

### The Dutch and German Notarial Systems Compared

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**ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK**  
CENTRE OF EUROPEAN LAW AND POLITICS

University Bremen

**ZERP**

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# **The Dutch and German Notarial Systems Compared**

ZERP-Working Paper 2/2012

*The author wishes to thank Tobias Pinkel, research fellow at ZERP, for his advice on European law.*

## **Editorial**

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## I. Introduction

Civil law notaries, also called Latin notaries, constitute a distinctive feature of the continental European legal system going back to Roman law, as they have an important role in providing non-contentious, „preventive justice’ (*vorbeugende und vorsorgende Rechtspflege*). Unlike lawyers, notaries act as independent and impartial advisors, and their advice typically extends to all legal issues raised by the transaction in question. Unlike public notaries in the Anglo-Saxon world, civil law notaries are not only competent to take oaths and certify signatures, but their involvement is mandatory by law in many fields of real estate, family and company law. Unless enshrined in notarial deeds, important transactions such as conveyances, mortgages, last wills,<sup>1</sup> marriage contracts or the establishment of, or structural changes in, companies are not valid. However, the scope of such mandatory intervention (and thus also the ‘consumer protection function’ of notaries) varies greatly in different legal systems. Whereas, for example in conveyancing, Slovenian law requires only the notarial certification of signatures on the deed of conveyance, in Dutch law the deed of conveyance itself must be drafted by the notary,<sup>2</sup> and in German law, mandatory notarial intervention extends to the draft of the sales contract,<sup>3</sup> too.

The current continental European notarial systems go back to the famous French revolutionary ‘Loi contenant organisation du Notariat’ of 25 Ventôse an XI (16 March 1803). This law established the double nature of notaries as liberal professionals and holders of a public office; moreover, it provided for the appointment of notaries on a *numerus clausus* basis by the Ministry of Justice and established fixed fees which must not be altered by the parties. Other restrictive regulations concern subjective requirements of access to the profession (generally in the form of a law degree and an ensuing training stage), strong limitations on inter-professional cooperation with other liberal professionals, business structures (companies being normally excluded), and advertising (typically forbidden altogether), as well as a duty to provide services, high professional and deontological standards, professional self-organisation

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- 1 In Germany, however, there is an exception that handwritten last wills are also valid, § 2247 (1) BGB (Bürgerliches Gesetzbuch): The testator may make a will by a declaration written and signed in his own hand. Translation provided by the Langenscheidt Translation Service (online available at <[http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html)> (accessed on 20 Nov. 2012)).
  - 2 It should however be noted that parties may of course opt for having the sales contract drafted by a notary as well, which is customary in the Amsterdam region.
  - 3 Under the German principle of abstraction, the sales contract is separate and prior to the conveyance though both transactions may be recorded in the same deed.

and regulation through chambers of notaries and, last but not least, mandatory indemnity insurance. The performance of this system, which is of course characterised by significant national variations, is difficult to assess. Whilst legal certainty is guaranteed all over Europe, high prices, inefficiencies such as long waiting periods for appointments and execution of deeds, and generally a lack of service orientation of notaries have often been criticised, in particular in Southern European countries. In the European Union, the professional regulation of notaries, especially the restrictive rules on *numerus clausus* and fixed fees, have increasingly come under attack from competition law rules. Indeed, similar arrangements would not be acceptable in other economic areas on account of their anti-competitive effect. However, apart from expert studies<sup>4</sup> (rebutted by competing studies commissioned by notarial associations,<sup>5</sup> in particular the Conseil Européen du Notariat Latin, and informal recommendations) not much has happened up until now.

