NOTARIES - A PROFESSION BETWEEN STATE AND MARKET

Gisela Shaw, University of the West of England Bristol, UK[1]

Abstract

Civil law notariats are facing a challenge of previously unknown proportions. This challenge has two main sources: economic globalisation on the one hand, and the European Commission's liberalisation project on the other. Notaries, a highly regulated and nation-focused profession, are having to reassess their chances of continuing prosperity, indeed, survival in this wholly novel context. This paper analyses the wider context within which all this is happening, that is the clash between two socio-political, economic and legal cultures: the civil law culture of continental Europe and the common law culture of Great Britain, the U. S. A. and former Commonwealth countries, with the latter being clearly favoured by the European Commission as well as by global business and commerce.

1 The challenge of the market

Amongst the legal professions, civil law (or Latin) notaries occupy a very special position. They are public officials appointed by the government to provide certain public legal services. But not only do they do so as independent professionals, they are also, in most countries, entitled to provide legal services in competition with other legal professionals. This has made for a built-in ambivalence as well as creating unique opportunities for manoeuvre.

Until recently, civil law notaries have, for the most part, preferred to present themselves very much as creatures of the state - a strategy that has served them well, given national governments' enlightened self-interest in the profession's services. Today, in a context which is often summarily referred to as 'Anglo-American globalisation', this constellation can no longer be taken for granted, as control over the profession's fortunes is increasingly passing from national governments to supranational and economic agents.

[1] A French version of this paper in *Le Droit et l'économie*. 38e Congrès Mouvement Jeune Notariat. San Francisco, 18-24 novembre 2007, 158-180

Threats to the traditional nature and function of the Latin notariat can be summarised under the following headings:

- the expansion of an international deregulated market at the expense of national regulated markets, both globally and within the European Union
- the growing domination of national and international legal services markets by international and inter-professional firms
- the inevitable risks associated with being a small and strictly regulated profession competing with vastly larger and increasingly deregulated professions
- the powerful influence of the culture of Anglo-American common law at the expense of the culture of civil law of Continental Europe.

In recent years, regulated liberal professions generally and national regulatory systems governing the profession of notary public in particular have increasingly come under attack. The most high-profile attacks have come from economic organisations such as the World Bank and the European Commission. At the centre of the controversy are regulatory measures such as nationality requirements, fixed fees and restrictions to access, advertising, choice of location and organisational structures. All of these, it is argued by advocates of economic liberalisation, tend to benefit the profession itself while hindering countries' economic efficiency as well as damaging the interest of consumers. In the wake of the World Bank's *Doing Business* reports since 2004, and an initial study commissioned by the European Commission,[2] further research has been undertaken by economists to assess the economic contribution or otherwise of regulated professions in general and of the notariat in particular. Not entirely surprisingly, recommendations have tended, at least to a degree, to reflect the expectations of commissioning agencies, whether the EU-Commission[3], national governments[4], or professional organisations[5].

---

[2] Institute of Advances Studies, Vienna, *Economic Impact of Regulation in the Field of Liberal Professions in Different Member States* (2003)
[3] Centre for European Law and Politics (ZERP), University of Bremen, *Conveyancing Services Regulation in Europe* (2007)
[4] Benito Arruñada, *Managing Competition in Professional Services and the Burden of Inertia* (2004); also: *Is There a need for Lawyers in Conveyancing?* (2004)
[5] Roger Van den Bergh & Yves Montagnie, *Theory and Evidence on the Regulation of the Latin Notary Profession. A Law and Economics Approach*, commissioned by the notary federations of France, Belgium and the Netherlands (2006) http://mediaecri.neon.estrate.nl/publications/theory-and-evidence-regulation-latin-notary-profes.pdf

Sweeping generalisations of the kind found in the Vienna study are gradually making room for more carefully thought through arguments. All parties, it seems, are by now agreed on three key points: (i) the fact that not all professional regulations are dispensable; (ii) the need for comprehensive, detailed and robust empirical data; and (iii) the importance of replacing unhelpful generalised criticism by observations on specific regulations for specific professions in specific social contexts.

However unwelcome this international focus on their work may be to regulated professions, few would dispute that it has at least served the useful purpose of acting as a wake-up call for these professions which are now aware that complacency and a merely reactive strategy is no longer sufficient to ensure their continued place in society. As for notaries, the realization is growing that what is needed is a critical and realistic look at their statutory mission as well as their own historically evolved interpretation of this mission, in order to secure a future for the profession in a rapidly changing economic and socio-political context. Debates frequently centre on the question whether the profession can afford to continue putting all its eggs into the basket of government support and guaranteed reserved areas of activity rather than going for a mixed-economy by also expanding into areas governed by competition with other legal services providers.

An important and effective contributor to these debates has been *Mouvement Jeune Notariat* ever since it was established in 1956. The organisation's founder, Louis Reiller, put it in a nutshell: 'Une profession qui n'épouse pas son siècle est une profession condamnée.' - a claim that has lost none of its relevance for us today. Even if the Commission's most recent and threatening attacks have been averted, at least for the moment, there are weighty challenges that will not go away. For instance, nothing has as yet been decided at European level regarding notaries' activities not covered by their official function - an issue of great significance in countries where either the monopoly is very limited (e.g. Austria, Hungary) or where notaries have at least potentially considerable scope for commercial activities (France). Also, national governments individually may well decide to curtail or even abolish altogether notarial monopolies. Thirdly, the unexpected revival by the European Commission in 2006 of the nationality clause debate is unlikely to blow over without stirring up further troubles. Finally, and most importantly, economic globalisation has acquired its own dynamic and is generally

acknowledged to be unstoppable. In sum, there is little room for complacency or for burying one's head in the sand.

