

## WORD OF WELCOME: THE DUTCH SITUATION ON REGULATION OF NOTARIES

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### INTRODUCTION

A year ago, I delivered a contribution to a conference on regulation of professions: Professions under Pressure. Lawyers and Doctors between Profit and Public interest. In this contribution, I will elaborate on this theme by giving an overview of the present position of the notaries in the Netherlands in a European context. First, I will focus on the effects of the new Law on notaries that came into force in 1999 with regard to the competition between notaries. In the second part of my contribution I will focus on the outcome of two comparative studies: a study on Conveyancing Services Regulation in Europe from the Centre of European Law and Politics, University of Bremen ('ZERP') and a study by Peter L. Murray 'Real estate conveyancing in 5 European Union Member States: A comparative study'.

### THE DUTCH NOTARY: A PUBLIC OFFICE

If we are talking about Dutch notaries, one must understand what role they play in our legal system. The Dutch Notary cannot be compared with the notary public in the common law countries. He is not the kind of functionary who merely takes oaths and checks the identity of the person who has put his signature at the end of a document. He is a civil law notary.

For approximately 80 types of transactions or legal acts in the fields of family law, real estate law and company law, it is necessary in the Netherlands to execute a notarial deed. The law states simply that without a notarial deed you cannot conclude a transaction or legal act, such as a last will, marriage contract, transfer of real estate, mortgage, charter of a new private company, or transactions concerning the equity in or fusion or merger of two or more companies, *et cetera*. Thus, transactions must be completed and proved in a kind of standard way, and the deeds will be stored by the Notary as property of the Government. The Notary is also an independent and impartial advisor to all parties, which includes advice as to tax questions and consequences.

The largest part of the work, as well as the largest part of the income of notaries relates to transactions concerning real estate. Approximately 65% of the annual turnover of an average notarial office can be attributed to transfers of real estate, making loans secured by real estate mortgages, *et cetera*.

Concerning transactions in real estate, the Notary normally only processes the real estate sale by passing a deed of transfer because of the traditional system that we have. In the Amsterdam-region, however, the Notary also becomes involved in the drafting and signing of the sales contract. The Notary also checks the legal position of the owner of the real estate, *i.e.* his power to dispose of it, the kind of ownership, and whether there are debts of the seller which encumber the land, and the Notary checks whether there is a pre-emption right that a municipality may have. In case the buyer finances his purchase with an obligation secured by a mortgage, the notary also drafts the deed of mortgage and acts as escrow holder for the transfer of the different amounts that have to be paid to the seller's bank, to the seller, to the tax collection-office, *et cetera*.

The notarial office plays a crucial role in the registration process. This is also necessary to safeguard the function the notary fulfils as an escrow holder, so it is considered to be the Notary's duty to record his deed as soon as possible. Furthermore, the notarial office controls the effecting of payment. In practice, all payments pass through the hands of the Notary, who holds in escrow the money deposited with the notarial office from before the signing of the deed of transfer until after the deed has been registered, and the registry has confirmed that no sequestration has been interposed by third parties between the time of the signing of the deed and the registration.

Transfers of real estate are very quick and very safe. Within two days after the deed of transfer is signed, the buyer becomes entitled to the real estate, and the seller and his bank get their money. While this sounds like an advertisement for civil law notaries, I mention it here for two reasons. On the one hand, it shows the significance of the Notary's function in our legal system, and on the other hand it demonstrates that the Dutch Notary is very much different from the so-called notary public in the common law countries. There are even some crucial differences from the notaries of other civil law countries.

#### **THE NEW DUTCH LEGISLATION ON NOTARIES**

The former legislation on notaries had lasted for 157 years. In 1999, completely renewed legislation on notaries was introduced. The former government introduced in the nineties a more liberal policy called 'Competition, Deregulation and Quality legislation'. It does not surprise me that the new legislation on notaries was strongly influenced by this new policy. There had been long and intense discussions concerning basically two aspects:

- the tariffs;
- *numerus clausus*.

To be brief, the monopolies of the notaries on making up deeds for specific legal transactions are maintained, but there are no fixed fees, and everybody who has the necessary papers to become a notary has the right to get appointed as a notary in a certain area, provided that person has a feasible business plan. The business plan must be examined for its feasibility by a special commission. The aim was that free access to the notarial profession and more competition would lead to lower fees, more differentiation in fees and services, and better quality and availability of notarial services.