As regards the compatibility of the Latin notary system with the European market freedoms, especially the freedom of establishment and the freedom to provide and receive services, which are also affected by restrictive professional and other regulations, the crucial question is whether the notarial system is covered by the ‘official authority’ exception contained in Art. 51 TFEU (ex Art. 45 TEC). This question was answered by the ECJ on 24 May 2011 in an infringement procedure brought by the European Commission against several Member States<sup>6</sup> who insisted on national clauses, according to which only na-

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4 ZERP et al., *Conveyancing Services Market*, Dec. 2007, Study COMP/2006/D3/003; id., *Conveyancing Services Market*, COMP/2006/D3/003, Summary of the comparative legal and economic study into the EU conveyancing services market; online available at <[http://ec.europa.eu/competition/sectors/professional\\_services/studies/studies.html](http://ec.europa.eu/competition/sectors/professional_services/studies/studies.html)> (accessed on 20. Nov. 2012).

5 P. L. Murray, *Real Estate Conveyancing in 5 European Union Member States: A Comparative Study*, 2007, online available at <<http://www.cnue-nouvelles.be/en/000/actualites/murray-report-final.pdf>> (accessed on 20. Nov. 2012).

6 Already on 12 Oct. 2006, the commission took the second step in the infringement procedure according to Art. 226 TEC (now Art. 258 TFEU) against Germany and 15 further EU Member States by delivering a reasoned opinion. In February 2008, the Commission started proceedings against Germany (C-54/08), Austria (C-53/08), Luxemburg (C-51/08), France (C-50/08), Belgium (C-47/08), and Greece (C-61/08). On 29 Jan. 2009 the Commission started further proceedings against the Netherlands (C-157/09) which had previously declared to open up their notarial system to other EU citizens but had failed to do so in the meantime. Furthermore, the Commission started an infringement procedure against all new Member States with the only exception of Cyprus, where non-citizens may become notaries; cf. COM IP/09/152 „Nationality requirements for notaries: Commission takes the Netherlands before the Court of Justice to ensure compliance with non-discrimination principle’ of 29 Jan.

tionals may become notaries.<sup>7</sup> The Court decided that Latin notaries, in the way they exist also in the German legal system, are not ‘connected, even occasionally, with the exercise of official authority’ in the meaning of Art. 51 TFEU *in toto*.<sup>8</sup> Therefore, every restriction of the European market freedoms needs to be justified. In this context, the ECJ also decided that ‘the fact that notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into by individuals, constitutes an overriding reason in the public interest capable of justifying restrictions’.<sup>9</sup> However, restrictions contained in professional regulation also need to be proportional, which has yet to be decided by the ECJ in future cases. It is, however, likely that the Latin notary system will need to undergo relatively strong changes, just as what happened with the professional regulation concerning lawyers following the *Reyner* decision<sup>10</sup> more than 30 years ago. Unlike other Latin notary countries, the Netherlands introduced ambitious liberalisation measures already in 1999. Significantly, fixed fees and *numerus clausus* have been abolished, and other restrictive regulation has been relaxed. For that reason, the new ECJ jurisprudence will probably generate fewer consequences in this country. Against the background of these developments, the two founding countries of the Hanse Law School provide interesting test cases for comparing two different versions of the Latin notarial system: the traditional German and the reformed and liberalised Dutch system.

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2009. For a detailed review of the proceedings and the arguments raised in these cf. already *C. Schmid/T. Pinkel*, Die Zulässigkeit nationaler Einschränkungen der Grundfreiheiten für juristische Dienstleistungen im Grundstücksverkehr vor dem Hintergrund des Verfahrens Kommission: Deutschland (EuGH C-54/08), *Hanse Law Review* 2009, pp. 129-161; online available at <<http://www.hanselawreview.org/pdf8/Vol5No2Art01.pdf>> (accessed on 20 Nov. 2012).

7 Cf. e.g. ECJ, decision of 24 May 2011, C-54/08, not yet published in ECR.

8 *Ibid.*, para. 116: ‘In those circumstances, it must be concluded that the activities of notaries as defined in the current state of the German legal system are not connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.’ The ECJ has not yet taken a decision in C-157/09 against the Netherlands, but it is quite obvious that the outcome will be the same.

9 *Ibid.*, para. 98.