2 The role of history and culture in the evolution of professions

Studies of the impact of the law and of legal institutions on the economy, so advocates of the institution of a civil law notariat argue, suffer from a major built-in weakness. That is, they are, by their very nature, not designed to take into account the importance of the wider historical, socio-political and cultural context within which legal systems evolve and operate. Instead they tend to start from a neo-classical position focusing more or less exclusively on individual or group choice based on rational utility and profit maximisation.

Three conceptual clusters are of particular significance in the context of current European debates on the role of liberal professions generally and notaries in particular: (i) the very different traditions of professions and of professionalisation in civil law as compared to common law cultures; (ii) the contrasting strategies to protect individuals' rights in these cultures; (iii) the change in the dynamics of developments in the professions today as compared to previous centuries.

2.1 Professions and professionalisation

There are generally accepted common characteristics to distinguish professions (often also called 'liberal professions'), such as lawyers, physicians, teachers, engineers, and notaries, from other occupations. Amongst these are: a high level of qualification, specialised expertise, some form of market monopoly, at least a degree of self-regulation and self-imposed ethical code, a relatively elevated socio-economic status, and a service to society above and beyond a purely commercial one.[6] There is also general agreement on the close links between the process of professionalisation and the process of increasing division of labour in modern societies. However, sociologists and social

[6] See for instance Hannes Siegrist (ed.), *Bürgerliche Berufe. Zur Sozialgeschichte der freien und akademischen Berufe im internationalen Vergleich*, Vandenhoeck & Ruprecht, Göttingen 1988; Werner Conze and Jürgen Cocka (eds), *Bildungsbürgertum im 19. Jahrhundert.* Part I: *Bildungssystem und Professionalisierung im internationalen Vergleich*, Klett-Cotta, Stuttgart 1985; Michael Burrage and Rolf Torstendahl (eds), *Professions in Theory and History. Rethinking the Study of the Professions*, Sage,

historians studying the professions have long been puzzled and hampered by their failure to realise that the Anglo-American understanding of what makes an occupation a profession is by no means synonymous with that held in countries on the continent of Europe.

One of the key criteria in this context is the differing answer to the question: how do professions relate to the market on the one hand and to the state on the other? In the Anglo-American world, professions have traditionally shunned dependence on their government and instead striven for professional autonomy, sustained by the consolidation of their own economic position to the exclusion of other groups. Self-regulation has concentrated on areas such as training and access to the profession, as well as on disciplinary matters, with practical and pragmatic criteria taking precedence over academic and conceptual ones. The success of a professional project was measured in terms of the degree of autonomy from state regulation achieved, and of the extent to which market monopolies had been won and profits maximised. Historically, the market developed earlier in these countries than in continental Europe. It also tended to be stronger than the state and to act as a major motor for professional reform.

Taking as an example the legal professions in England and Wales, we find that barristers, a small and closely knit group based in the country's capital, were particularly successful at an early stage in consolidating and defending both their independence and their market monopoly of pleading in court. By contrast, solicitors were in a somewhat different position, being a much larger profession, as well as lacking internal cohesion, geographical concentration, and a clearly defined professional profile. It was only in the 19th century that state legislation helped them to create their own national statutory organisation, the Incorporated Law Society in London. However, once set up, the Law Society went from strength to strength, expanding and consolidating the solicitors' market by eliminating a number of competitors and significantly increasing the profession's powers of self-regulation.[7]

London etc., 1990. The most common reference point for any definition is M. Sarfatti Larson's *The Rise of Professionalism. A Sociological Analysis*, Berkeley 1977.

[7] Michael Burrage, 'From a gentlemen's to a public profession: status and politics in the history of English solicitors', *International Journal of the Legal Profession*, Vol. 3, Nos 1/2, March 1996, 45-80; David Sugarman, 'Bourgeois collectivism, professional power and the boundaries of the State. The private and

The oldest legal profession in England and Wales, that of notary public, experienced an internal split not dissimilar to that between barristers and solicitors. Again, the split was based on geographical distribution, level of autonomy and socio-economic status. On the one hand, there is the tiny group of London notaries, since 1373 members of the Worshipful Company of Scrivener Notaries, who have traditionally been firmly in control of their own professional destiny, including the selection of trainees, qualification requirements and any disciplinary matters. For over 700 years, this regime ensured stability of numbers (around 25 to 30 members, with a focus on certain well established families) and a statutory geographical monopoly for all notarial work in the City of London. Over the centuries they consolidated their networks at home and abroad and built for themselves the most lucrative notarial market in the country. Against all the odds, the scrivener notaries were able to defend their independent status against even the Law Society. How did they do it? The answer is that, not only did their small size and highly specialised work make them relatively immune to attacks by predators, but their main clients, the merchants and bankers in the City of London doing business abroad, were not a lobby to be easily dismissed. We therefore have here a striking example of the long-established power of the market in the common law world.[8] By contrast, notaries in the rest of the country who made up the vast majority of the profession, had little incentive or opportunity to establish themselves as a coherent body. They were geographically dispersed across the country, worked very much in isolation and without the guidance and authority of a statutory professional organisation, as well as drawing only a modest income from their notarial activities. The fact that they survived at all as a separate profession and were not swallowed up by the Law Society (as, in 1884, were attorneys and proctors) can be put down to the lobbying powers not of their own ranks but of their London colleagues, the scrivener notaries.