Another major change took place: the former private Royal Association of Notaries became a public institution, the Royal Organization of Notaries ('KNB'). The law states that each notary and notarial candidate is an *ex lege* member. It is no longer a private club, but a part of the government.

One might ask: What influence have these major changes had on the work of the notaries? Have the fees for their services become lower than before 1999? Have the numbers of notaries increased compared to the period before 1999? Has the quality of their work improved? How did the institutional change effect the attitude of the notaries towards other notaries and towards their new public organization? These are the questions I would like to answer.

Because of the role that notaries have in our society, the government has closely monitored the notaries for a number of years. First, we had the Commission Monitoring Notariaat, the so-called 'Commission Kok', which evaluated the new law each year during its first three years. Then we had the first and second Trendrapportage, a report on the developments in the notaries' practices. The most important report was that of the Commission Evaluation Law on the Notary, better known as the 'Commission Hammerstein', named after a well known member of our Supreme Court, who was the chairman of that Commission. This report was issued in February 2006 and was actually discussed in our Parliament on Wednesday the 23 May 2007.

#### **ATTITUDE OF NOTARIES TOWARDS COLLEAGUES AND THE NEW ROYAL ORGANIZATION OF NOTARIES**

There is no doubt that the relationship between notaries and their attitude toward each other have changed very dramatically. Fierce competition in some areas of the Netherlands has caused tension between notaries. The area in Drenthe, which neighbors Groningen, is sometimes called a notaries' Fallujah, the city in Iraq where a fierce battle took place during the occupation. Competition is especially intense in areas with relatively small populations, for example in the northern part of Limburg, in Friesland and in Drenthe, as I just mentioned. While it had been quite

usual to help your colleague with dossiers without asking for compensation, nowadays no services are rendered without a bill.

The Royal Organization of Notaries is a professional organization. It has an '*esprit de corps*'. The notaries are comparatively very loyal to their own organization. Our annual meetings demonstrate this. Although the Dutch Lawyers Association has approximately 14.000 members and the Royal Organization of Notaries has some 3.500 members, the annual meetings of the notaries are attended by more than double the number of participants that attend the annual meetings of the lawyers.

Although this has not changed very much, the notaries do not always find themselves fully represented by their new organization. This has a legal reason. The new law provides that the new Royal Organization of Notaries is not allowed to promote the interests of the notaries. One might ask which organization does? The legally correct answer is that no organization at present is allowed to do this on behalf of the notaries. However, in reality the Royal Organization of Notaries does not fully live up to this rule. It still goes on promoting the interests of notaries as long as there is some connection with the competence of notaries, their skills, professional education, *et cetera*, and nobody seems to care, although there was a time when some revolutionists, like me, called for a new, independent private organization of notaries because of this situation, and because we were disappointed by the policy of the president. I and my colleague, Van Mourik, got lots of media attention, but nobody started a new private association of notaries.

#### **THE POSITION OF THE ROYAL ORGANIZATION OF NOTARIES IN COMPETITION-REGULATIONS**

The position of the Royal Organization of Notaries is also interesting from another point of view: the power to issue regulations that may relate to competition law. Take the case where the Royal Organization of Notaries issued a new regulation that includes a provision that notaries are not allowed to associate with lawyers unless it is only on the basis of sharing costs. Are the National Competition Authority and its chief executive officer, Mr. Kalbfleisch, the ones who can challenge that regulation because it might be in conflict with national and EU-competition law? If the Royal Organization of Notaries is an organization of entrepreneurs, the National Competition Authority is capable of challenging that regulation. So it depends on whether the Royal Organization of Notaries is a part of the state or an organization of entrepreneurs.

Three elements are important to answer this question. First, the law states that the Royal Organization of Notaries may only prescribe a regulation if it is strictly necessary for the purpose for which the regulations are made and the regulation does not restrict competition between notaries. Secondly, the law states that each regulation has to be approved by the Minister of Justice. Third, the Royal Organization of Notaries is a part of the government, because it is constituted by law. These three elements are of great importance to answer the question whether the Royal Organization of Notaries is an organization of entrepreneurs.

