the quality and continuity of notarial services. Therefore, the KNB and the Supervisory Chambers advised to require junior notaries to draw up a business plan to be approved by a committee of experts.

### **Expected effects of greater competition**

Greater competition in the market for notarial services was expected to have the following positive effects (Kamerstukken II 1993-1994, 23706, nr. 3):

- *Acceptable fees.* Price competition should drive down fees towards cost levels. That would imply the end of cross subsidisation of family services with the high fees from real property services. Thus, fees for real property services would go down and fees for family services would go up.
- *Increase in efficiency.* Greater competition should provide an incentive to work more efficiently. More efficiency would lead to lower prices.
- *Higher quality of service.* Competition would also provide an incentive to notaries to offer high-quality services.
- *Differentiation in services and more innovation in service provision.* Competition would provide notaries with a greater incentive to innovate and to differentiate in services.
- *Better geographical distribution of offices.* The greater freedom of establishment would lead to a more equal distribution of notaries over the country. Since notaries would no longer have to live in the same place as their office location, localities that are relatively unattractive to live are no longer put at an disadvantage. The mandatory approval of the business plan could also secure an equal geographical distribution of offices.

### **The KPMG report**

The decision of the Dutch government not to impose legal price controls for notarial services was partly motivated by the results of the KPMG (1994) study commissioned by the Department of Justice and the Department of Economic Affairs. In this study, KPMG analyzed the cost structure and the returns in the notary profession. The main findings of this study were:

- Both real property services and family services are profitable. Thus there is no need for cross-subsidisation between these two services. Some cross subsidisation between different family services could be necessary. Some family services like marriage contracts and last wills were loss making.
- The fixed fees undermined incentives for efficiency improvement, which led to bloated costs.



The KPMG study was conducted in consultation with the KNB. The KNB-members were not satisfied with the findings, however. They asked Moret Ernst & Young for a second opinion based on the research conducted by KPMG. Moret Ernst & Young criticised the KPMG report, arguing that the report of KPMG showed too rosy a picture of the financial situation of notaries. In the perspective of Moret Ernst & Young, notaries' expenses were 30 percent higher than calculated by KPMG. Then the KNB filed a complaint against KPMG at the disciplinary council for accountants (Raad van Tucht voor registeraccountants en accountantsadministratie consulenten). The KNB demanded that KPMG should either withdraw the report or change it in line with the comments by Moret Ernst & Young. The council ruled that the complaint was not valid; the court of appeal came to a similar judgment.

### 4.3 Debate in Parliament

In 1994 the Notary Bill was sent to Parliament. Years of stalemate followed. Between 1996 and 1998 the Bill was amended four times. None of these amendments radically changed the Bill, however.

#### **Competition and quality**

The debate concentrated on the impact of price competition on quality, and therefore legal certainty. It was argued that with unregulated fees, notaries could become too commercially minded, which could undermine his independence and impartiality. Several members doubted whether safeguards in the new Notary Act would actually prevent a deterioration of professional standards. Often they referred to the situation in Quebec. In Quebec notary fees are unregulated since 1991. From that time on, fees went down dramatically. Several measures indicated a deterioration in quality of service too (Kamerstukken 1996-1997 23706, nr. 10). When competition undermines quality of notarial services, legal certainty will decrease. For instance, an increase in the number of mistakes in the land register (Kadaster) will have negative consequences for the legal certainty of real property transactions. Consequently, the number of claims taken to court may increase. Additionally, with unregulated fees, the fees for family services could increase, lowering accessibility for this type of notarial services. Given these possibly negative effects of competition, several Parliamentary members saw unregulated fees as incompatible with the Latin notary system. The more so since all other European countries with a Latin notary system regulated notary fees. Moreover, a resolution of the European Parliament suggested that regulation of fees could be in the interest of clients (Kamerstukken II 1996-1997, nr. 11).

The exclusive rights to performance notarial services (*domeinmonopolie*) was not a matter of debate. All political parties agreed that notarisatation of certain legal transactions was an important guarantee for legal certainty.

### **The Minister of Justice's response**

The Minister of Justice motivated the government's choice for unregulated fees with the following arguments:

- Greater competition will lead to higher efficiency and lower prices. The efficiency improvements would dampen the possible price increase for family services.
- The situation in Quebec is fundamentally different from the situation in the Netherlands. Professional standards for entering the profession are low in Quebec: after a four-year university education and a work placement of eight months a candidate could be appointed as a notary and he could establish an office anywhere he wanted. As a result of low barriers to entry, Quebec had 5.5 times as many notaries per capita as the Netherlands (Kamerstukken II 1997-1998, nr. 16).
- Negative effects on quality will be prevented in several ways. The new Act will include provisions to safeguard the independence and impartiality of notaries. Moreover, notaries can only be appointed by the Crown, they need to take an oath upon appointment, their entry is dependent on a sound business plan, and they are subject to oversight by the Office for Financial Oversight (BFT), to possible disciplinary action by the Supervisory Chambers and to rules of conduct issued by the KNB.

### **Towards passing the Bill**

Initially, all major political parties (except D'66) argued for legally determined fees. Fixing the fees would safeguard the impartiality and accessibility of notaries and support legal certainty. When the administration promised to monitor the fees for the first three years after introduction of the Act, and to cap rates for low-income households, the political parties agreed to unregulated fees. April 1998 the Bill was passed in Parliament, a little later in the Senate. The Notary Act came into force in October 1999.

## **4.4 The role of the KNB and other organisations in the legislative process**

Several organisations tried to influence the political debate about the Notary Bill, including the KNB, the Consumers Union (*Consumentenbond*) and the Home Owners Association (*Vereniging Eigen Huis*).

### **The KNB**

The business association KNB lobbied not to liberalise fees and to keep freedom of establishment limited. The KNB proposed to set rates based on the costs of a set of 70 notaries (*kostprijvolgsysteem*). Price competition would undermine the impartiality and independency of the notary. With unregulated fees, a notary can no longer maintain his position as an impartial expert who serves the interests of all parties involved in a transaction. Because the

notary has an information advantage over clients, clients are also not in a good position to negotiate about the price of services. Greater competition would also lower quality, more mistakes and a greater number of complaints from customers. Moreover, unregulated fees would mean a strong increase in fees for family services such as drawing up wills and marriage contracts, which would lower the accessibility of these services. Capping the rates for low-income households would be inconsistent with a policy of price competition. Rather than to oblige notaries to offer their services below costs, it would make more sense to subsidise legal assistance to low-income households.

To influence the political debate, the KNB hired a special lobbyist, publicly attacked the KPMG study, lowered the rates for real property services to win public support, asked a great number of technical questions about the Bill, and the KNB invited a notary from Quebec to present their experiences with liberalisation to members of Parliament (Plug et al., 2003).

### **Other organisations**

The Home Owners Association and the Consumers Union strongly opposed the KNB in the debate. Both organisations were positive about the Notary Bill. In 1988, the Home Owners Association had already waged a campaign against high notary fees. Notaries abused their monopoly position and the KNB-prescribed fees violated European competition law, according to the Association. The Association filed a complaint with the European Commission, but the complaint did not lead to a conviction. The Association also brought the issue to the attention of the Dutch competition authority (Plug et al., 2003).

Both organisations proposed to break the monopoly of notaries. The Consumers Union was a proponent of breaking the notaries' monopoly for real property services and some standard family services. The Home Owners Association proposed to give the Land Register (Kadaster) the authority to draw up deeds of sale – a proposal rejected by the Land Register itself.

The business association for small and medium size companies, MKB-Nederland, tended to side with the KNB. The association feared that fees would go up once notaries were free to set fees. Moreover, since most people visit a notary only once or twice in their life, they are incapable to judge the relation between price and quality.

Initially, KNB's lobby seemed to work, later on its strong lobby started to irritate some members of Parliament. Eventually the only achievement of the KNB was the legal requirement for junior notaries to draw up a sound business plan. The KNB could not prevent the introduction of price competition and a freer establishment policy.