An extreme instance of the power of market forces on professionalisation can be found in the United States of America. In the context of legal services provision, the role of the state has been limited to issuing lawyers, the country's only legal profession, with a state-licensed monopoly. Notaries, who do exist by name, have traditionally not been

---

public life of the Law Society, 1825-1914', *International Journal of the Legal Profession*, Vol. 3, Nos 1/2, 1996, 81-135

[8] Ready (1992), 19

members of any profession but lay people empowered to certify signatures and documents. A protean entrepreneurial spirit has been the hallmark of American lawyers, for ever ready to capture new segments of the market and to seize economic opportunities presented by particular legal problems. Neither geographical nor political nor even their own professional bodies' constraints have put a brake on their drive to expand their activities across the globe, following commercial opportunities as they arise.[9]

In continental Europe, the professions in their modern form evolved very much in the wake of the formation of modern nation states that took place in the course of the 19th century. This process preceded the evolution of a strong market, and professions were defined and defined themselves much less by their autonomy and market power than by their relationship with governments. It was governments that wielded regulatory powers in most or all key areas, such as training, access, disciplinary matters, fees, and business structures. Professional qualifications were based on academic knowledge gained in state higher education institutions rather than being defined in terms of locally acquired work-based skills. In return for loyalty to the state and acceptance of strict limitations on their self-regulatory powers, the professions were granted statutory market monopolies which ensured for them a relatively privileged socio-economic status.

Admittedly, within this common framework, the situation in countries of continental Europe have varied greatly in terms of the level of state-dependence, market-orientation or autonomy of comparable professional groups. Relatively speaking, professions in France have always enjoyed a particularly generous scope for independence.[10] Thus, relations between the bar and the state were close, but they were based on mutual assistance and interdependence, a kind of institutional co-government. The same goes for *notaires* in France, who also succeeded in consolidating their economic and social status by cultivating political support and alliances and ensuring state protection of their market monopoly while retaining considerable professional autonomy. In Italy, professionalisation was the result of a mix of pressures from above

[9] Robert L. Nelson et al. (eds), *Lawyers' Ideals / Lawyers' Practices. Transformation in the American Legal Profession*, Cornell UP, Ithaca and London, 1992

[10] Gerald L. Geison (ed.), *Professions and the French State, 1700-1900*, University of Pennsylvania Press, Philadelphia, 1984; Lucien Karpik, *French Lawyers. A Study in Collective Action 1274 to 1994*, Clarendon Press, Oxford, 1995; Ezra N. Suleiman, *Private Power and Centralization in France. The Notaires and the State*, Princeton University Press, 1987

and below, with the state providing the statutory framework but leaving the professions to further develop and adapt it to their particular wishes.[11] By contrast, professionalisation in Prussia was very much a process initiated from above and followed a bureaucratic model. Reform was largely driven by government initiative, with liberal forces only slowly gaining ground once Prussia had been absorbed into a united Germany in 1871.[12]

Overall, however, there is a clear and historically rooted divide between traditions of professionalisation in common law and in civil law countries, in terms of relations to the market on the one hand and those to the state on the other - a divide which cannot be ignored if we are to understand and manage today's tensions in the international legal services market.

2.2 Protecting the rights of individuals

There is a second issue of wider cultural significance that provides a key to an understanding of the situation of notaries in today's major legal cultures in Europe and needs to be taken into account. This second issue is closely linked with the first and concerns societies' attitudes towards the protection of individual citizens' rights - an aspect of direct relevance to the existence or otherwise of a Latin notariat.

In common law countries, priority is given to individuals' own responsibility for their decisions and actions. In his *Two Treatises of Government* of 1689, a work with which eighteenth-century Englishmen and Americans were closely familiar, John Locke provided the foundational text of Anglo-American liberalism. It is based on the existence of laws of nature which are accessible to our rational intellect. Locke's political philosophy soon found its most famous expression in Thomas Jefferson's Declaration of Independence of 1776:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights,

[11] Maria Malatesta (ed.), *Society and the Professions in Italy, 1860-1914*, Cambridge University Press, 1995, transl. by Adrian Belton

[12] Charles E. McClelland, 'Escape from Freedom? Reflections on German Professionalization, 1870-1933', in Rolf Torstendahl and Michael Burrage (eds), *The Formation of the Professions. Knowledge, State and Strategy*, Sage, London etc, 1990, 97-113; Geoffery Cocks and Konrad H. Jarausch (eds), *German Professions, 1800-1950*, Oxford University Press, 1990

> Governments are instituted among Men, deriving their just powers from the consent of the governed ....

If the original power rests with those governed, then so does responsibility for the functioning and well-being of society. Risk-taking has always been an essential feature of Anglo-American culture, and Locke's liberalism provides a key to the notion of individual responsibility embedded in the English legal system. If social order is the result of a social contract which, if necessary, can be revoked, then the powers of the state must only come into play when all else fails. This puts the contentious judiciary at the core of the legal system, but leaves little room for an institution such as the notariat which is intended to avoid legal conflict from occurring.

