PUBLIC-PRIVATE GOVERNANCE OF THE NOTARY PROFESSION

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1. INTRODUCTION

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 mainly 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.

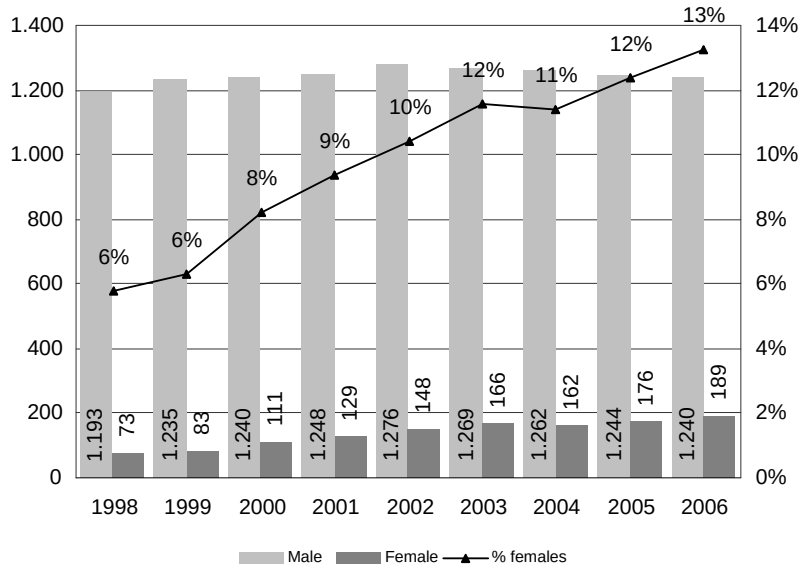
Another major change took place: the former private Royal Association of Notaries became a public institution, the Royal Organization of Notaries ('KNB'). The law states that each notary and notarial candidate is an *ex lege* member. It is no longer a private club, but a part of the government.

These major changes have had important effects 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? Does the new regulatory model work in practice? These are the questions I would like to answer.

2. INCREASED NUMBER OF NOTARIES?

The first 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?

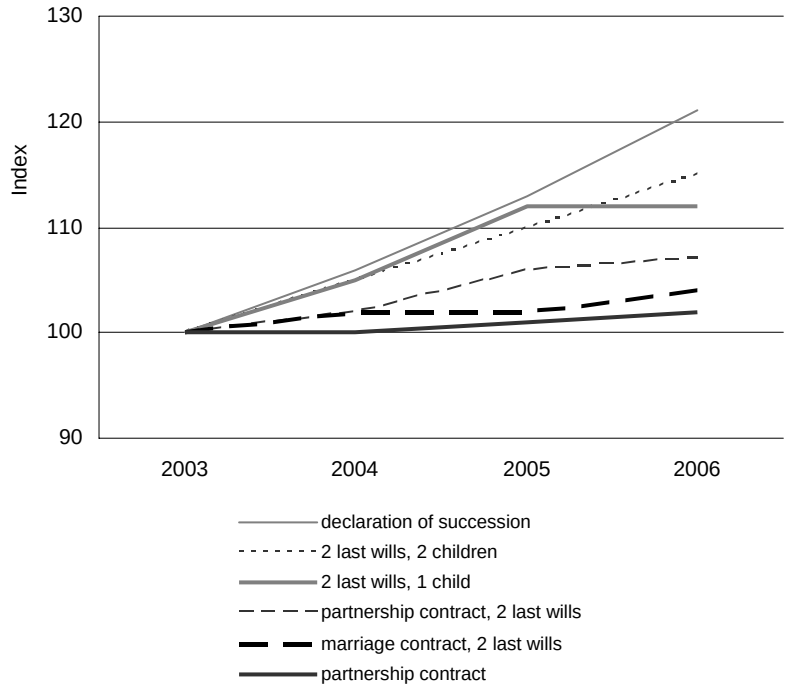
The explanation heard most is that newcomers are restrained from starting a new notarial office because of the high costs and the high risks that are involved in starting a notarial company nowadays. The increased competition and the knowledge about different legal topics that is required to perform 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.