## **5 The market for notarial services**

In this chapter, we survey developments in the market for notarial services before and after the introduction of the new Notary Act. Based on the existing empirical evidence, we discuss to what extent the developments are likely to be the result of the change in the legal framework.

### **5.1 The number of notaries**

Since the end of the nineteenth century until halfway through the 1980s, the number of notaries remained stable between 800 and 900. After some changes in establishment policy in 1985, the number of posts started to grow. At the end of the 1990s, each year some 80 new notaries were appointed (Vogels et al., 2002).

In the first four years after introduction of the new Act, growth in the number of notaries was capped at 10 percent per year. Actual growth remained below 10 percent, however. The number of notaries grew from 1318 in October 1999 to 1440 in August 2004 (Ter Voert and Van Ewijk, 2004), an average annual growth of only 24 notaries. Thus, although the new Act was meant to speed up the appointment of junior notaries into notary positions, the number of appointments did not markedly increase after 1999.

### **5.2 The number of junior notaries**

As stated in the previous chapter, many observers thought the number of junior notaries to be too high under the old regime. With the new Act, junior notaries no longer had to wait for a vacancy to be appointed. Therefore, the number of junior notaries was expected to go down. Indeed, the number of junior notaries declined after 1999. Most of the decline was not due to an increase in outflow into notary posts, however. Instead, the inflow of the number of students showed a decline. Thus, the Act does not seem to have the expected effect.

As of the beginning of the 1970s, the number of junior notaries started to exceed the number of notaries. In 1955, there were 707 junior notaries and 830 notaries. In 1975, the number of junior notaries increased to 1018 and the number of notaries to 844. The number of junior notaries exceeded the number of notaries by 20 percent. Between 1975 and 2001, the number of junior notaries doubled, mainly due to a lack of vacant posts. In 2001, there were 2125 junior notaries and 1414 notaries. From 2001 on, the number of junior notaries started to decline. In August 2004, the number of junior notaries had dropped to 2061 (Ter Voert and Van Ewijk, 2004).

The decline in the number of junior notaries has been attributed to the following factors (Ter Voert and Van Ewijk, 2004, p. 38):

- The share of notary students in the number of law students decreased from 4 to 3 percent.
- An increasing percentage of law graduates specialised in notary law choose a job outside the notary profession.
- The inflow from other law professions and EU-countries has been very limited.

Each of these factors is related to the inflow of junior notaries; none of them seem to be attributable to a greater outflow as intended with the introduction of the new Notary Act.

### **5.3 The number of notary offices**

The greater freedom of establishment did not go together with a marked increase in the number of new independent notary offices. In the period 1994-2000, the number of independent offices remained stable between 740 and 750 offices. After 2000, the number of independent offices slightly increased to 768 in August 2004 (Vogels et al., 2002). In fact, most of the newly appointed notaries joined already existing offices, leading to an increase in the size of notary offices (Exel et al., 2002).

#### **Branch offices vs. independent offices**

Since an independent office can have several branch offices, the total number of offices exceeds the number of independent offices. The total number of offices remained stable at 800 during the period 1994-1998. Between 1999 and 2001, the period of the economic boom, the number grew by 64 (Vogels et al., 2002). The growth was mainly attributable to an increase in the number of branch offices. Between the introduction of the new Act in October 1999 and August 2004, 20 new independent offices were founded, while the total number of offices grew by 47. Thus more than half of the new offices were branch offices. The number of branch offices grew particularly strongly before 2002. After 2002, growth in the total number of offices with similar to growth in the number of independent offices. The trend towards more branch offices already started in 1998, before the introduction of the new Act. Most likely, this trend is the result of a drive towards more cooperation and greater economies of scale – and not of the introduction of the new Act.

### **5.4 The size of notary offices**

Over the last decades, the size of notary offices has greatly increased. The percentage of notaries working in a solitary post decreased from 95 percent in 1959 to 31 percent in 1989, with the decline starting in the early 1970s. By 1999, this share had increased to 50 percent (De Jong, 2002). Between 1993 and 2000, the average number of notaries per office increased from 1.4 to 1.7 (Van Velten, 2000). In 2004, 17.2 percent of all notaries worked in one of the 30 largest offices. The highest number of notaries active in one office was 14. The largest office

had 12 notaries and 60 junior notaries (KSU, 2004). Although office size is increasing, the majority of the offices remain solitary posts. Between 1999 and 2003 the absolute number of solitary offices increased from 506 to 539. In the same period, the number of associative offices increased from 328 to 356.

Clearly, the trend towards greater office size had already started before the introduction of the new Act. Drivers of this trend are likely to be economies of scale and economies of specialisation within an increasingly complex profession. Even within the solitary office, an increase in the minimum efficient size can be noticed. In the early days, a solitary post consisted of a notary, a junior notary and a secretary. Nowadays, a solitary post consists of a notary, two junior notaries, secretaries, an accountant, an employee with a college degree, and other support staff (Plug et al., 2003).

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### **Why solitary offices are unappealing**

Vogels et al. (2002) examined the factors that discourage junior notaries from starting up or purchasing a solitary office. A solitary office consists of one notary, some junior notaries and other staff; in an associative office several notaries are active. Succession of a notary and entry as a notary in an existing associative office are seen as far more appealing options to enter the notary profession. Some of the bottlenecks for establishing a new office (solitary or associative) or taking over a solitary office that were mentioned include:

- The supply of work is too complex for one person to handle
  - It is hard to obtain and maintain a good position in the market with a solitary office
  - The high up-front investments and the difficulty to attract capital
  - The amount of goodwill that has to be paid
  - Relatively few possibilities for consultation
  - Risks in case of illness
  - Finding suitable support staff and junior notaries
- 

## **5.5 Geographical distribution of notary offices**

As we will discuss in the next section, the proximity of the notary's office is an important factor in the choice of customers between notaries. Therefore, the number of potential customers per notary can provide an indication of the accessibility of notarial services.

The greater freedom of establishment was expected to lead to a more equal geographical distribution of notaries over the country. Indeed, the geographical distribution seems to have improved in the first three years after the introduction of the new Notary Act. Between 1998 and 2003, the number of population per notary decreased from 12,365 to 11,284. The percentage of areas with 13,500 or more population per notary declined from 34 in 2000 to 21 in 2002. Thus there are fewer areas with a very low density of notaries than before. The percentage of areas with 11,500 or less population per notary increased from 29 in 2000 to 42 in

2002. Thus there was also growth in the number of areas with a very high density of notaries (Vogels et al., 2002).

In 2003, the district of Amsterdam had the lowest number of population per office (8,228), followed by the district of Assen (9,225). The district of Zwolle had the highest number of population per office (13,523).

## 5.6 Price consciousness

Vogels et al. (2002) conducted a telephone survey to study the use of notarial services by consumers between 1999 and 2002. Among the 200 respondents of the survey, 29 percent consumed notarial services in 2002 because they bought a house. Other important reasons to visit a notary included; drawing up a will, taking out or altering a mortgage, and settling an inheritance. Between 1999 and 2002, the percentage of the respondents who visited a notary for family services declined. Two probable causes of the decline are changes in family law (inheritance law in particular) and the increase in the fee for family services.

The respondents tended to find their notary through the following channels (Vogels et al., 2002):

- Family, friends and acquaintances
- The yellow pages, white pages or a city guide
- The other party in the real property transaction
- A (financial) advisor

The two most important factors in choosing a notary are the place of establishment and recurring business with the same notary. For about a quarter of customers the place of establishment was the most important reason to choose their notary. People tend to return to the same notary once they have used his services. In 2002, one third of customers stated that they chose their notary because of recurring business.

Vogels et al. (2002) analyzed changes in consumer behaviour with respect to prices for notarial services over the period 1999-2002:

- *Comparing rates.* The share of respondents comparing rates between notary offices increased from 8 to 14 percent. The share of respondents stating that prices really affected their choice of a notary remained low: 2 and 9 percent, respectively.



- *Negotiating rates.* The share of respondents discussing rates with a notary before concluding a transaction increased from 15 to 22 percent. A much lower percentage stated that notary fees are really negotiable: 3 and 5 percent, respectively.