The redundant character of such an institution in the English system is further underlined by the priority given to oral evidence in common law courts. If notarial documents are accepted as evidence at all in English courts, they are at best granted enhanced credibility but are never enforceable. This explains why the waning of the role of Roman law in courts in England and Wales since the Middle Ages has been accompanied by an ever decreasing need for notaries.

Having in 1533 handed over the power to appoint notaries to the Archbishop of Canterbury, British rulers and governments lost interest in and awareness of the existence and fate of the profession which gradually drifted into a state of being frozen in time. Any remaining functions for notaries were almost exclusively due to notarial certification requirements on the part of foreign civil law jurisdictions. British nationality never became a requirement for appointment as notary, nor would there have been any reason for considering it, given the type of work they did. The same applied to any statutory regulation of such aspects as numbers, fees or advertising. Individuals and the market were all that counted. Not surprisingly, hardly any notary outside London was able to afford not to practise as solicitor as well - a state of affairs not conducive to the evolution of a strong corporate identity. What kept interest in practising as a notary alive was a sense of the profession's exclusivity and mystique, not dissimilar to that conveyed by membership of a gentlemen's club.

By contrast, civil law systems do not prioritise risk and risk-taking but security and reliability of contracts. The onus to ensure citizens' rights is not placed on

individuals but on the state. It is generally seen to be up to the state to protect individuals from unnecessary damage, cost and the need for litigation. In these systems, the contentious jurisdiction is complemented by a non-contentious jurisdiction, with the notariat as one of its corner-stones. Notaries are charged by governments with providing legal security for parties entering into contracts in areas such as property, inheritance, family, commercial and company law. Notarial acts, drawn up in compliance with strict formal rules, do not only have probative weight but are also enforceable. Notaries combine state officialdom with independent professionalism, and they are, to varying degree, free to provide legal services in the open market.[13] The former traditionally goes with a statutory monopoly, a state-imposed *numerus clausus*, and protection from competition, while the latter offers opportunities for satisfying entrepreneurial ambitions. The combination of the two tends to yield a secure, and, indeed, often generous income base. Intriguingly, there is one feature which civil law notaries, at least in Western Europe, share with their common law colleagues, that is, a gender profile that has remained heavily biassed in favour of men.[14]

There is a third type of notarial system, based on the assumption that what needs to be protected by statutory measures is not the rights of individuals but the rights of the state. In so-called state notariats, notaries are government employees enjoying neither professional autonomy nor exposure to market opportunities. Traditionally this has been the preferred model of authoritarian regimes in the civil law world, favoured by feudal rulers and, in the 20th century, revived in Russia by Lenin and in Portugal by António Salazar. Lenin first introduced it in the Soviet Union in 1922. Although he had initially, in view of its traditionally strong affinities with capitalism and individuals' rights, abolished the institution of the notariat altogether, he subsequently discovered its potential usefulness in a centralist political system and re-introduced it, suitably transformed from an independent to a bureaucratic state-controlled profession.[15] After World War II, some variant of the Soviet state notaries system was installed in all

[13] In some countries, notably Austria, notaries are even entrusted with a narrow range of tasks in the contentious field.

[14] Women's share in the profession of notaries: Austria (2002): 3.6%; France (2004): 18.3%; Germany (2003): 18.1% full-time *Nurnotare* (West: 6.1%; East: 46.1%) and 9% *Anwaltsnotare*; the Netherlands (2001): 9.1% ; Spain (2005): 30%. – A rare exception: Greece (2004): 85%

Central European member states of the Soviet Bloc where an independent notariat had previously existed.[16] In contrast to the traditional independent Latin notary who tends to be male and enjoy high social and economic status, the state notary in all these countries was most likely a woman and her income the lowest of any professional in the field of law.

2.3 Fluctuating dynamics of professional evolution: centrifugal versus centripetal forces

Since its Roman origins, the control over and the shape of the profession of notaries have evolved in a fluctuating pattern determined by centrifugal or centripetal forces respectively. This pattern continues to be in evidence today. The profession's original unity of purpose and legislative framework were largely lost from the Middle Ages under the impact of centrifugal pressures. As the system spread northwards across Europe, home-grown legal traditions and political priorities were absorbed and integrated to produce a whole range of variants of the original model. At macro-level, we note the separation of the common law system in the British Isles from the civil law system on the continent of Europe. At micro-level, differentiation resulted from demographical and socio-economic developments (urban versus rural regions), and, especially in the territory of the Holy Roman Empire, from political interference on the part of feudal princes keen to seize control over the profession. Fragmentation reached its peak by the end of the 18th century. It came to a halt when exposed to sweeping political counter-forces, most prominent amongst them military conquest (by France, Austria, Prussia) and the creation of nation states. Both processes involved the transplantation and/or restructuring of notarial systems. The outcome was a much more homogenous overall picture in Europe. Globally, colonisation and its aftermath meant that by the end of the 19th century European systems had gained sizeable footholds across the entire world.