According to the *Wouters*-case, our Bar Association is such an organization of entrepreneurs, which means that competition regulations, both EU and national, are fully applicable, and Mr. Kalbfleisch has the authority to challenge such a regulation on the basis of national and EU-Competition law. But in my opinion, the Royal Organization of Notaries is not an organization of entrepreneurs because of such arguments. The given example does not amount to a decision of an organization of entrepreneurs. It is rather, a regulation prescribed by the government.

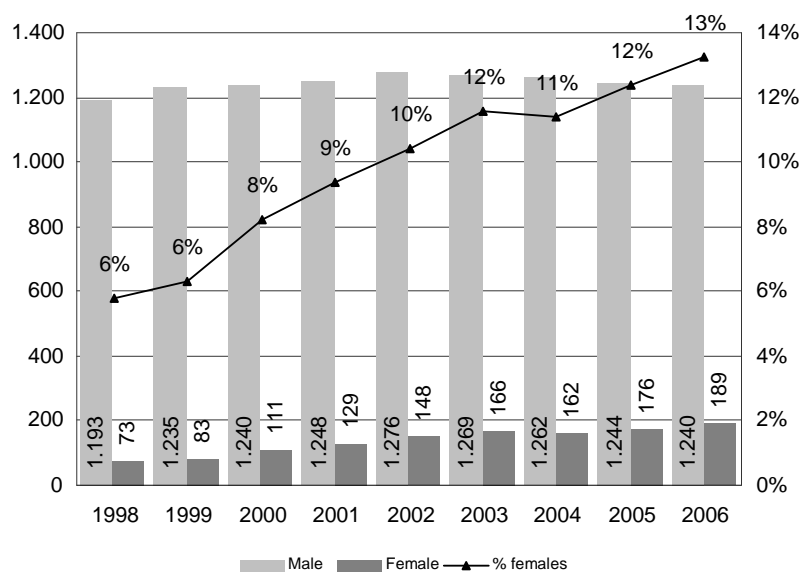
I posed this question to Mr. Kalbfleisch, chief executive of the National Competition Authority, during a conference in The Hague, last summer. He really jumped from his chair and asserted that he was able to challenge such a regulation. Immediately after his statement, the director-general of the Ministry of Justice, Mr. Holthuis, jumped out of his chair, took the microphone and stated that ultimately the judge has the last word and not Mr. Kalbfleisch. Earlier the former Minister of

Justice Piet Hein Donner had stated in *Notariaat Magazine* that Mr. Kalbfleisch was no more than a civil servant, and that he has no authority in these matters.  
So, this is to demonstrate that this is highly controversial issue, which has not yet been decided.

**INCREASED NUMBER OF NOTARIES?**

The next question to be answered is whether the total number of notaries increased after the new law was introduced. Let me provide some figures:

Total number male and female notaries (candidate-notaries excluded) 1998-2006:



Source: *Trendrapportage Notariaat 2006*, Z.D. Laclé and M.J. ter Voert.

The answer is very clearly: no. There has been hardly any significant increase of the number of notaries. That seems to be very strange because the new law makes it much easier to become a notary. Can we give an explanation for this?

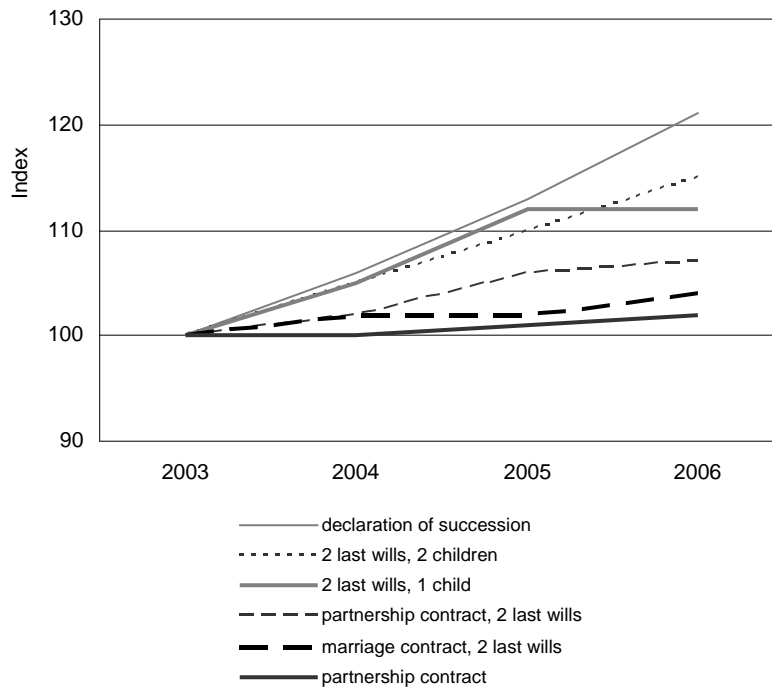
The explanation heard most is that newcomers are restrained from starting a new notarial office because of the high costs and the high risks that are involved in starting a notarial company nowadays. The increased competition and the knowledge about different legal topics that is required to perform a job as a notary in a satisfactory way, make it difficult to start a new office on one's own. For that reason, most new notaries associate with existing notaries and do not start a new office and the existing offices mostly accept new notaries only when the old ones retire on pension.