3. IS THE WORK OF THE NOTARIES CHEAPER THAN BEFORE?

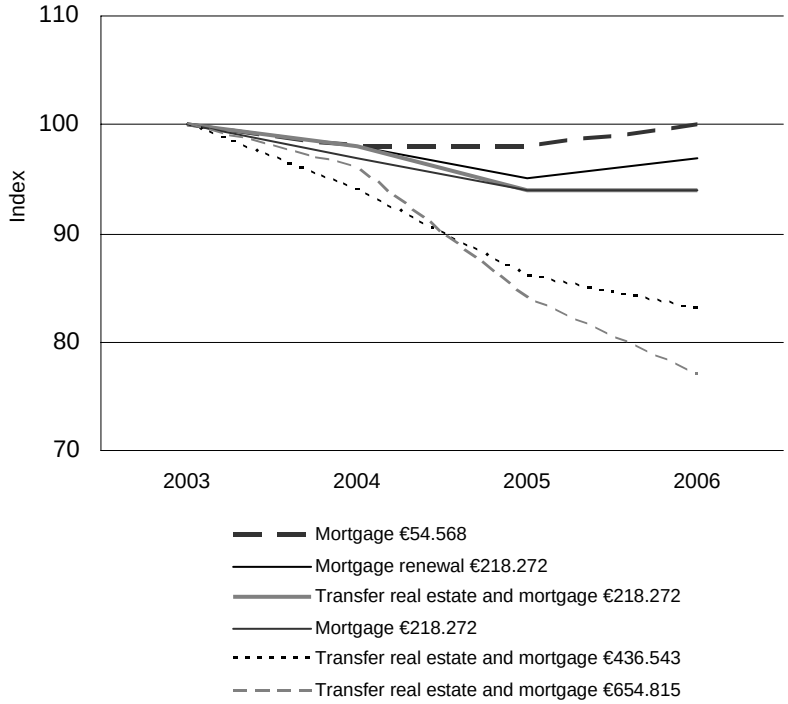
Let me provide some recent figures.

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



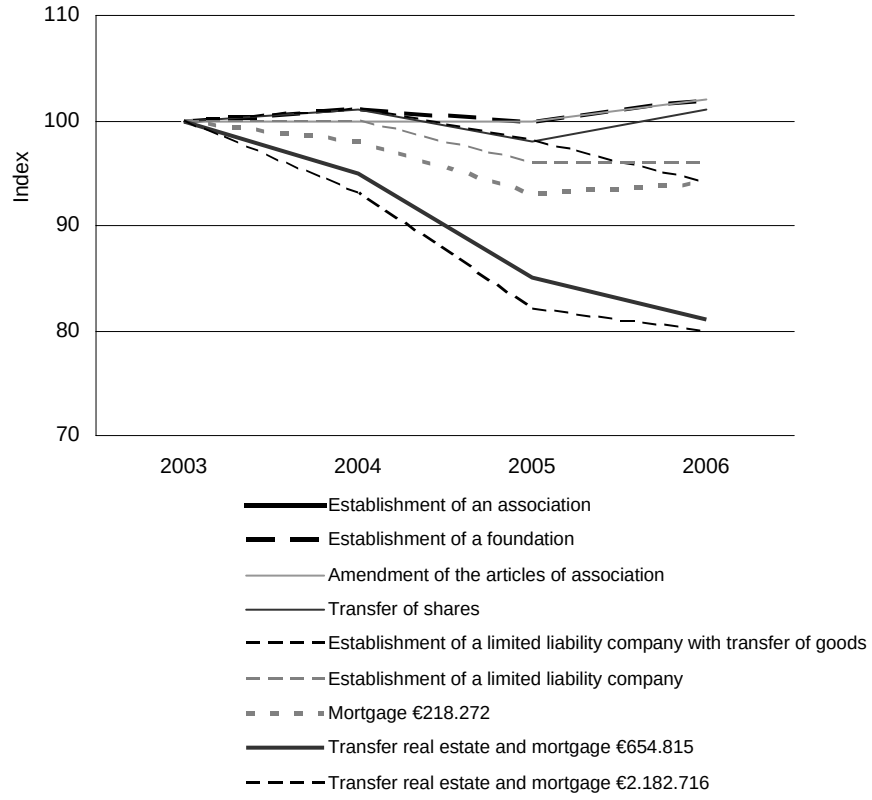
Source: Trendrapportage Notariaat 2006, Z.D. Laclé and M.J. ter Voert