10 ECJ, decision of 21 June 1974, C-2/74, *Reyners v Belgium* ECR1974, 631.

## II. The German System<sup>11</sup>

The current German notarial system is regulated in the Federal Notarial Law of 16. Feb. 1961 (*Bundesnotarordnung – BNotO*), which succeeds the former *Reichsnotarverordnung* of 1937. This law foresees uniform characteristics of the notarial office especially as regards subjective access requirements, professional organisation, ethics and disciplinary sanctions.

### 1. General Features

Generally, notary candidates must have passed the second legal ‘state exam’ and acquired professional experience as notarial candidates or advocates of at least 3 years. However, according to the recent ECJ-ruling in *Commission v Germany* (C-54/08), the Directive 2005/36/EC on the recognition of professional qualifications of 7 Sept. 2005 (Professional Qualifications Directive) applies to notaries as well.<sup>12</sup> Yet the Court added that ‘[i]n view of the particular circumstances of the legislative procedure and the situation of uncertainty which resulted thereof’, Germany was not in breach of the TEU for not transposing the directive into national law.<sup>13</sup> It is, therefore, unclear at which point a private person will be able to invoke the application of the Directive. At any rate, in the near future, notaries, who are fully qualified under the law of another Member State, will need to be allowed to establish themselves in Germany after passing an ‘aptitude test’ within the meaning of Art. 3 (1) (a) Professional Qualification Directive, provided that this requirement will be implemented under national law. Otherwise, foreign notarial qualifications would need to be recognised automatically after the implementation deadline of the Directive. As regards objective access limitations, a strict *numerus clausus* ex-

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11 On the German system of notaries *H. Schippel/U. Bracker* (eds), *Bundesnotarordnung, Kommentar*, 8th ed., 2006; C. Schmid/T. Pinkel, *Die Regulierung rechtlicher Dienstleistungen bei Grundstücksgeschäften zwischen Wettbewerbs- und Verbraucherschutz*, *Hanse Law Review* 2007, pp. 6-10, online available at <<http://www.hanselawreview.org/pdf5/Vol3No1Art01.pdf>> (accessed on 20 Nov. 2012). The following section is mainly based on those sources. To make reading as easy as possible, references thereto will not be made.

12 ECJ, decision of 24 May 2011, C-54/08, not yet published in ECR, para. 140. Accordingly the ECJ decided that the statement in recital 41 that the directive was ‘without prejudice to the application of Article 45 EC ‘concerning notably notaries’ had no influence on the question, whether or not it shall apply to the activities of notaries. Recital 41 of the directive, however, was the only argument against the application of the directive to notaries.

13 *Ibid.* para. 142.



ists (§ 4 BNotO). For the creation of notarial positions, the state ministries of justice usually take as reference the number of notarial acts and in some cases also the population in the district where the position is supposed to be created. Minimum numbers for creating new notarial positions usually range between 250 and 400 acts per year for advocate-notaries and between 1,500 and 1,800 per year for single-profession notaries. This rule is clearly a limitation of the market freedoms to the extent that fully qualified notaries from other Member States would not be able to use their rights of establishment if they were not assigned one of these notarial positions. According to the Cassis formula, this limitation would need to be justified by overriding reasons in the public interest, which has already been acknowledged by the ECJ in its recent judgement.<sup>14</sup> Furthermore, it would also need to pass the proportionality test,<sup>15</sup> which is far less clear. In our view, it appears to be quite unlikely that a restriction on the number of notaries is necessary to achieve the goal ‘to guarantee the lawfulness and legal certainty of documents entered into by individuals’<sup>16</sup> or another overriding reason in the public interest. Instead, less restrictive measures, such as high subjective requirements for notaries should be sufficient. Up until 24 May 2011, only German citizens could become notaries in Germany (§ 5 BNotO). However, since the ECJ has decided that the duties and responsibilities of German notaries are not connected with the exercise of public authority in the meaning of Art. 51 (1) TFEU (ex Art. 45 (1) TEC), § 5 BNotO must no longer be applied to citizens of the European Union.<sup>17</sup> In conveyancing, the sales contract may be authenticated also by a foreign notary, whereas the transfer of title to real property (§ 925 BGB) can be recorded only by a German notary.<sup>18</sup> As regards ‘market conduct’, neutrality is the most fundamental duty of a German notary (§§ 1, 14 (1) BNotO). Neutrality also translates into notarial instruction duties (*notarielle Belehrungspflichten*). Furthermore, the German notary has a duty to provide services in vital fields of activity such as authenticating documents, certifying signatures or administering oaths (§ 15 (1) BNotO). Thus, the notary cannot deny these services. For other functions, such as executing the contract or accepting to handle an escrow account (§§ 23, 24 BNotO), the notary may refuse to act. As these rules do not appear to restrict the fundamental market freedoms, they will not need to be justified.