Some economists reacted to this information like the dogs in the Pavlov's experiment: there are still too many barriers to becoming a notary. It should be made easier to become a notary. However, the notaries warn that we must not further liberalize because the requirements in the law for becoming a notary are now at the absolute minimum. Notaries must be sufficiently qualified, and their independence and impartiality will be at stake if they are exposed to the dangers of free competition.

## IS THE WORK OF THE NOTARIES CHEAPER THAN BEFORE?

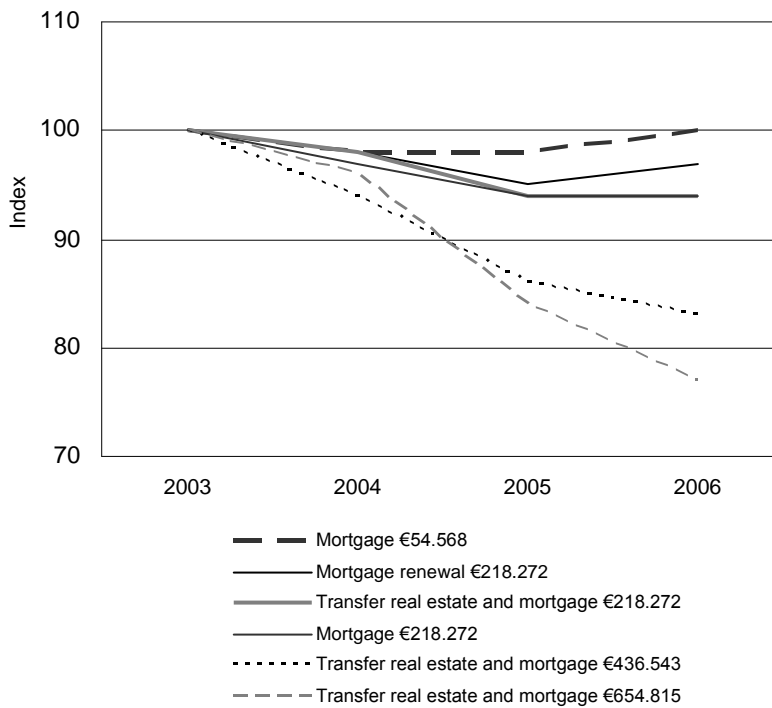
Let me provide some recent figures.

Average tariffs family law related deeds (2003-2006):