Clearly, the importance of price as a decision factor is growing, but it remains a minor factor. Thus, currently, price competition is only of limited importance to consumers' choice of a notary.

## 5.7 Number of notarial deeds

Between 1985 and 2004, the number of notarial deeds increased from 911,092 to 1,688,054, with a peak in demand in 1999 because of a buoyant housing market. Since the number of notaries also increased over this period, we did not see a significant change in the number of deeds per notary (1117 in 1995 and 1151 in 2004, data from KNB). The new Act did not affect total demand for deeds for which notaries are legally required, since notaries kept their professional monopoly.

Vogels et al. (2002) analyzed trends in the number of notarial deeds in the period 1997-2001.<sup>2</sup> The number of deeds per notary differs greatly between notaries. In 1999, the top 5 percent of notaries produced 2,353 deeds, whereas the bottom 5 percent produced only 241 deeds. Some of the notaries in the latter category mainly provided legal advice.

### Real property services

More than 60 percent of notarial deeds are related to real estate services. Some 60 percent of these real estate services are mortgages, the other deeds in this category mainly concern conveyance of property. The share of real estate services in the total number of deeds did not change much over the period 1997 to 2001 (62.6 and 62.1 percent, respectively). Because of developments in the housing market, we see a peak in 1999 (65.4 percent).

### Family services

Between 1997 and 2001, the share of family services in the total number of deeds declined from 24.0 to 21.5 percent. The deeds in this category are mainly wills (78 percent in 1997 and 72.3 percent in 2001). The declining share of family services is mainly due to lagging growth in the number of wills. Mostly likely, this drop is the result of changes in the law governing inheritances. It is not known with certainty whether notaries brought down the share of family services in their total workload by charging high fees, a fear among some opponents of the new Notary Act. It is not likely, however, since 99 percent of all notaries processed family related deeds in 1999 and in 2001.

<sup>2</sup> EIM relies on data from the tax authority and the Central Register of Wills (*Centrale Testamenten Register*).

### Corporate services

Between 1999 and 2001, the percentage of deeds in the corporate practice increased from 6.2 to 8.1 percent. The absolute number of these deeds also increased, from 111,600 to 121,600. The large offices, with more than 20 employees handle relatively more deeds in the corporate practice than small offices. In offices with more than 20 employees, 14 percent of deeds were related to corporate service in 2001, in offices with 10 to 20 employees 9 percent and in offices with 10 or fewer employees 7 percent.

## 5.8 Notary fees

We draw on two studies on notary fees: Vogels et al. (2002) and Wils and Oostdijk (2004). The first study is based on a survey among 265 notary offices, the second study on a survey among 272 offices. Both studies analyze fees for eight common notarial deeds. Table 5.1 presents the development in notary fees over the period 1999 to 2004.

**Table 5.1 Development in notary fees, 1999-2004**

	October 1999 (fixed fee)	April 2002 (average fee)	Change 1999-2002	September 2004 (average fee)	Change 2002-2004
	€	€	%	€	%
<b>Family services</b>					
Marriage contract, two wills	541	758	40	868	20
Partnership agreement	279	353	27	388	12
Will	145	245	69	286	28
<b>Real estate services</b>					
Mortgage + conveyance (€113,500)	3,554	3,007	- 15	2,284	- 21
Mortgage + conveyance (€245,000)	2,196	2,098	- 4	1,817	- 13
Mortgage + conveyance (€363,000)	1,779	1,733	- 3	1,599	- 7
Mortgage + conveyance (€590,000) and two wills	1,711	2,029	19	1,882	- 9
Conveyance yard	280	499	78	578	24

### Family services

The fees for family services increased considerably in the period following the introduction of the new Act. Between 1999 and 2004, the price for drawing up a will almost doubled, the price for a marriage contract with two wills increased by 60 percent and the price for a partnership agreement increased by almost 40 percent. In 2002, only 20 percent of notary offices charged fees for family services below the fixed fees of 1999 (Vogels et al., 2002). Although the strong hike in fees took many policymakers by surprise, the actual fees for low-income households are still lower than the price cap (Ter Voert and Van Ewijk, 2004).

The hike in fees for family services is not likely to be the result of the new Act alone. The work involved in drawing up deeds in this category has also become more complex and time consuming – partly due to changes in the law governing inheritance. The notary’s honorary fee and the expenses related to inquiries make up some 75 percent of a client’s fee. Other elements of a notary’s fee can include legal charges, registration fees, conveyance tax, and costs for registration with the land register (Wils and Oostdijk, 2004). The increase in legal charges had a noticeable impact on notary fees (Ter Voert and Van Ewijk, 2004).

### Real estate services

Policy makers also expected the fees for real property services to decrease – and so it happened, even in the presence of higher housing prices. The fees as percentage of the value of real estate declined strongest for high-priced real estate. This development is remarkable since the fees often are a percentage of the value of the property conveyed. In 2002, about half of all notary offices charged fees for real estate services below the fixed fees of 1999 (Vogels et al., 2002). Only the fee for conveyance of a yard increased. This increase is not surprising: under the old regime of fixed fees, conveyance of small parcels had a particularly low fee.

### Variance in fees

Vogels et al. (2002) and Wils and Oostdijk (2004) also analyzed the variance in fees between notary offices. Table 5.2 presents the average fees for the five percent cheapest and the five percent most expensive offices in 2002 and 2004. The table shows that fees vary widely. The difference in fees is even greater in 2004 than in 2002. Small offices tend to charge lower fees than large offices, with solitary offices being the cheapest.

**Table 5.2 Notary fees charged by the cheapest and the most expensive offices, 2002 and 2004**

	Average fee for bottom 5 %		Average fee for top 5 %	
	2002	2004	2002	2004
	€	€	€	€
<b>Family services</b>				
Marriage contract, two wills	547	526	1,027	1,386
Partnership agreement	279	269	438	576
Will	157	160	378	522
<b>Real estate services</b>				
Mortgage + conveyance (€113,500)	1,871	1,194	4,054	3,859
Mortgage + conveyance (€245,000)	1,589	1,146	2,495	2,550
Mortgage + conveyance (€363,000)	1,368	1,067	2,043	2,158
Mortgage + conveyance (€590,000) and two wills	1,616	1,326	2,466	2,558
Conveyance yard	306	319	697	1,062

Based on the variance in fees in 2002, Vogels et al. (2002) clustered notaries in four different groups. Some 45 percent of offices follow the same pricing strategy as under the system of regulated fees. They charge relatively low fees for family services and relatively high fees for real estate services. Indeed, Dijkstra and Aalbers (2002) find that some 40 percent of notary offices still cross-subsidise family services with earnings from real property services. 28 percent of offices belong to the group of price fighters. 25 percent of offices based their fees on costs. The remaining 2 percent of offices charge particularly high fees.

## **5.9 Notaries' earnings**

Based on data from Statistics Netherlands (CBS) and a mail survey, Dijkstra and Aalbers (2002) analyzed turnover of notary offices. They find that notarial deeds make up some 94 percent of total turnover, legal advice is part of the remaining 6 percent. Real estate services contribute most to turnover: on average, they make up some 65 to 70 percent of total turnover, depending on cycles in the housing market. Between notary offices, this share varies between 12 and 90 percent. On average, some 15 percent of turnover is related to family services, with their share in earnings varying between 1 and 39 percent. Some 9 percent of turnover is related to corporate services, with their share varying between 1 and 47 percent. The contribution of corporate services is particularly high in large notary offices.

Profits declined after 1999, mostly as a result of lower market demand for real property services. In 2003, average profits per notary (FTE) amounted to € 224,408, with the top 5 percent making € 655,000 and the bottom 5 percent making a loss of € 273 (Ter Voert and Van Ewijk, 2004).

## **5.10 Notaries' costs**

Notaries' costs can be divided into five major categories (Dijkstra and Aalbers, 2002, cost shares for 2000/2001):

- Personnel costs (70%)
- Office costs (17%)
- Housing costs (5%)
- Depreciation (5%)
- Interest payments (3%)

The new Notary Act was expected to drive down costs. Actually, average total costs increased by 8 percent between 1999 and 2001, but declined somewhat between 2002 and 2003 (Ter Voert and Van Ewijk, 2003). Half of the increase is caused by an increase in personnel costs. Interest payments and housing costs also contributed to the increase in total costs.