However, deep-rooted fractures, even within national boundaries, have remained and have lost little of their topicality and potential for the creation of inner-professional

---

[15] Friedrich-Christian Schroeder, Das Notariatswesen in der Sowjetunion, *Deutsche Notarzeitschrift* 1964, 645-671

[16] The one exception was the newly constituted Republic of Yugoslavia where the notariat has not survived in any form.

tension. This is particularly true of countries with a long-established federal structure, such as Switzerland and Germany. In Switzerland, notarial variety has become the norm, as regulatory powers are in the hands of the 26 cantons: in western and southern regions we find the Italian-French model of the liberal profession, while in German-speaking parts a civil service notariat in its pure form (members are local civil servants and mostly not law graduates) exists side by side with various mixes with the French-style notariat. This was fairly unproblematic in a context of low demographic mobility, but does pose problems in today's mobile and technologically advanced society, where standardisation is a normal expectation. On the other hand, the existence of a range of different notarial regimes in Switzerland has also acted as an attraction to entrepreneurs and business clients from abroad who welcome the opportunity to cut costs by circumventing their own country's fixed value-based notarial fees. The result has been a growing trend towards 'notarial tourism', causing a serious headache especially to the profession in neighbouring Germany.

While Switzerland has settled for cantonal control over the notarial profession, with only minimalist central powers, Germany has over the last hundred years attempted to create a unified structure. Yet, the German notariat, too, still displays the hallmarks of the country's particularist tradition. Even today, there is a division into two major branches. On the one hand, there are full-time notaries with an organisational structure broadly based on the French model (*Nurnotare*) - the inheritance of Napoleonic conquests and alliances; on the other hand, in former Prussian territories, the tradition of part-time notaries (*Anwaltsnotare*) has continued as the norm, that is of advocates who, later in their career, are granted the right to add notarial functions to their professional profiles. In addition, in the southwestern state of Baden-Württemberg, a third organisational form (itself encompassing two variants), the civil service notariat, has survived alongside the other two. Over the past two centuries, repeated efforts to create a fully integrated and united German profession have failed, as the full-time notariat - the driving-force behind such efforts - has not been able to overcome particularist forces. They did win a crucial victory in 1990, when their concerted political campaign resulted in the installation of a full-time notariat in the regions of the former GDR to replace the socialist model. But the much larger and less well organised camp of solicitor notaries

have not forgotten their defeat, and the tacit gentlemen's agreement of mutual tolerance based on enlightened self-interest that had previously governed relationships between the two sides has taken a serious knock.

The fragility of the German profession's unity due to the strength of regional lobbies and the absence of strong commitment on the part of the national government has been further demonstrated, as recent negotiations between regional governments and Berlin regarding a comprehensive reform of the German system of federal government very nearly ended with regulatory powers over the profession being handed over to the *Länder*. Given the by now unstoppable process of deregulation of the German advocacy, there are justified fears that this might spill over into the notariat, if those members who combine both professional functions in personal union discover the benefits of liberalisation and start pressing for similar measures in their notarial work.

Even in France, structural fractures rooted in history have survived into our time. Two organisational models continue to co-exist, that is a German-type notariat in Metz, Kolmar and Strasbourg (retained after the territories were returned to France in 1918) and the standard Napoleonic model in the bulk of the country. What sets aside the former from the latter are amongst other features its meritocratic system governing access to the profession and the strict focus on official functions to the exclusion of commercial activities.

If in continental Europe the evolution of the profession of notaries took place in, and has been shaped by, a context of political instability, developments in England occurred in a politically and culturally stable environment where market forces and professions' striving for autonomy took precedence over government action. Unfortunately for notaries, this resulted in their gradual but inexorable marginalisation within the domestic market, leaving them with an almost exclusive focus on business originating abroad, and, with the exception of scrivener notaries in London, a need to work mainly as solicitors.

3 A break with tradition: deregulation on the European continent, reregulation in Britain

Over the last ten or fifteen years, strong winds of change on either side of the English Channel have come to affect the legal professions generally and notariats in particular. Ironically, developments have gone in inverse direction to their traditional course. In continental countries, where governments have traditionally been more or less firmly in control of regulatory regimes, market considerations are now asserting themselves and national governments are loosening their exclusive regulatory grip. By contrast, in England and Wales as well as in Ireland, where the market has traditionally been the prime mover, it is national governments that are proposing sweeping reforms in the organisation of legal services providers at the expense of professions' regulatory autonomy.

In continental Europe, a relaxation of professional rules first occurred in France, as a purely national initiative. It happened with the support of the profession itself in its successful attempt to manage and control more sweeping liberalisation measures originally considered by the French government. In this way, *notaires* in France acquired greater flexibility and new opportunities within a changing economic environment, without losing their traditional *chasse gardée* and core regulatory framework. From 1966/7, they have had the choice between two, and from 1990, between three types of organisational structures, as a consequence of which only about one third still practise on their own. Partnerships can be either monoprofessional (the norm) or pluriprofessional, offering opportunities for specialisation and expansion into new areas of work. A further opening for specialisation, coupled with a relaxation of the rigorous numerus clausus, was introduced in 1990 by the creation of the post of *notaire salarié* (in most other national systems considered as a contradiction in terms). In 1986 the fees scale had been lifted on all commercial transactions and activities involving companies, and notaries' activities ceased to be tied to a particular location. Since then, fees negotiations have become the norm in legal transactions costing above 500,000 francs (80,000 euros), and individuals are free to notarise anywhere in the country. These measures have helped to strengthen the profession through modernisation from within and have offered opportunities for development unavailable to their colleagues in most other countries. They have also, it must be said, encouraged the fracturing of the French notariat on the basis of region, clientele and strategic approach.