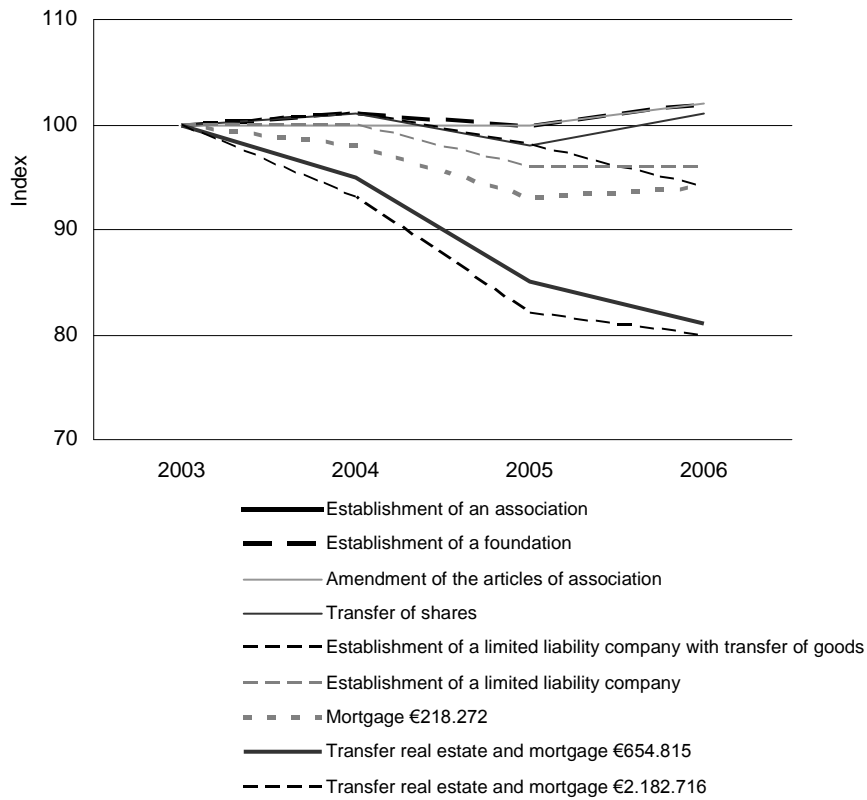
Source: *Tendrapportage Notariaat 2006*, Z.D. Laclé and M.J. ter Voert

Average tariffs real estate related deeds for households (2003-2006):



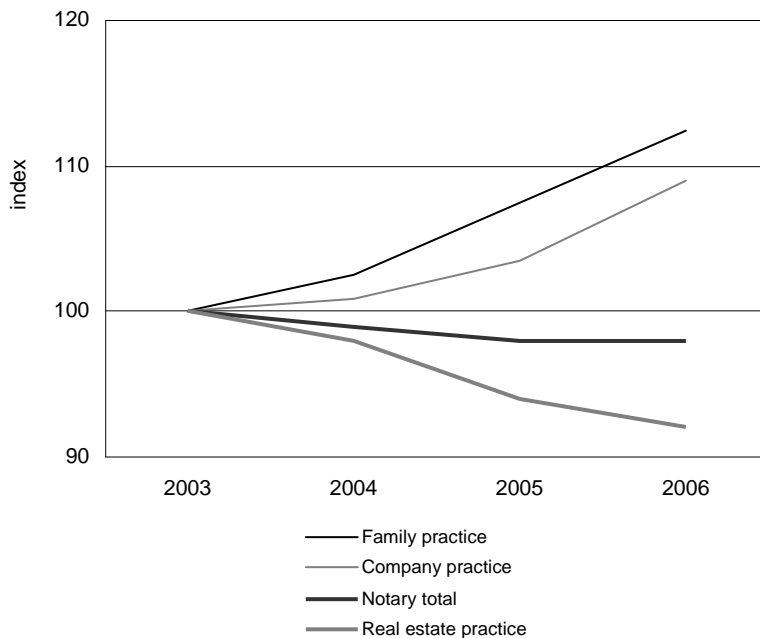
Source: *Tendrapportage Notariaat 2006*, Z.D. Laclé and M.J. ter Voert.

Average tariffs commercial real estate and company law related deeds (2003-2006):



Source: *Trendrapportage Notariaat 2006, Z.D. Laclé and M.J. ter Voert*

Average tariffs notaries (2003-2006)



Source: *Trendrapportage Notariaat 2006, Z.D. Laclé and M.J. ter Voert*

What can we learn from these statistics? First, the costs of family law deeds have increased even further. They more than doubled in the first five years after the new law, and they are still rising. Second, the costs of transferring real estate and mortgages decreased, especially in the higher

segment, and they are still falling. But the fees for transfer real estate and mortgages of very small parcels of land increased dramatically. Third, the fees for deeds in the field of company law did not change all that much.

This outcome was predictable. Whereas in the old days notaries charged fees for family law deeds that were way below their costs, the cross-subsidizing practice, enabled by more than sufficient profits from real estate transactions permitted them to compensate for the losses. More competition meant that notaries would charge fees that are more in correlation with the corresponding costs.