Notaries have become more cost conscious since the introduction of the new Act. In 1999, only 1 in 4 notaries used timesheets to keep track how much time was spent on which activities. By 2001, 1 in 2 notaries used timesheets. Additionally, notaries spend more time on improving the efficiency of internal processes by implementing new information technology.

If the new Act fosters competition, then higher marketing costs are to be expected. Indeed, Vogels et al. (2002) find that these expenses increased markedly in 1999 compared to 1998. For large offices, marketing expenses decreased again in 2000 and 2001, however. Large offices can focus on corporate services, for which they can rely on recurring business with customers. Marketing expenses for small offices continued to increase between 1999 and 2001. They are more dependent on infrequent individual customers needing family or real estate services.

## **5.11 Quality**

As discussed in section 3.7, the quality of notarial services has three dimensions: integrity (impartiality and trustworthiness), legal quality (quality of deeds) and commercial quality (treatment of customers). Only the latter dimension of quality is easily observable for customers. A customer satisfaction survey conducted by EIM shows that customers are generally satisfied with service levels: the introduction of the new Notary Act did not lead to low perceived quality.

The number of complaints against notaries is an useful, albeit imperfect indicator of quality. It is an imperfect indicator since complaints sometimes refer to notarial services performed (far) in the past. Moreover, supervisory bodies may have incomplete administrative data on the number of complaints processed.

KNB data on the number of complaints filed are most complete. The KNB does not administer complaints filed directly at the Supervisory Chamber or at other bodies. Therefore, these data do not provide a complete picture. Between 1999 and 2003, the number of complaints filed at the KNB decreased from 309 to 254. Most complaints were related to commercial quality (Ter Voert and Van Ewijk, 2004), which is not surprising given the observation at the start of this section. Most of the complaints are not directly forwarded to the Supervisory Chamber. First, the KNB tries to solve the issue via correspondence. In a third of the cases, correspondence was not necessary since the conflict had been solved already or the complaint had been withdrawn.

Correspondence tends to solve most issues: only 10 percent of all complaints filed with the KNB is forwarded to the Supervisory Chamber (Ter Voert and Van Ewijk, 2004).

Between 1999 and 2003, the number of complaints filed with the Supervisory Chambers doubled from 150 to 300. Half of the complaints were deemed admissible, legitimate and substantial. One-sixth of the complaints resulted in disciplinary action against a notary. This ratio did not change over this period. In 2003 and 2004, the disciplinary judge produced several judgements on the boundary between entrepreneurship and legal tasks of notaries. The disciplinary judge disapproved of commercial initiatives that undermined quality of services (Ter Voert and Van Ewijk, 2004).

Researchers from Leiden University examined the development of ethics in the notary profession after the introduction of the new Act. Some of the findings of this study are (Ter Voert and Van Ewijk, 2004):

- Notaries have become more commercially minded. As a result, they tend to pay less attention to the quality of their services and the responsibilities related to their profession (think of the importance of legal certainty for society).
- Compliance with several rules of conduct has diminished, in particular compliance with the full-service obligation (*ministerieplicht*), cooperation in case of transfer of documents, and the prohibition on financial commission. Half of the notaries state that they comply less frequently with regulation on informing customers about the consequences of a notarial deed and about withholding their services.
- The majority of notaries think that the existing culture in the profession leads to a low self-cleaning capacity: remarks about possible non-compliance to colleagues are not welcome.

## 5.12 Conclusions

A survey of the developments in the market for notarial services before and after the introduction of the new Notary Act brings us to the following conclusions:

- *Number of (junior) notaries.* The new Act was expected to speed up the appointment of junior notaries into notary positions. The number of junior notaries declined – due to a smaller inflow rather than a greater outflow. Growth in the number of notaries did not accelerate after 1999. Since most of the newly appointed notaries joined existing offices, the number of independent offices grew at an even lower rate. The size of notary offices increased, but this trend had already started before the introduction of the new Act.

- *Geographical distribution.* The greater freedom of establishment was expected to lead to a more even geographical distribution of notary offices. Notary density indeed developed positively; the tail of the distribution became smaller over the years 2000-2002.
- *Price as a decision factor.* Unregulated fees were expected to make customers more price conscious. Evidence shows that the importance of price as a decision factor is growing, but it remains a minor factor. The two most important factors in choosing a notary are the place of establishment and recurring business with the same notary.
- *Number of notarial deeds.* As the new Act maintained the professional monopoly of notaries, structural demand for legally required notarial deeds was not expected to change. Demand showed some fluctuations because of the housing market, which determines a major part of an average notary's workload. All notaries remain active in providing family services.
- *Development of fees.* Fees for family services increased much stronger than expected after introduction of the new Act. Fees for real estate services decreased, which was expected. Many offices still follow a policy of cross-subsidisation between different services, i.e. pressures from price competition are not very strong yet.
- *Notaries' costs and earnings.* Fluctuations in earnings of notaries seemed to be mainly related to the housing market. Costs were inflated, mainly as a result of higher personnel costs. As expected, notaries seem to become more cost conscious: a greater number of notaries used timesheets to keep track of how much time was spent on which activities.
- *Quality of notarial services.* Customers remain satisfied with the quality of services provided. The number of complaints filed grew rapidly after the introduction of the new Act and compliance with the rules of conduct and other regulation seems to decline.





## **6 The evaluation of 2003**

In the four years following the introduction of the 1999 Notary Act, a specially appointed Commission monitored the developments in the notary profession. The Commission published its findings in a final report in 2003 (Commissie Monitoring Notariaat, 2003). In this chapter, we review the Commission's findings and recommendations for policy - and the reactions from involved parties.

### **6.1 Development of competition**

Generally, the Commission judged positively about the developments after the introduction of the new Act. Customers enjoyed greater freedom of choice and the Commission did not think that the continuity and accessibility of notarial services had been endangered.

The new Act did not seem to be successful in breaking the monopoly position of incumbent notaries. The number of independent offices did not really grow substantially after the introduction of the Act after all. Freedom of establishment is limited through high barriers to entry and too much regulation. Requirements for appointment as a notary are higher than necessary. The Commission deems it necessary to further stimulate entry before competition can really take off.

The new Act seems to have had little impact on prices. Many notary offices base their fees on standard earnings that they wish to make, which is typical behaviour of firms in markets with fixed fees. This practice could only be justified if fees for real estate services are based on costs and family services are loss making, but such is not the case. Fees for real estate services still include high profit margins, and fees for family services have increased sharply. The Commission expects fees for real estate services only to decrease substantially if the number of entrants increases and competition takes off.

Businesses seem to benefit more from lower fees for real estate services than households. The main reason for this difference is the greater negotiation power of business clients. Only households who bought relatively expensive houses enjoyed substantial price breaks.

In the years following the introduction of the Act, fees for real estate services were limited to ranges. These ranges were based on pre-1999 fixed fees. Since the fixed fees were used as a point of reference, notary offices did not have a strong incentive to bring their fees in line with cost levels. The Commission thinks that reductions in fees for real estate services are certainly possible.