An important outcome of regulatory relaxation has been the creation of national monoprofessional notarial networks. An outstanding example is the Groupe Monassier.[17] Established in 1992 by the Parisian *notaire* Bernard Monassier who had read the signs of the times and was determined to keep up with national and international market developments and corporate requirements, Groupe Monassier in 2006 comprised 28 notarial firms across France, with a total of 85 *notaires* and 650 staff. Its image is that of a modern enterprise, committed to cutting-edge expertise supported by relevant research and active in the whole range of areas open to notaries. In 1993, an international network of currently some 1000 jurists has been added, comprising not only notaries but also members of the advocacy in a number of countries.

Other national monoprofessional groupings have sprung up in recent years. They have tended to focus on one specific area previously neglected by notaries and requiring a high degree of specialisation. The best known of these is Pharmétudes, a network created to engage with all aspects of legal advice required by pharmacists, that is to go beyond the normal notarial act of authenticating the purchase or sale of a pharmacy.[18] Another, Nôtel, created in 1998 for the hospitality industry (hotels, bars, restaurants), was modelled on Pharmétudes.[19] A third national grouping, Jurisvin, caters for all legal needs of winegrowers.[20]

A later break with tradition that was, however, much more dramatic and abrupt than in France occurred in the notariat in the Netherlands. In 1999, legislation was passed that abolished the *numerus clausus*, introduced the option of interdisciplinary associations with tax advisers and advocates (even from abroad), and relaxed the fees scale (finally abolished in April 2003). By 2003, around a fifth of notarial firms had taken advantage of the opportunity to join an interdisciplinary partnership. By August 2006, the largest such partnership, Loyens & Loeff, boasted a legal specialist staff of over 700 notaries, advocates and tax advisers. It operated across 7 offices in the Netherlands, Belgium and Luxembourg and had 10 offices in the world's major financial centres.[21] Foreign members of such associations have tended to be mainly British - a welcome chance for British solicitors to get a foot in the door of the civil law notariat.[22] Recent research evidence suggests that, on the one hand, the impact of these reforms as a boost

[17] http://www.groupe.monassier.com
[18] http://www.pharmatudes.com
[19] http://www.notel.org
[20] http://www.jurisvin.fr
[21] http://www.loyensloeff.com
[22] François Boucher, 'Pays-Bas: des notaires très très libéreaux', *Notaires. Vie professionnelle*, no. 240, 2003, 50-1

for competition has been modest. On the other hand, costs, particularly in family law matters, have increased rather than decreased, and there has been some deterioration of the quality of notarial services, both objectively and as perceived by clients.[23]

If events in the Netherlands have been watched with considerable concern by notaries in other civil law countries in Europe, recent liberalisation campaigns by the European Commission aimed specifically at the liberal professions, including notaries, have made the threat of deregulation a great deal more real. Already, national competition authorities are responding with varying degree of enthusiasm to the Commission's request to submit reports on national regulatory regimes of the liberal professions and their appropriateness or otherwise. Amongst the keenest and most openly critical are the competition authorities in EU accession countries where, ironically, the liberal regulated professions had only just been re-instated.

In 2004, the Office of Competition and Consumer Protection in Poland published a report highly critical of the legal professions generally and notaries in particular, and recommended deregulation of access to the profession, advertising, fees scales, and organisational structures. In the same year, notaries' (admittedly generous) monopoly was cut down when authentication requirements for mortgage credits were relaxed. Also, a ceiling on fees was introduced. Further drastic measures can be expected.

Also in 2004, the Hungarian Competition Authority in its annual report recommended deregulation of notaries, while in Slovenia the regulatory regime for notaries came in for serious criticism by the national competition authority, supported by reference to highly publicised cases of abuse of their powers, as well as to the fact that of the country's 68 notaries (the total - equalling one notary public for 30,000 inhabitants!), 22 were shown to have been among Slovenia's 100 highest earners in 2003.[24]

The Portuguese Competition Authority undertook a detailed study of the restrictions existing in the context of the profession of notaries since the privatisation of

[23] Richard Nahuis and Joëlle Noailly, 'CPB Document 94: Competition and Quality in the Notary Profession', http://www.cpb.nl/eng/pub/cpbreeksen/document/94; Roger Van den Bergh & Yves Montangie, 'Competition in Professional Services Markets: Are Latin Notaries Different?', *Journal of Competition Law and Economics*, 2(2)/2006, 189-214

[24] Marco Kranjec, 'Slovenia' in CUTS International, *Competition Regimes in the World – A Civil Society Report (*http://www.competitionregimes.com)

notarial services in 2004. It concluded that the newly established regulations governing the 543 independent notaries were excessively restrictive regarding entry, fees, advertising and business structures, and recommended their amendment or removal.[25]

Finally, the German Monopoly Commission's biannual report of for 2004/05 entitled 'More Competition in the Services Sector, too!' includes a separate section on the liberal professions.[26] Although notaries are not specifically mentioned, any action taken in response to criticisms aimed at advocates is unlikely not to reflect directly or indirectly on their notarial colleagues.

In sum, within only a few years, deregulation has made serious inroads in the regulatory systems governing notaries in a number of EU member states in continental Europe. In France, where traditionally notaries have enjoyed a generous range of reserved activities alongside significant opportunities for commercial activities, liberalisation began early and has progressed in a remarkably cautious, steady and undramatic manner, based on carefully negotiated consensus among the various parties involved. It remains to be seen whether this approach remains sustainable in a climate of increased national and international economic pressure, and in the face of the European Commission's determination to include the profession in its liberalisation drive.