One result is that socially vulnerable citizens pay more for family law deeds, whereas wealthy people profit most from competition because the fees on transactions with high value decreased. All of that is the result of the elimination of the possibility of such cross-subsidizing which is made worse by the lack of publicly financed notary services like those that the lawyers have.

### **THE PERFORMANCE IN A EUROPEAN CONTEXT**

One can ask how the Dutch notaries perform in comparison with their brothers and sisters in other countries. The Centre of European Law and Politics, University of Bremen ('ZERP') made a study on Conveyancing Services Regulation in Europe. The request came from the EU Commissioner of Competition, Ms. Neely Kroes, which is not without meaning because she promotes free competition, and it is considered as her task to eliminate all barriers to free competition. Their findings are quite hopeful for the Dutch notaries.

The Centre divided the European countries into four regulatory groups:

1) The traditional, highly regulated Latin notary system, in which the notary as a neutral intermediary drafts and executes the contract. This system is dominant in most European countries and reflects the public office characteristic of notarial activities. This model is characterized by mandatory involvement of notaries, *numerus clausus* of professionals, fixed fees and strict regulation of market structure and conduct.

2) The deregulated Dutch notary system, which reflects a more modern vision of the notary as a private professional who performs public tasks. Under this model, no *numerus clausus* exists, fees are negotiable and market structure and conduct regulation is generally less strict.

3) The lawyer system existing on the British Isles, in Hungary, in the Czech Republic and in Denmark. Whereas in the British Isles both the seller and the buyer are represented by their own solicitors (adversarial system), on the continent one lawyer usually acts for both parties. In general, the lawyer system is characterized by quality control of professionals only through licensing and professional examinations, negotiable fees and a low level of regulation of market structure and conduct.

4) The Nordic licensed agent system under which estate agents provide legal services, too. This model is also characterized by quality control of professionals only through professional examinations and licensing, negotiable fees and a low level of regulation of market structure and conduct.

I note that according to the Centre's classification, the Dutch notaries are no longer grouped with those of the traditional Latin notary countries. In the preliminary findings from the ongoing Study on "Conveyancing Services Regulation in Europe" of this study it is stated in the summary on page 1:

"Legal fees vary greatly between countries, even within similar legal systems.' For a transaction of 250.000 Euros, including a mortgage for the same amount, we found the following average costs in absolute terms:

- lower than 1.000 Euros: Finland, Sweden, the Czech Republic
- 1.000 to 1.500 Euros: Spain, Slovenia, the Netherlands, England, Poland,
- 1.500 to 2.000 Euros: Germany, Scotland, Austria,
- 2.000 to 3.000 Euros: Ireland, Denmark, Hungary,
- 3.000 to 4.000 Euros: France, Belgium, Italy



- more than 6.000 Euros: Greece (here both a notary and two lawyers are mandatory)

(...)

The deregulated Dutch system – being a notarial system, but with less professional regulation and in particular without limits on the number of notaries and without statutorily fixed fees – ranges close to the Nordic countries systems, according to these figures. It is worth noting that our newer system performs significantly better than the traditional notary system did, even as to low-value transactions.

If we look at the development of fee levels, as adjusted by net earnings factors, an interesting picture emerges: the Nordic and Dutch deregulated model perform very well across the board, followed by the lawyer system. The traditional notary system has been the worst performer with substantially higher fees for all types of the transactions examined.

Furthermore, when one compares the level of regulation with fee levels, preliminary findings show a statistical correlation between more regulation and higher prices. However, in a number of cases, equally regulated countries also have different fee levels.”

Compared to similar functionaries in other European countries, the Dutch notaries have performed very well. The European Commission wants to put the Dutch notaries forward as an example of a successfully liberalized notarial system, so other countries in the Latin notary category will follow. The German report is an example of their strategy.