## 6.2 Recommendations

The Commission did several recommendations to foster competition in the notary profession:

- *Abolish the business plan.* The requirement to have a business plan approved by a committee of experts protects the interests of incumbent notaries. The Commission thinks the business plan discourages junior notaries to apply for appointment as a notary – and sees the requirement to evaluate the business plan as a costly instrument. To abolish this barrier of entry, the business plan should be replaced with tighter supervision of newly established offices.
- *Reduce the length of the work placement.* The Commission recommends to reverse the decision to lengthen the duration of the work placement for junior notaries from three to six years. Six years is simply too long, especially for junior notaries who work part-time. The duration of the work placement acts as a barrier to entry and discourages students to choose the notary as their profession. Additionally, it should become possible to count experience acquired in other legal professions toward the work placement requirement.
- *Introduce the salaried notary.* The salaried notary is an attractive alternative for junior notaries, especially for those who want to work part-time. The introduction of the salaried notary can broaden the supply of notarial services, in particular when he or she can be employed by parties outside the notary profession.
- *Allow for specialisation.* The obligation to offer the full range of notarial services is old-fashioned and it ignores the complexity of the current notary profession. Specialisation will foster competition, and it makes the profession more attractive.
- *Examine whether it is proper practice to pay goodwill for the acquisition of a public office.* Newly appointed notaries often have to pay high amounts of goodwill. This practice makes it more difficult for junior notaries to take over an existing post.
- *Implement a system of periodic inter-fraternal evaluation.* Peer review should be used to evaluate compliance with rules of conduct. The creation of a Notary Inspection coordinating the oversight of compliance should be considered. Measures to create more transparency about the performance of notary offices are of great importance.
- *Provide clients with better price information.* Notaries should inform their clients in advance about the fees for service. Currently, many clients consumers receive such advance information too rarely.

## 6.3 Reactions to the report

### KNB

The KNB agreed with most of the findings of the Commission, although the KNB thought the Commission paid too little attention to the financial problems faced by about 50 notary offices.

The KNB did not agree with most of the Commission's recommendations based on the findings. It did not see the business plan as a major barrier to entry. The KNB also opposed reducing the duration of the work placement. According to the KNB, most junior notaries see the work placement as an important condition for providing high-quality notarial services when they have assumed the post of notary and not as an obstruction. In line with the Commission's recommendation, the KNB suggested to open the position of salaried notary, but only if employed by another notary. If other firms could employ a salaried notary as well, impartiality of notaries could be undermined. The KNB also thought paying for goodwill to be normal practice in a free market. Finally, the KNB pointed at specialisation within larger notary offices - and the disadvantage of having clients to travel to different notary offices for different services (Notariaat Magazine, February 2003).

### **Consumers Union**

After publication of the Commission's final report, the Consumers Union (*Consumentenbond*) recommended to monitor the notary market yet another year. If the fees would continue to rise, then fees should be regulated. The Union judged lagging competitive pressures to be the main reason for the hike in fees. Entry barriers were still too high, limiting competition. Unlike the KNB, the Consumers Union reacted positively to the suggestion of non-notaries (including the Union itself) employing salaried notaries (Notariaat Magazine, March 2003).

### **Home Owners Association**

The Home Owners Association (*Vereniging Eigen Huis*) agreed with most of the Consumers Union's reaction to the final report. The Association deemed competitive pressure to be too low, which resulted in notarial services becoming more expensive. The Association thought it time for drastic measures to foster competition in the market for notarial services.

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### **Experiences of a notary and a junior notary with the 1999 Notary Act**

To obtain a practical understanding of the impact the new Act is having on the profession, we conducted two open interviews. We asked a notary and a junior notary about their experiences with working in a liberalised market.

The notary, Mr. B, had been appointed as notary in 2000. He is one of the notaries working at an interdisciplinary office in The Hague. Four notaries and eight junior notaries work at the office, next to 40 lawyers. B. is specialised in real estate services.

The liberalisation of the notary market has had several consequences for the office in which B. is working. He noticed that clients have become more price conscious. Fees for real estate services have been halved. Because of the low profitability of family services, the office has decided to only offer these services to regular clients in the nearby future. B. expects family services to be offered only by small notary offices in the future.

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**Experiences (continued)**

In B.'s opinion, liberalisation of the notary market brought many positive things. He has definitely become more of an entrepreneur since the introduction of the new Notary Act. He argues that there are several bottlenecks in the current regulation of the profession. First, there is a tension between the obligation to offer the full range of services and the commercial risk: some notarial services are just not profitable. Second, he does not think the business plan to be useful; notaries are able to judge themselves whether or not to open an office. Third, he sees the quality control by the KNB as too repressive in nature.

B. thinks liberalisation has lowered the quality of notarial services. Market forces make notaries less attentive to the quality of their services. The resulting growing number of claims against notaries increased premiums for professional liability insurance considerably, creating upward pressure on fees. B. wonders how customers trade off price breaks against lower quality of service. A return to regulated fees would positively affect the quality of notarial services and could make family services more affordable.

The junior notary, Mrs. L., works at a small notary office in Geertruidenberg since 1998. There is one notary active in this office, L. is the only junior notary. In one or two years, L. would like to be appointed as a notary herself. Although many junior notaries do not want to work as a notary in a solitary office because of the high commercial risk, this does not deter L., although she does mention the uncertainty about the market for notarial services as a difficulty.

L. also experienced several changes after the introduction of the new Act. Often customers phone ahead to ask about price of notarial services. It is increasingly common for customers outside the region to contact the office. Preparing price quotes turns out to be quite time consuming. At this particular office fees for real estate services also decreased, while the rates for family services increased. L. thinks competition is fierce everywhere, not only in larger cities. The fierce competition puts pressure on the collegiality in the profession.

L. does not think the quality of notarial services suffered after the introduction of the new Notary Act. She thinks professional standards prevent notaries to lower quality. She acknowledges that the temptation to provide lower quality services has grown.

She thinks the longer duration of the work placement to be a useful part of training to become notary. According to L., greater consumer awareness of the importance of high-quality notarial services is crucial. The KNB could have a role in increasing this awareness. This way, customers know better what to pay attention to when choosing a notary and what they pay for.

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## 7 International comparison

In this chapter, we compare the Dutch notary profession to the organisation and regulation of the profession in the United States, Belgium, Germany and Quebec.

### 7.1 The United States

The United States does not have the Latin notary system. Before we launch into a discussion of the differences between the American notary public and the Latin notary, we first look into differences between the American and the Dutch legal system.

The Netherlands is organised under a Civil Law system. The Civil Law system originated from Roman law and can be found in almost all European countries, Latin America and parts of Asia and Africa. The main characteristic of the Civil Law system is that laws are laid down in legislation. The adversarial approach is confined to truly litigious cases.

In the United States we find a Common Law system, which originated in England during the Middle Ages. In a Common Law system, the law is developed through judgements. Jurisprudence is the most important source of law. The adversarial approach can be found in all aspects of the Common Law system. For instance, when buying a house, the buyer and the seller can seek independent judicial advice, whereas under the Civil Law system both parties are advised by one notary, who is independent and impartial.

Every state in the United States has its own Notary Law. Thus regulation governing the profession differs from state to state. A true special case is the state of Louisiana. In contrast to all other states, this state has a Civil Law system. This part of the United States used to be a colony of France, and therefore adopted a different law system. As a result, the state of Louisiana has the Latin Notary, just like the Netherlands.

#### **Not a legal professional**

In Common Law jurisdictions, lawyers are the only legal professionals. The task of a legal professional in the United States involves both giving legal advice and representing clients in Court. Every lawyer in the United States has the authority to represent clients in Court. In contrast, in Civil Law jurisdictions the legal profession is divided in two groups; only lawyers have the authority to represent clients in Court, other legal experts merely give advice. The Dutch Latin notary is a legal professional, but he is not allowed to represent clients in Court. The notary public is not a legal professional. As we will see, many differences between the Dutch Latin notary and the American notary public can be explained by the fact that the Dutch Latin notary is a legal professional and the American notary public is not.

### **Function and the duties of a notary public**

An American notary public is a 'citizen of high moral character and integrity', who is legally empowered to witness and certify the validity of documents and take attestations and depositions. He is not a person who practises law (St-Aubin, 2000). The Latin notary is an legal professional like an attorney who also prepares documents on behalf of both sides in a transaction and ensures that these documents meet the legal requirements of the appropriate jurisdiction (Thaw, 2000). Giving legal advice and making up notarial deeds is the most important function of the Dutch Latin notary. In contrast, the American notary public is strictly prohibited to give legal advice and draw up documents unless he is also an attorney. For legal advice or drawing up official documents one needs to turn to a lawyer, but the notary public is not impartial and independent like the Dutch Latin notary. The main function of the American notary public is to deter fraud. The notary public's primary activities are (Barassi, 2004):

- Taking oaths and declarations regarding the truth of material statements contained within documents that require such an act.
- Attesting or acknowledging acts by witnessing the signing of a document; the notary verifies the signer's identity, checks the validity of the signature, countersigns and seals the document.
- Certification by warranting the truth of a fact, above the mere act of witnessing a signature. The notary can certify a copy of a document for example by comparing it to an original.