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14 ECJ, decision of 24 May 2011, C-54/08, not yet published in ECR, para. 98.

15 So the general rule laid down by the ECJ, decision of 31 March 1993, C-19/92, *Kraus*, ECR 1993 I-01663, para. 32.

16 ECJ, decision of 24 May 2011, C-54/08, not yet published in ECR, para. 98.

17 On this cf. already C. *Schmid/T. Pinkel*, supra fn. 6, pp. 132-133.

18 On the possibility to justify these restrictions in details *ibid.*, pp. 150-154.

Professional standards are regulated not only by the German Notarial Law (BNotO – *Bundesnotarordnung*) but also the law on notarial authentication (BeurkG – *Beurkundungsgesetz*). Generally, most details are clarified by self-regulatory guidelines enacted by the local chamber of notaries (*Richtlinien der Notarkammer*) or regulations by the local ministry of justice (DONot – *Dienstordnung für Notare*). Indemnity Insurance is compulsory. It is currently fixed at 1 million € i.e., 1,000,000 € insurance by the notary himself (§ 19a BNotO) and an additional 500,000 € by the chamber of notaries (§ 67 (3) no. 3 BNotO). An insurance against intentional breaches of professional duty (*‘vorsätzliche Handlungen’* – which are excluded from the general indemnity insurance) with a mandatory minimum coverage of 250,000 € must be contracted by the respective chamber of notaries (§ 67 (3) no. 3 BNotO). Plus, the chambers together maintain an additional reimbursement fund for damages exceeding the insurance coverage (*‘Vertrauensschadensfonds’* – § 67 (4) no. 3 BNotO).

Moreover, continuing education is mandatory for the profession (§ 14 (6) BNotO); some of the chambers’ self-regulatory guidelines set targets of around 15 hours per year. Advertising restrictions are severe. Any advertisement contrary to the public office is forbidden by statute (§ 29 (1) BNotO).<sup>19</sup> Control by the judicial administration was previously quite strict. However, the courts have in some cases struck down sanctions applied by the judicial administration and thus somewhat relaxed the prohibition on advertising within the last years. A disciplinary control of conduct is exercised by the president of the intermediate court of the notary’s district (*Landgerichtspräsident* – § 92 BNotO). To this end, all notarial deeds and other practices are checked by a judge appointed by the president of the intermediate court in intervals of 3 to 5 years (§ 93 BNotO). Notarial fees are – together with court fees in non-contentious matters – uniformly regulated in the *Kostenordnung* (Gesetz über die Kosten in Angelegenheiten der freiwilligen Gerichtsbarkeit – *KostO*) of 1957, last amended in 2006. This regulation contains fixed fees for all notarial activities, from which derogation is not permitted. These fees are based on a percentage of the transaction value, but they are degressive for high value transactions.

At the level of European law, the ECJ already decided in the *Cipolla* and *Meloni* cases<sup>20</sup> that fixed fees qualify as a limitation to market freedoms as

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19 Since foreign service providers or newly established notaries will have more difficulties to find consumers for their services if advertisement is forbidden, this rule is also to be regarded as a restriction of the fundamental freedoms of the EU. In this case, however, a justification seems to be somewhat reasonable.