Frankly, I do not agree with some of the findings of these researchers. The Dutch notaries are definitely not deregulated. What we have seen since the new Law on the Notary was adopted is that the amount of regulation of notarial practice certainly did not decrease. Rather, it increased dramatically. This is a distortion between policy and reality. Despite the aim of the former governments to decrease regulation, in reality the opposite happened. Public trust in the work of the notaries had been sufficient until recently, and supervision and audits have been better nowadays, but auditing the work of a notary requires the availability of standards that the notary must live up to. Moreover because of the intensified competition, notaries are more likely to go to the brink to please their clients. This has stimulated the legislative process toward more regulation. I am not the only one who challenges the findings of this report. It seems too easy to assess a system only by some aspects like the costs of transactions. In Peter L. Murray’s study ‘Real estate conveyancing in 5 European Union Member States: A comparative study’, published 31<sup>st</sup> of August 2007, he gives a more holistic view as he states in the executive summary:

“Modern real estate conveyancing involves a number of complex and interrelated activities to meet the needs and requirements of diverse economic and regulatory interests involved in the ownership, transfer and financing of residential real estate. In all of the European jurisdictions studied the function of effectuating transfer of title has become relatively straightforward and routine thanks to efficient systems of title registration. Complexity is lent to real estate transactions by the many legal, financial and regulatory considerations that surround and attend the transfer and the financing of the purchase. Most of the work of conveyancers deals with these considerations rather than the now relatively simple task of passing title to the property from seller to buyer.

The variety of these considerations external to the pure conveyance among the jurisdictions under study makes it very difficult to compare the cost and efficiency of conveyancing institutions or professionals. Consumer protective legislation, incidence of taxation, public and communal rights and interests all impose complexity on real estate transactions and are all different among the countries under study. Varying provisions of national substantive law (other than regulations of the conveyancing function) also affect the nature and degree of performance required of conveyancers.

Finally, and likely of greatest significance, requirements of financing banks, and the market for real estate financing itself, seem to vary greatly among the countries under study, thus imposing different burdens on conveyancing professionals and their clients.

It is thus very difficult to compare conveyancing efficiency or cost on an "apples to apples" basis.

It is also very difficult to find appropriate proxies to make economic comparisons of conveyancing systems or institutions on an international basis. Attempts to gauge relative efficiency or quality of conveyancing services or systems based, for instance, on the comparative number or amount of post transactions disputes, or the professional liability insurance premiums paid or claims sustained by conveyancing professionals are of very dubious validity. There are simply too many other variables, such as local substantive and procedural law, other professional exposures, and claims-friendliness of local legal cultures affecting these purported proxies to permit any reasonable correlation with quality or efficiency of conveyancing services.

It is also evident that conveyancing costs represent a relatively insignificant element of costs attendant on the transfer of real estate. In all of the jurisdictions under study real estate brokers' commissions dwarf charges by conveyancing professionals.

In most jurisdictions real estate transfer taxes in various forms also contribute more to overall transaction cost than do fees of lawyers or notaries.”

(...)

“There is no reasonable correlation between kind or degree of regulation of conveyancing professionals and conveyancing costs among the jurisdictions under study. There are far too many other variables among jurisdictions to make a meaningful comparison based on any particular feature or degree of professional regulation.”

(...)

“Ultimately there is no evidence that conveyancing costs are affecting the market for real estate in any of the Member States under study. Each Member State's conveyancing system reflects its national public policies and priorities and appears to respond to the requirements of transaction participants and financing entities. There is no evidence that the diversity of such systems impedes cross-border investment in European real estate.”

#### **THE QUALITY OF THE NOTARIES' WORK**

The Dutch system of real estate transfer and land registration depends to a great extent on the cooperation between the notaries and our land registry. In each transaction, the Notary in charge must place trust in the colleague who handled the last transaction concerning that specific parcel. Each notary does research on the land that has to be transferred. He relies on the result of the research of his colleague concerning the same property. It is like a chain: as strong as its weakest link. Thus, the system depends a lot on the quality of each notary's work. It is for this reason that the minimum standards of quality are high. High quality means low risk and means for example lower interest rates or no insurance on the conveyance. To become a notary, one must complete four years of study of notarial law at a university. After starting as a candidate-notary, one must complete, while working in a notarial office, three years of professional training, which culminates with a kind of bar-exam. To be appointed as a notary, one must have completed an internship of six years including the three years of professional training.

The economist will see this regime again as an attempt to bring about a closed supply of notaries that as much as possible deters other people from entering the exclusive world of this profession. They argue that it would be enough to have three years of apprenticeship instead of six, or that such professional training is not necessary at all.