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



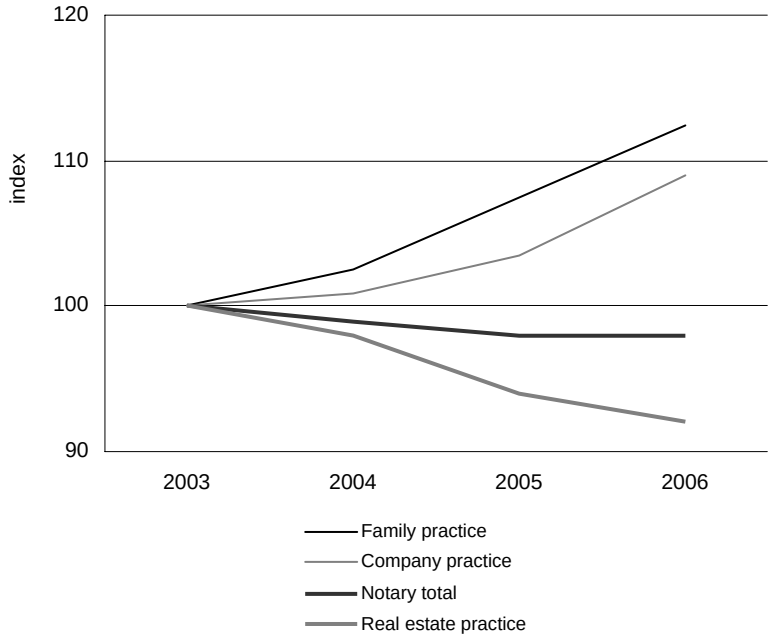
Source: Trendrapportage Notariaat 2006, Z.D. Laclé and M.J. ter Voert.

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.

4. 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. Competition is especially intense in areas with relatively small populations, for example in the northern part of the Netherlands, in Friesland and in Drenthe. 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.

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 at that moment a new private association of notaries. But times have changed. The economic crisis deteriorated the situation of notaries dramatically. A lot of employees are dismissed. Again, notaries began to consider the establishment of a new organization that really promotes the interests of notaries. Some time ago, it happened. Notaries in the Northern part of the Netherlands established ´De nieuwe stempel´ (The new Seal). This new association of notaries is growing very rapidly.

5. The position of the Royal Organization of Notaries in competition-regulations

One can put the question whether rules and regulations that restrict competition are allowed. Clearly the European Commission wants to abolish all kinds of restrictive regulations, but notaries serve also public interests, so there is a reasonable argument not to discard all the regulations.

The first question is whether the provisions laid down in the European Treaty concerning freedom of establishment, are applicable on the notaries and the organization of notaries.

Article 45 of the treaty stipulates that these provisions 'shall not apply, so far as any given Member State is concerned, to activities which in that State are connected,

even occasionally, with the exercise of official authority'. To my opinion the notaries and the organization of notaries in the Netherlands are clearly connected with the exercise of official authority. The notary is excluded from Directive 2006/123/EC, 12th of December 2006, of the European Parliament and the European Council on services in the internal market, see article 2 lid 2 sub l. But the European court ruled May 25th this year otherwise. The Court finds that the activities of notaries as currently defined in the Member States in question are not connected with the exercise of official authority within the meaning of Article 45 of the EC Treaty. Consequently, the nationality condition required by the legislation of those States for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by the EC Treaty. The main arguments for this decision are:

"The Court observes, however, that the instruments that are authenticated are documents and agreements freely entered into by the parties. They decide themselves, within the limits laid down by law, the extent of their rights and obligations and choose freely the conditions which they wish to be subject to when they produce a document or agreement to the notary for authentication. The notary's intervention thus presupposes the prior existence of an agreement or consensus of the parties. Furthermore, the notary cannot unilaterally alter the agreement he is called on to authenticate without first obtaining the consent of the parties. The activity of authentication entrusted to notaries does not therefore involve a direct and specific connection with the exercise of official authority. The fact that some documents and agreements are subject to mandatory authentication, in default of which they are void, cannot call that conclusion into question, as it is normal for the validity of various documents to be subject to formal requirements or even compulsory validation procedures."

And:

"Similarly, the fact that the activity of notaries pursues an objective in the public interest, namely to guarantee the lawfulness and legal certainty of documents entered into by individuals, is not in itself sufficient for that activity to be regarded as directly and specifically connected with the exercise of official authority. Activities carried out in the context of various regulated professions frequently involve an obligation for the persons concerned to pursue such an objective, without falling within the exercise of official authority.

As regards the probative force of notarial acts, the Court points out that that force derives from the rules on evidence of the Member States and thus has no direct effect on the classification of the notarial activity of drawing up those acts. As regards the enforceability of notarial acts, the Court observes that it is based on the intention of the parties appearing before the notary precisely to draw up the instrument and to make it enforceable, after its conformity with the law has been checked by the notary.