In England and Wales, regulatory reform of the legal services market began under Prime Minister Margaret Thatcher, but was focused mainly on the profession of solicitors. The Courts and Legal Services Act of 1990, aimed at eliminating outmoded and discriminatory anti-competitive regulations, devoted only one section (no. 57) to notaries. The notarial profession's fragmentation into three distinct groups was reduced (though not yet wholly eliminated), and a statutory stepping-stone provided for a process of modernisation, especially regarding notarial training. All this happened very much with the support of the professional organisation of notaries working outside London, the Notaries' Society, which was keen to modernise the profession and to bring training into

[25] Organisation for Economic Co-operation and Development, *Annual Report on Competition Policy Developments in Portugal*, 1 July 2004 - 30 June 2005 (http://www.oecd.org)

[26] *Mehr Wettbewerb auch im Dienstleistungssektor!*, 2006 (http://www.monopolkommission.de/haupt.html)

line with that for civil law notaries as well as with the conditions for the application of the EU Directive on the Mutual Recognition of Higher Education Diplomas of 1989.

Under Prime Minister Tony Blair's Labour government, the liberalisation project was extended to the liberal professions at large. However, its thrust became not so much deregulation as centralised reregulation, aiming to improve transparency for the benefit of the customer. Thus, the current 'regulatory maze' is to be transformed into a modern, flexible, simplified, accountable and transparent system. Regulatory powers are being removed from currently 18 professional regulators and instead vested in one national independent body, the Legal Services Board. Even if day-to-day business is then delegated to 'front-line' professional bodies such as the Bar Council (barristers), the Law Society (solicitors), and the Court of Faculties (notaries), the Board will retain consistent overall control. In addition, all disciplinary matters are being handed to a central Office for Legal Complaints.

These new measure are dealing a serious blow to the principle of autonomy so dear to professions in the Anglo-American world. Although they are particularly aimed at the Bar Council and the Law Society, and although - a major concern on the part of the government - disciplinary powers and representational functions in the notariat, as opposed to the other two professions, are already clearly separated, the new regulatory system may well serve to erode notaries' sense of identity as a distinct and independent profession. Unfortunately for them, they also lack a strong representative body and lobby to defend their interests. So there remains the nightmare of notarial work ending up as no more than one of a number of possible specialisations for solicitors. Very similar reforms are happening in Ireland.

What we observe, then, is an accelerating change of dynamics in inverse directions amongst civil law notariats on the one hand and common law notariats in England, Wales and Ireland on the other. While the former, traditionally shaped by national political forces and interest groups, are increasingly having to respond to market pressures, the latter, after a long tradition of professional autonomy and strategies determined by market forces, are now feeling their governments' regulatory will. Not a bad time, one might suggest, for both sides to get to know each other, learn from each other's experience and explore the extent of their common ground. Might such gradual

convergence ultimately even open up a window of opportunity for the creation of a European notarial profession?

4 State or market? The profession's response

For notaries in England and Wales, there is little room for manoeuvre and not very much to lose or, indeed, to gain. They are (and have been for a long time) an integral part of the competitive domestic legal services market and cannot count on any state protection from competition. Their only (and very modest) *chasse gardée* is owed to the existence and requirements of Latin notarial systems in civil law countries and is therefore independent of their own government arrangements.

Their main political agenda has been and will continue to be to argue for an upgrading of notarial acts in their own system in order to create parity and credibility with the civil law world. One step in this direction occurred in October 2005, when an amendment to the Civil Procedure Rules in England and Wales came into force, which provides that 'a notarial act or instrument may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved.'[27] The new rule enhances the probative force of English and Welsh notarial acts, although it falls short of conferring on them the executory force of civil law authentic acts. The latter would be out of the question as it would offend against two fundamental principles of common law, i.e. the principle of orality and the rule against hearsay. But notaries are pleased to see at least a chance of gradual cultural change, given that already courts in England and Wales are more and more inclined to accept written evidence, a trend that should ease the acceptance of notarial documents.

Both professional organisations, the Society of Scrivener Notaries and the Notaries' Society, have over the last 15 years seized any opportunity to strengthen their position at home and abroad. Scriveners applied successfully to become full members of the UINL and have continued to cultivate contacts and collaboration with colleagues in civil law countries. The Notaries' Society has focused on improving the qualifications of new members, on raising existing members' awareness of wider professional

[27] http://www.opsi.gov.uk/SI/si2005/20053515.htm

developments affecting them, on strengthening the profession's corporate spirit, and on impressing on all members the importance of high professional standards. There can be no doubt that professionalisation of notaries in England and Wales has made considerable progress. In an unfavourable climate and in the face of the almost unstoppable expansion of their main competitors (solicitors), they have made best use of their key weapons - a sharp eye on quality improvement, a strengthening of the home front, solidarity with civil law notariats, and skilful lobbying of potential supporters in government, the Bar and the judiciary. But as most of them derive their main income from working as solicitors anyway, the number of notaries lying awake at night worrying about the future of their profession is likely to be negligeable.