For many documents, the law requires notarisation. Certain affidavits, deeds and powers of attorney may have no force of law, unless they are properly notarised. The most common document in the US for which notarisation is required is a deed conveying land. If notarisation is not required by law, someone can involve a notary to strengthen a document's validity and protect it from fraud. Only if the notary is uncertain of a signer's identity, willingness or general competence or when he has a good reason to suspect fraud, he can refuse to notarise a document.

A document can be notarised if it contains:

- Text committing the signer in some way
- An original signature
- A notary certificate, which may appear on the document itself or on an attachment.

When notarising a document, the notary completes the notary certificate and signs it. The notary has to determine the identity of the person requesting the notarisation. The notary may not notarise a signature of a person who has not appeared before him. The notary has to affix his notary seal to every notarised document, which ensures the integrity and authenticity of the

signature on the document. It does not ensure the integrity and authenticity of the document's contents.

Unlike the Dutch Latin notary, the American notary public is not responsible for the accuracy or legality of the documents he notarises. The notary certifies the identity of the signers, who are responsible for the content of the document. A document of an American notary public has little probative value in Court, while a document of a Dutch Latin notary has strong probative value.

### **Appointment of a notary public**

Several state officials, including the governor, judges and county clerks can appoint a notary public. The notary public gets appointed for a term of several years, generally four to six years.

The requirements one has to meet to become an American notary public vary between states, as each state has its own notary law. In general someone who wants to become a notary public has to meet the following requirements:

- Be at least 18 years old
- Be a resident of the State
- Able read and write English
- Not be a convicted felon
- Have filed an application
- Taken an oath of office

Most states require the payment of an application fee and a bond. For example in the State of California one has to pay a \$ 15,000 bond before one can become a notary public, in order to provide some protection to the public. The bond functions as a limited fund for paying claims against the notary public. The amount of the bond differs between states.

Many states also require the passing of an exam. For example, the state of California put together a handbook in which the duties of the notary are briefly described. With this handbook an applicant can prepare himself for the state exam. These exams are not comparable to the high requirements for Latin notaries. The required education of a Latin notary is more comparable to the required background of an attorney in the US.

After a notary is appointed he is authorised to provide his notarial services throughout the state in which he is appointed. He is not allowed to offer his services outside his own state, but he can notarise documents from another state or country.

The number of notaries in the US is not capped. There are about 4.5 million notaries in the US (estimate of the National Notary Association). With a population of about 296 million, some 66 people share one notary. Notary density is much higher in the US than in the Netherlands (in the Netherlands, on average some 12,000 people share one notary). The difference is probably partly due to the low barriers to entry in the US.

### **Regulation of fees**

The American notary public receives his fee from his client. Most states regulate fees in their notary law. But there are also states without regulated fees, like Alaska. The level of the maximum fees differs from state to state. For example: a notary in California can charge \$ 10 for an acknowledgement, whereas his colleague in Missouri can only charge \$ 2.

Most states also regulate the travel fee a notary is allowed to charge. There are a lot of so-called mobile notaries in the United States who travel across their State to offer their services. Most states also regulate which services the notary has to offer for free, for example: in many states charging a fee for absentee ballots are not allowed.

### **Developments in America's legal system**

Initiatives have been taken to create some kind of a civil law notary in the US. One initiative is by a team of professors of the Preventive Law Center of the University of Colorado. They considered the introduction of a properly educated and trained non-litigious lawyer.

Another interesting initiative is the creation of a Cyber Notary in 1993 by the Information Security Committee of the American Bar Association. This Cyber Notary has some characteristics of the Latin Notary. His main duty would be to ensure the security of business communication on the 'electronic highway'. The activities of the Cyber Notary would not be limited to that of the notary public; the Cyber Notary is also allowed to authenticate documents. That implies that he has to verify whether the terms and execution of the document is in accordance with the law (Barassi 2004).

The concept of the Cyber Notary is not yet materialised, but it did result in the adoption of laws creating a new legal profession in the states of Florida and Alabama. The purpose of the new laws was to heighten the trust in the integrity of American documents abroad (Thaw, 2000). In many civil law jurisdictions and also in other common law jurisdictions, the authentication of a document is an affirmative requirement for many transactions. But authentication does not play a major role in the United States and this lack of proper authentication resulted in rejections of documents by public authorities abroad. The authorities abroad then often required the re-execution of a transaction before a notary in their country and the attachment of a legal opinion by a United States lawyer (Barassi, 2004).



In 1997, the state of Florida introduced the international notary, comparable to the Latin notary. Only attorneys with five years of experience in practicing law who passed a special exam, could become an international notary. The Florida international notary is given the power to perform any act that a Florida notary public may perform. The documents of the Florida international notary are for use in the United States and abroad. The state of Alabama also created an international notary, although their rules for the international notary are not yet as extensive and detailed as those for the Florida international notary (Thaw, 2000). The documents of the Alabama international notary are only for use abroad.

## **7.2 Belgium**

Belgium has a Latin notary profession, just like the Netherlands. The Belgian notary performs activities that are similar to the activities of the Dutch notary: he draws up legally required deeds and can act as a legal advisor. In 2000, a new Notary Act was introduced in Belgium, but regulation of the notary profession remains strict. Regulation of the notary profession in Belgium is comparable to the regulation that existed under the old Notary Act in the Netherlands – in some respects it is even stricter.

### **Appointment**

The Crown appoints notaries – and also junior notaries. To be appointed as a junior notary, a candidate has to meet the following requirements:

- A six-year university education, involving five years of law study and one year of specialisation in notary law
- A three-year work placement
- Passing a written and oral exam

Upon completion of university education and specialisation in notary law, the candidate becomes a licentiate. After the work placement a licentiate can become a junior notary if he passes the special exam. After the licentiate passes the exam, a classification is made based on the test results and two advices; one from the public prosecutor, another from a regional advisory committee of notaries. The best candidates get appointed as junior notary. The licentiate and the junior notary both perform the same activities. The main difference between them is that the junior notary is allowed to replace the notary, while the licentiate is not.

There are three ways for a junior notary to become a notary (Schaumans, 2005). First, a special committee can appoint a junior notary if a post becomes vacant. The committee selects three candidates for the vacant post. The Minister of Justice selects one of the three junior notaries for appointment by the Crown. Second, a junior notary can associate himself with a notary. The

junior notary then works at the same post as the notary, and is authorised to perform all actions the notary is granted by law. When the notary ceases his activities, the junior notary can assume his post. This type of appointment is attractive as the junior notary enjoys job security as an associate-notary. Third, a junior notary can be active as a substitute notary for a notary who is temporarily unable to carry out his activities.

Like the Dutch notary, the Belgian notary has to take an oath upon appointment. The Belgian notary is subject to the Belgian Notary Act and the regulations of the notary organisations.

### ***Numerus Clausus***

The number of notaries and the number of junior notaries is regulated in the Notary Act. To guarantee accessibility of notarial services in areas with low population density, the regulated number of notaries per population is higher in these areas. Article 31 of the Notary Act sets a maximum of one notary per 5,000 inhabitants in districts with less than 75,000 inhabitants; per 6,000 inhabitants in districts with 75,000 to 150,000 inhabitants; per 7,000 inhabitants in districts with 150,000 to 250,000 inhabitants. Historically, the actual number of notaries exceeds this number in some districts. Vacancies in these districts do not result in the discontinuance of a post, however. A post can only be abolished when advised so by the disciplinary board and the president of the Court. The legal number of notaries is also a minimum: the number of notaries should be equal to or greater than the legal number minus one. For instance, if regulation sets a maximum of 10 notaries for a district, there should be 9 notaries at a minimum. In practice, the number of notaries sometimes falls below the minimum (Schaumans, 2005).