In addition to the activity of authenticating instruments, the Court examines the other activities entrusted to notaries in the Member States concerned – such as

involvement in the attachment of immovable property or in connection with the law on successions – and finds that those too are not connected with the exercise of official authority. Most of those activities are carried out under the supervision of a court or in accordance with the wishes of clients.

The Court then observes that, within the geographical limits of their office, notaries practise their profession in conditions of competition, which is not characteristic of the exercise of official authority. They are also directly and personally liable to their clients for loss arising from any default in the exercise of their activities, unlike public authorities, liability for whose default is assumed by the State."

It is important to stress that the court made it very explicit that this decision does not apply to the organization of notaries:

"In the first parts of the judgments delivered today, the Court of Justice states that the actions brought by the Commission concern solely the nationality condition imposed by the national laws in question for access to the profession of notary, and do not relate to the organisation of the notarial profession as such."

How about the regulations that have and will be issued by the Royal Organization of Notaries? Article 81 of the European Treaty (compare articles 6 en 24 Dutch Competition Law) states that prohibited are all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions.

Any agreements or decisions prohibited pursuant to this article are automatically void. These provisions may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices, *which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In short: restrictions are allowed, but only if there is a task in the general interest and if the restriction is effective with regard to the public interest, there are no reasonable alternatives and the disadvantages are in proportion to the advantages of the restriction. Radical restrictions are not likely to meet these requirements, so one has to choose for the least radical option.

Clearly one has to balance the interests of free competition against the public interest that is involved in the way they perform their particular tasks assigned to them in the general interest ('in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them').

Now, the position of the Royal Organization of Notaries is interesting with respect to these provisions in EU law, because of 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 only sharing costs, not profits. 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 according to the national and EU-regulation, especially art. 81 and 82 of the European Treaty. 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. It simply does not serve the private interests of the notaries. 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, a couple of years ago. 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.

I was told that the question whether the Royal Association of Notaries is an organization of entrepreneurs, will likely be decided in favor of the Commissioner of Competition. Jurisprudence show that the Court will take into consideration not so much the fact that the association is a form of government, but primarily how this entity acts. So if the entity shows itself as an organization that promotes the interests of notaries by issuing regulations or promoting a certain kind of conduct, competition law is applicable. So suppose the Royal Association of Notaries promotes tariffs among the notaries, competition law is almost certain applicable. This has as a consequence, that the judge can evaluate whether this tariffs regulation can be brought under the exception of article 81 of the European Treaty. But, since our Royal Association of Notaries is not allowed to work in the private interest of notaries and all the regulations must be proved by the minister of Justice, competition law is not likely going to be applied on the regulations they issue under approval of the minister of Justice.

6. THE QUALITY OF THE NOTARIES' WORK

Now to the question: has the quality of the notaries' work decreased since the new law on notaries? 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.degoedkoopstenotaris.nl (translated: 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.

A fine example is a notary who executes about 6.500 notarial deeds a year. At the first of each month, he passed 119 notarial deeds on the average in 14 hours. That means for each notarial deed 7 minutes, supposing that he executes notarial deeds nonstop. Suppose he has a break for approximately two hours, then the average time he spends on passing one deed is approximately 6 minutes. The economist probably will be very positive about his efficiency and because of the advantages in terms of low costs for the public. But the problem of course is, that it is simply impossible that this notary performs the services as prescribed by law. By no means it is possible to give advice and explain the content of a notarial deed in a proper way within 6 minutes from arriving in the room of the notary until leaving that same room.

7. 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. In addition, new laws like the law on business partnerships, give the notaries more monopolies. 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. 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.

However, it is very difficult for the Royal Organization of Notaries to reach consensus on draft regulations they put forward for discussion in the Council of members, the most important governing body of the Royal Organization of Notaries. At the one hand, the members are more divers so it is hard to get them in one line, and at the other hand the members obviously tend to vote in the interests of the notaries and not so much in the interests of the public. Having said that, one must consider that the result also has to be approved by the minister of Justice, who will evaluate whether the regulation is in compliance with competition law.

Many times, the board of the Royal Organization of Notaries issues guidelines and other informal rules to do at least something. And in some cases, they just bring cases to the highest disciplinary court in Amsterdam, to reach decisions in some controversial cases. In short: they avoid to use the regulatory tracks that were specially designed for these kinds of rules.

7. Some conclusions

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. The public trust the people had in the Dutch notaries because of their position in the legal system has changed. Nowadays, public trust must be earned by delivering good services against lowest costs. Those services have to be controlled and evaluated. Increased competition makes notaries exploring the boundaries of good notary practice. This leads inevitable to new rules and/or guidelines.