The situation is very different in countries of continental Europe. Here notaries have traditionally identified very much with their status as public officers and, as a rule, have had little incentive to engage in competitive market activities. Civil law notaries' response to recent changes in their economic environment and to liberalisation campaigns has tended to oscillate between complacency and defensiveness. Arguably the most vigilant, imaginative and innovative national notarial organisation has been that of Austria. Having never enjoyed the security of close relations with the government, nor a substantial monopoly, Austrian notaries learnt early in their history to remain on the *qui vive*. One just needs to recall that the country's first statutory system of a public notariat, created in 1850 following the abolition of feudal land ownership, has been described as an 'atrophied twin of its French model'[28]. It offered little professional autonomy, only a narrow range of monopolistic functions, no executory force attached to authentic acts, and no clear dividing line between notaries and advocates. Although the authenticity of notarial acts was granted in a revised model introduced in 1871, the notarial monopoly has remained modest in comparison to that of, for instance, France (Austria: 20%; France: 80%). Competition with the advocacy is fierce, as authentication can often be replaced by mere certification and advocates are lobbying for the status of authenticity for private contracts drawn up by themselves. The main defence strategy of the currently 460 Austrian notaries compared to more than 5000 competitors in the advocacy has been to demonstrate high quality as well as social and economic added value to society. The

[28] Christian Neschwara, *Österreichs Notariatsrecht in Mittel- und Osteuropa*, Manz, Vienna, 2002, 5

list of their initiatives is impressive, ranging from free consultation and major social projects to a series of bold technological innovations which have placed the Austrian notariat in the forefront of technological advance.

The Austrian notariat also proved itself to be foreword thinking and proactive in the context of the European Union, once Austria joined the EU in 1995. Not only have Austrian notaries acted as an engine in the restoration of a civil law notarial system in former socialist neighbouring countries. They also pioneered the establishment of a national notarial office in Brussels as early as 1997.

In Germany, notaries have traditionally relied more or less exclusively on government allocated tasks and have generally shown little interest in venturing into the open legal services market. Nor does the tight regulatory framework within which they operate encourage such a move. However, developments around them are beginning to influence some notaries' attitudes to the way they would wish to approach their work. This goes in particular for *Anwaltsnotare* in urban regions. In a city such as Frankfurt/Main, a centre of global economic activity and lawyering, notaries are finding it difficult to accept that the retention of the status quo should be in the profession's best interest, although there is anything but agreement amongst them on what reforms, if any, would benefit the profession in the mid- or even long-term.

National notarial organisations in Germany are largely in the hands of representatives of the full-time notariat. Their priority has been to emphasise the profession's unity as defined by their status as public officers, and to avoid rocking the boat in any way. Nevertheless, even within the *Nurnotariat*, in particular in the city of Hamburg, there are voices calling for a relaxation of professional regulations in order to allow notaries to respond more adequately to the needs of business clients.

By comparison with other civil law notaries in Europe, French *notaires*, as we have seen, are relatively well placed to engage in commercial activities in the open legal services market and to take full advantage of their dual role as public officers and members of a liberal profession. But, as can be expected, views regarding the extent to which the demands of the market should determine their professional strategies vary greatly. There are many who remain unconvinced of the need to consider a move away from the (currently comfortable) status quo. At the other end of the spectrum, we find

that as early as 1989, Gérard Julien Saint-Amand, second President of *Mouvement Jeune Notariat* (1972-1974), outlined a radical proposal for 'un grand plan de développement' for the French notariat in order to ensure its competitiveness in the national and international legal services market.[29] He called for:

- the abolition of the numerus clausus
- the abolition of fixed tariffs except for activities covered by notaries' monopoly
- room for specialisation
- the creation of (some) powerful internationally active notarial firms capable of competing with Anglo-American law firms
- structural modifications in the profession's organisation, in particular the creation of interdepartmental chambers on the one hand and of 'ministries' with specific briefs within the Conseil supérieur aimed at developing particular aspects of the profession's role on the other.

In fact, on all these fronts things have since begun to shift, resulting in a gradual, albeit uneven process of modernisation and responsiveness to market demands. The problem is: things are moving on, and they are moving on rapidly. So:

5 What future?

For the moment, immediate fears have been allayed as the two European Commission directives that have raised most fears amongst civil law notaries - the Directive on Services in the Internal Market and the Directive on the Mutual Recognition of Professional Qualifications - will not directly affect the profession's core work as public officers. This creates a breathing space that the profession will want to use wisely to instigate a process of self-critical scrutiny in the light of clients' changing needs and regulators' changing perceptions. Every facet of its regulatory framework requires scrutiny and justification as to its relevance, proportionality and usefulness, both to society and to the profession.

Among those committed to getting a fair deal for the profession, there seems to be a growing consensus on the following points:

[29] Pierre Argney, *Histoire du Mouvement Jeune Notariat*, Les Imprimeurs Associés Maubeuge (Nord), 1996, 111-122

- persuading governments and the public of the social and economic value of the authentic notarial act is best done by means of very concrete evidence
- this requires co-operation between university researchers and the profession
- merely insisting on the regulatory status quo would be counterproductive
- successful modernisation presupposes both critical self-assessment and respect for historically grown cultural differences
- international and interprofessional solidarity and co-operation are essential for the profession's survival
- diversity within the profession should not be seen as a barrier but rather as a complementary strategy to solidarity and co-operation

If any notariat has the experience, expertise, manpower, organisational and financial resources as well as the statutory room for manoeuvre to adopt a balanced and forward-looking approach, it is that of France. To repeat the words of Louis Reillier: 'Une profession qui n'épouse pas son siècle est une profession condamnée.' The MJN Congress in San Francisco on the subject of *Droit et Economie* is welcome evidence that this organisation is taking Louis Reiller's message seriously.