My answer to that contention is to ask: Would you like to be treated by a dentist who had only completed half of his professional training? Another, more constructive answer to those arguments would be to literally write down exactly what notaries have to know and do in their professional environment. For this purpose, we asked approximately 80 notaries to write down the most common procedures a notary must be able to execute, together with all of the necessary fiscal and civil ins and outs, as well as the deontological aspects of the procedures. We have now completed three books, each having a volume of approximately 1500 pages, with nearly 1000 standard forms and models for notarial deeds. The last book will be ready next year. This will be to demonstrate

that it really requires professional knowledge and skill to perform all of the professional notary's obligations in a proper way. Simply put, it is not an easy job.

Now back to the question: has the quality of the notaries' work decreased?

According to Commission Hammerstein, it has not. There is no hard proof that the quality of the work of the notaries has decreased as a result of increased competition between notaries. The odd thing is that the notaries have wrongly presumed that those notaries who charged the lowest rates would be the ones who make the most mistakes. There was no significantly poorer performance by those lower charging notaries.

But there are serious doubts about whether the services those notaries offer become diluted and are thus deteriorating in another way. We see more and more diversification in types of services and prices. More and more offices offer a kind of cheap notarial service: please do not take off your coat, you do not get a cup of coffee, and please do not ask us questions because for the lowest fees we only have a quarter of an hour for you. You will get your perfect notarial deed, but 'that's all folks!'

In addition, since there is an asymmetry as to available information between notaries and their clients, the client is incapable of evaluating the quality of the notary's services. The Royal Organization of Notaries has responded to this situation by opening a web site that not only focuses on the fees of notaries, like the site [www.degoedkoopstentaris.nl](http://www.degoedkoopstentaris.nl) (translated: [www.thecheapestnotary.nl](http://www.thecheapestnotary.nl)) does, but also on quality aspects. Because of the informational asymmetry between the notary and his clients, the client cannot sufficiently assess the quality of those services. The only aspect they can assess quite well, is the price of the services. If that is the only aspect the client takes into account, the notary offering the lowest rates will be chosen. Economists agree that this will have an effect of deteriorating the quality of notarial services because notaries will tend to respond to that behavior of average clients by cutting the quality of their services to an absolute minimum in order to be as economical as possible. Sufficient transparency might serve to interrupt such a vicious circle.

#### **THE FUTURE OF NOTARIES IN THE NETHERLANDS**

Is there any future for notaries in the Netherlands? Earlier, I stated the Dutch system of public notaries could be abandoned, provided there is an alternative that is better. But this will not happen. The Commission Hammerstein reaffirmed the necessity to have an institution like the notary in our civil society and stressed the importance of the integrity, independence, skills and abilities of the notaries. Against all the odds, the Commission proposed further enlargement of the monopoly that the notaries have in the Netherlands. Furthermore it is quite clear that the Dutch government depends on notaries for other purposes, like preventing money laundering and fighting criminal activities in general and in the collection of taxes on behalf of the government. In other words: they need the notaries quite badly.

The Dutch Ministry of Justice is pretty much concerned about the situation in the Netherlands. They are engaged in ongoing research into the quality and accessibility of notarial services. They do not want to leave this responsibility to the economists. Too much is at stake in terms of our national legal order and the important role that notaries play in it. We will probably not return to the situation of fixed tariffs and *numerus clausus*. Nevertheless, in the ongoing competition between notaries, it is necessary to determine what clients may expect in terms of minimum service and quality guarantees. That leads to new rules and/or guidelines. The public trust the people had in the Dutch notaries because of their position in the legal system has changed. Nowadays, that public trust must be earned by delivering good services. Those services have to be controlled and evaluated. More and more regulations and guidelines are being issued nowadays. For example, the new rules on real estate transactions, on the public sale of real estate and on the making of last wills by elderly people. Recently, the Royal Organization of Notaries adopted a system for auditing notary offices. More competition thus leads to more regulations and more government.

Are we better off? This question is difficult to answer, because we are still undergoing a kind of growth process. Since the new law took effect, the number of notaries did not increase substantially. The quality of services has altogether not increased, but there has been more diversity, differentiation and specialization in notarial services. There is fear about attenuation of notarial services. Are notary services cheaper? For some real estate transactions the answer is yes, but not so dramatically as was predicted. For family transactions, like last wills and marriage contracts, the fees have doubled and even tripled. For some of our citizens, notarial services have simply become too expensive.

After all of that, I conclude that:

1. More competition causes more regulation; and
2. More competition does not necessarily bring about cheaper and better services.