### **Geographical distribution**

A notary's location in a district is also regulated. A legal district is divided into areas that often correspond with borders of municipalities or communities. A notary gets appointed for one of these designated areas. He is only allowed to establish or relocate his office inside this area. A notary can obtain legal permission to relocate or expand his area of service, according to a strict procedure and after publication of the accompanying Royal Decree. In practice, primarily expansions are requested. Outside his district the notary is only allowed to draw up notarial deeds if the presence is required of a client who (temporarily) resides outside the district (for example, hospital patients or convicts). Providing legal advice is allowed outside the district.

### **Cooperation and specialisation**

With the new Notary Act in Belgium, associations between a junior notary and a notary or between two notaries become possible, on the condition that both persons are active in the same district. The primary aim of this change was to open up the profession for junior notaries. In the Netherlands, notaries already started to form associations before the 1970s.

Interdisciplinary cooperation between notaries and lawyers or tax consultants is not allowed in Belgium. Specialisation is not allowed either: each notary is obliged to provide the full range of notarial services.

### **Regulation of fees**

Fees are regulated by Royal Decree. A client's fee consists of three elements: the notary's honorary fee (regulated by law)<sup>3</sup>, a registration fee at a minimum of € 25 to be paid with each notarial deed (and to be transferred to the Department of Finance), and some miscellaneous expenses related to drawing up the deed. For a notary, the only way to earn a higher income is to supply more notarial deeds or to provide more legal advice.

### **Notary organisations**

Several organisations are part of the Belgian notary profession. The National Notary Chamber (*Nationale Kamer van the Notariaat*) was created with the introduction of the new Notary's Act. It is comparable to the KNB in the Netherlands. The National Notary Chamber has the following tasks:

- Creating regulation supplementary to the Notary Act
- Standardise and oversee the notaries' accounting and administration
- Appointing members of the committees involved with appointing (junior) notaries
- Management of the notary fund meant to subsidise fees for low income households. All notaries donate 1.5 percent of their annual income to this fund.

The Provincial Notary Chambers (*Provinciale Kamers van Notarissen*) are authorised to handle complaints against notaries. They also have the powers for disciplinary actions, to oversee the administration of notary offices, and to validate draft agreements of associations and the foundations of notary firms.

Other institutions that are part of the Belgian notary profession include:

- Appointment committees
- Advisory committees, advising the Provincial Chambers on appointment of junior notaries.
- Royal Federation of Belgian Notaries (*Koninklijke Federatie van Belgische Notarissen*), providing information on notarial services to the public and facilitating knowledge exchange between notaries.

<sup>3</sup> As of 2004, a notary is allowed to charge more than the regulated fee, but a client can always demand the regulated fee.

- Notary Assurance (*Notariële Zekerheid*) handles customer complaints and intervenes if notaries face financial problems.
- Notary Insurance (*Verzekeringen Notariaat*), represents notaries in Court proceedings related to their responsibility as a notary.

### **Some statistics**

At the end of 2003, 1,306 notaries were active in 1,207 offices (KFBN, 2004). On average, one notary serves 8,000 people, against 12,000 in the Netherlands. Annually, some 2 million people visit a notary. In 2003, 747,009 notarial deeds were produced. On average, a Belgian notary produces 572 deeds annually, about half the number produced by a Dutch notary. On average, a notary office consists of 4.7 employees. Clearly, Belgian notary offices are much smaller than their Dutch counterparts: a Dutch solitary office alone counts on average 8 employees.

In 2003, 80 junior notaries were appointed, of which 30 filled vacant posts; 41 chose to associate with a notary. As of 2004, the number of junior notaries that can be appointed is capped at 60 per year.

## **7.3 Germany**

The German notary's activities are similar to the activities of the Dutch notary. The notary profession is highly regulated, just like the Belgian profession. A specific feature of the German system is the existence of three types of notaries.

### **Three types of notaries**

The type of notary differs between regions. First, mostly in Eastern Germany but also in the South-West, we find the *Hauptberuflicher Notar* whose work as a notary is their single occupation. In total there are 1,700 of such notaries in 11 states (*Länder*). Second, in Western Germany and in Berlin, we find the *Anwaltsnotar* who provide notarial services next to their work as lawyer. An *Anwaltsnotar* is not allowed to work on a case in which he is also involved as a lawyer. There are 8,900 of these notaries spread over seven states. Third, in two states, we find *Staatliche Notar* employed by the state. In total, there are 630 of these state-employed notaries. In states with an *Staatliche Notar* there are two different types of notaries: *Amtsnotar* and *Bezirksnotar*. The *Amtsnotar* is a judge who deals with matters relating to land registration, succession and auction of goods, and also acts as a notary. The *Bezirksnotar* is a specially trained civil servant who works alongside the *Hauptberuflicher Notar* and the *Anwaltsnotar*.

## **Education**

*Hauptberuflicher Notar* need to complete a five-year university study in law. There is no special notary study in Germany. Upon graduation, the candidate needs to complete a work placement of two years. When the candidate passes the second state exam satisfactorily, he can be appointed as junior notary and complete the three-year work placement to become ready to be appointed as notary.

To become an *Anwaltsnotar*, a lawyer must practice at the bar for five years – without any complaints filed against him. During these five years, he also has to follow additional training in notary work.

State-employed notaries are selected in a similar way as civil servants. The *Amtsnotar* also needs to pass the second state exam - and is also required to obtain an academic law degree. The *Bezirksnotar* receives special training for the practice of his function, he does not need to take the second state exam.

## **Establishment policy**

The Minister of Justice appoints a notary. In the case of the *Hauptberuflicher Notar*, a candidate can only get appointed as junior notary if it is expected that he can be appointed as a notary upon completion of his three-year work placement. To this end, the Minister of Justice makes an annual estimate of the need for notaries. There are two ways for a junior notary to become a notary: by appointment into an existing vacant position and by appointment into a newly created vacant position. There is a maximum of four notaries per office in Germany.

In the case of the *Anwaltsnotar*, the decision whether or not to create a new post is based on the number of deeds per notary. For instance, in Berlin, the standard number of deeds per notary is 325. To see whether a new post is necessary, the Minister of Justice judges whether a greater number of notaries brings the number of deeds per notary closer to the standard of 325.

## **Regulation of fees**

Fees are strictly regulated. The German notary is not allowed to give a discount or charge more in a difficult case. Just like the Netherlands, Germany has reduced fees for low-income households.

## **Cooperation and specialisation**

A German notary is not allowed to cooperate with other professions. The only exception to this rule is the *Anwaltsnotar* who is member of a professional association of lawyers. In that case, his activities as a notary should be distinguished from his other activities.

Associations between notaries are allowed. But associations with more than two notaries are relatively rare. The German notary is obliged to offer the full range of notarial services. Given the small size of offices, possibilities for specialisation are very limited. There are notaries with a large corporate practice, but they are never allowed to refuse clients in need of family or real estate services.

### **Notary organisations**

Each district has its own Notary Association. The Notary Associations are the self-governing bodies of the notary profession. They represent the interests of the notary profession and operate as a regulatory authority for their members (issuing a code of conduct, for instance). Within their districts, the Notary Associations supervise the notaries' compliance with the standards of the profession. They also provide professional education to *Hauptberuflicher Notar*. Consumers can file their complaints against notaries at the Notary Associations. Each Notary Association has its own indemnity fund, which covers client's damages caused by notaries. Every notary contributes to this fund.

The umbrella organisation for the Notary Associations is the Federal Chamber of Notaries (*Bundesnotarkammer*). This institution formulates guidelines relating to all aspects of the notary profession. The Federal Chamber also promotes the interests of the notary profession within political and economic institutions, and advises on legislation concerning the notary profession.

The German Institute of Notaries (*Deutsches Notarinstitut*) is part of the Federal Chamber. This institution answers notaries' questions related to unusual or complicated legal problems. The institute also publishes technical reports and offers an information service, and it gathers statistics relevant to the profession.

The Notary Institute (*Fachinstitut für Notare*) is part of the German Institute of Lawyers. This institute offers continuing education and specialist courses to lawyers who want to become an *Anwaltsnotar*, and to existing *Anwaltsnotar*.

## **7.4 Quebec**

Next to the Netherlands, the Canadian province of Quebec is the only other region that combines a Latin notary profession with unregulated fees. In Quebec, fees are already free as of 1991.

### **Education**

To become a notary in Quebec, one needs to obtain an academic degree. The first three years of the university education are the same for notaries and lawyers. After three years the future

lawyers leave university for law school, while the future notaries continue for an additional year of practical studies related to work as a notary. This is followed by a one-year work placement at a notary firm.

After completing the one-year work placement the notary-to-be is officially sworn in and admitted to the profession and he can start to apply for a notary position. The Quebec notary is licensed for life and may only be suspended for ethical misconduct. The notary can establish a solitary office or be part of an associate office, where he can also work as a salaried notary. A special committee evaluates each application. Criteria of the committee include the character, conduct, competence and qualifications of the applicant.

### **Activities of the Quebec notary**

The activities of the Quebec notary are very similar to those of the Dutch notary. The Quebec notary deals with non-litigious matters and drafts and authenticates legal documents and provides legal advice. He is expected to be independent and impartial. Similar to the Dutch notary, real estate services constitute the major source of income (55 percent). The Quebec notary is subject to the Notary Act, the professional code, and other regulations based on the Act and the code.

In 1998 and 2002 the scope of the notary's duties was widened. In 1998 the notary was granted rights to perform non-challenged proceedings related to guardianship and probate of wills and mandates. In 2002 the notary received the authority to make marriages official and to perform official acknowledgements of civil union break-ups. Dutch notaries do not perform these activities.

The Quebec notaries also developed expertise in various new legal sectors such as:

- International private law
- International adoption
- Maritime mortgage
- Intellectual property
- Telecommunications law
- Family and commercial mediation and arbitration

### **Chambre des Notaires du Quebec (CDNDQ)**

The CDNDQ is very similar to the Dutch KNB. The CDNDQ is a professional association. Its main purpose is to protect the interests of notary clients. The CDNDQ regulates and supervises professional training of notaries and issues regulation on the standards of professional practice. The CDNDQ also handles complaints from people who are dissatisfied with the services provided by a notary.

The syndic of the CDNDQ is responsible for disciplinary intervention. The syndic can file a complaint against a notary with the disciplinary committee. This committee can impose penalties if the complaint is found to be legitimate.

In 1966, the CDNDQ created a indemnity fund to which all notaries contribute. The fund compensates clients of notaries who misused the funds entrusted to them. In 1973, the CDNDQ created a notary studies fund. A major part of this fund is used to finance professional training of notaries. The fund also supports a legal documentation centre for notaries, research into the profession, and the development of computer applications for notaries.

### **Freedom of establishment**

The number of notaries in Quebec is not regulated. At this moment there are about 3,200 notaries in Quebec. Given a population of 7.4 million, density of notaries is much higher than in the Netherlands (2,300 people per notary instead of 12,000).

The Quebec notary can practise his profession anywhere in Quebec and even abroad if his services involve Quebec residents or if the object of the transaction is located in Quebec. Clearly, Quebec notaries enjoy a greater freedom of establishment than their Dutch colleagues.

### **Unregulated fees**

Similar to the Netherlands, notary fees are unregulated. Notaries and their clients agree in advance on the fee or on a method of calculating the fee based on the nature and complexity of the work involved. In line with Code of Ethics for Notaries of 2002, the notary has to explain to the client the total amount charged. If there is no preliminary agreement and the client is dissatisfied with the total fee and the notary's explanation, he may apply for conciliation, and if necessary arbitration.

With free rates and freedom of establishment, the market for notarial services in Quebec is even more liberalised than the market in the Netherlands. Similar to the Dutch experience, deregulation of fees did not lead to a greater number of notaries in Quebec. Quite the opposite happened, the number of notaries actually went down as a result of a decline in the number of notary students (from 188 in 1990/1991 to 60 in 1996/1997).

After the introduction of price competition in 1991, fees went down dramatically. At the same time, several indicators suggested a drop in the quality of notarial services. After 1991 the number of insurance claims filed at the special indemnity fund almost doubled from 27 to 51 per year. The amount of granted claims increased from \$ 400,000 to \$1,700,000 per year. The average number of claims filed at the professional liability insurance, resulting from the liquidation of notaries, increased from 519 to 718. The total amount of these claims increased



from \$ 1.4 to \$ 3.5 million. The number of complaints related to violations of the Notary Act and the code of conduct also increased. The Inspection reported a deterioration of service quality and a demoralisation within the profession (Van Waarden, 1998).



## 8 Conclusion

Before the introduction of the new Notary Act in 1999, the market for notarial services was characterised by fixed fees and strictly regulated establishment of notaries. As in other countries with a Latin notary profession, the number of notaries was legally determined. Notaries could only compete on quality.

With the introduction of the new Notary Act in 1999, the notary profession in the Netherlands has become one of the least regulated notary professions among countries with a Latin notary. Fees for real estate services and the number of notaries were gradually set free during a transition period. Current regulation of the notary profession is comparable to the situation in Quebec. Although regulated fees and establishment policy were liberalised, some of the core values of the Latin notary profession have been left untouched:

- As formally stated in the new Notary Act, impartiality and independence remain crucial values of the notary profession.
- The notary profession keeps its professional monopoly (*domeinmonopolie*).
- Notaries are still obliged to provide the full range of notarial services (*ministerieplicht*)

Next to the introduction of price competition and greater freedom of establishment, other regulatory changes were made. First, a new regulation is the obligation for junior notaries to have a business plan approved by a special committee. Consequently, establishment is not completely free yet. Second, the duration of the mandatory work placement for junior notaries doubled from three to six years. This change is not likely to have a great practical impact, since junior notaries usually worked for some 10 years before being appointed as notary under the old regime. Third, to promote self regulation, the KNB was transformed from a professional association into a public body with statutory powers.

In line with economic and societal developments, the work of the notary has become more diverse and complex over the past decades. This development fostered specialisation into specific notarial services and cooperation between notaries and cooperation with other professions. Opportunities for specialisation and cooperation did not change with the new Notary Act. The rules on cooperation are still set by the KNB and specialisation is primarily limited to large offices. Given the low profitability of family services, durability of the legal obligation to offer the full range of notarial services is questioned and in some cases evaded by charging high fees for these services.

The authorities expected several positive effects from the new Notary Act. In the first years after the introduction of the Act not many of these expectations materialised.

### **Fees**

Many notary offices still base their fees on the standard income to be earned. Average fees for real estate services have decreased, but still include high profit margins. Most consumers did not benefit from the decrease in fees as they were concentrated in high-priced real estate. Fees for family services increased considerably, much more than expected by the authorities.

### **Establishment**

Greater freedom of establishment did not result in a greater number of appointments of new notaries. The slight decrease in the number of junior notaries was the result of a decline in the inflow of notary students rather than a greater outflow into notary posts. Without new entrants to the market, competition does not seem to take off.

### **Geographical distribution**

Notary density increased, but the number of solitary offices was not expanded as a result of the new Act. As a further increase in the size of notary offices is expected, the geographical distribution of notarial services over the country is not likely to improve.

### **Efficiency**

The new Act was expected to create greater incentives to improve efficiency, resulting in lower costs and lower notary fees. Although notaries have become more cost conscious, notaries' costs only increased in the last years, mainly as a result of higher personnel costs.

### **Quality**

For many consumers it is unclear whether a notary charging relatively low fees can provide high-quality services. In general, consumers remained satisfied about the quality of notarial services. A concern is the diminishing compliance with the rules on conduct and the increasing number of complaints against notaries.

In conclusion, the 1999 Notary Act deeply transformed the landscape of the notary profession in the Netherlands. Although some major trends are already visible, many opportunities created with the liberalisation are still to be taken up. The market still seems to be in the process of absorbing the effects of the policy of liberalisation.

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