20 ECJ, decision of 5 Dec. 2006, C-94/04 and C-202/04, *Cipolla v Portolese, Macrino, Capoparte v Meloni*, ECR 2006 I-11421.

they limit the possibility of accessing foreign markets by undercutting domestic competitors' prices. Whether the justifications accepted by the ECJ in these cases – above all preventing a race to the bottom in terms of quality of legal services – may be transferred to notaries as well is an open question.<sup>21</sup>

## 2. *The Splitting of the Notarial Profession*

Beyond these general features, due to their origins in the different territories prior to German unification, a division into three basic types of notaries has survived up until today: single profession notaries, advocate-notaries and state-employed (civil servant) notaries. Bavaria and Baden-Württemberg even managed to negotiate a guarantee of their existing notarial systems in art. 138 Basic Law (Grundgesetz). Against this background, the reform of notarial law at federal level in 1961 was not successful in establishing a uniform regime. The existing division leads to a significant and unfortunate splitting of large parts of professional regulation. That notwithstanding, it was declared constitutional by the Constitutional Court in 1964,<sup>22</sup> and there have been no further challenges since that time.

### a) *Single Profession Notaries*

Single profession notaries (§ 3 (1) BNotO) exercise the notarial office as their only profession and indeed are not allowed to exercise any other professional activity. This system may be found predominantly in South and East German regions,<sup>23</sup> which together account for about 50% of the total German population (of about 80 million), with the overall number of single profession notaries in Germany amounting more than 1,600. Single profession notaries are appointed according to needs-based criteria by the regional Ministries of Jus-

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21 On the possibility of justifying this restriction for notaries in details see already *C/T. Pinkel*, supra fn. 6, pp. 155-159.

22 BVerfG, decision of 7 Apr. 1964, BVerfGE 17, 306, 317.

23 Specifically, this system may be found in the following German regions (Bundesländer): Bavaria (Bayern), parts of North Rhine-Westphalia (Nordrhein-Westfalen – i.e. in the districts West of the Rhine formerly governed by French law), Rhineland-Palatinate (Rheinland-Pfalz), Hamburg, Saarland and Baden-Württemberg (in the Württemberg area only, where they exist alongside the other two types) and in the 'new regions' Brandenburg, Mecklenburg-Western Pomerania (Mecklenburg-Vorpommern), Saxony (Sachsen), Saxony-Anhalt (Sachsen-Anhalt) and Thuringia (Thüringen), which belonged to the communist German Democratic Republic (GDR) before German reunification in 1990.

tice, and they are usually recruited among the 5% of the best candidates taking the professional exam.<sup>24</sup> The recruitment of top lawyers as notaries is usually successful, which may be ascribed not only to the specific features of the notarial profession including its high social prestige but also to the high and stable income perspectives guaranteed by regulatory privileges such as exclusive rights, *numerus clausus* and fixed fees. Compared to advocate-notaries, far fewer single profession notaries are appointed in relation to population and territory, a limitation which is justified with the objective of ensuring adequate incomes to all notaries in the region. In some regions including Bavaria, the regional notarial chamber organises a system of cross subsidisation within the profession: Each notary is guaranteed the income of a district court judge. In the event that a notary does to reach this income in his business, the notarial chamber pays the difference out of the contributions of all notaries in the region. However, the number of notaries actually using this scheme is very low (usually below 5 per year). Still a considerable number of notaries, particularly in less affluent rural regions as for example the region bordering on the Czech Republic, are said to be underemployed.

Before being appointed as a notary, the recruited candidates have to pass a training period of several years (currently between 3 and 6) as notary associates (*Notarassessoren*) in the office of a notary. The precise length of the period depends on the number of notaries needed to fill vacant offices at a particular moment in time and on the number of candidates on the waiting list, with senior candidates being preferred to junior candidates. Generally, vacant notarial offices are offered first to eligible incumbent notaries, then to notary candidates. As a result, a typical notarial career in Bavaria would start in a small notarial office e.g. in the border region, lead, after a minimum of five years of holding that office, to a small or midsize town and may, normally not before the age of 45 years, reach its apex in the larger towns, in particular the Munich region.

The reputation of single profession notaries is usually high, and they are generally presumed to provide good quality services with liability actions brought against them being very rare.

#### *b) Advocate Notaries*

The second type of notaries are advocate-notaries. They exercise the notarial profession as an additional office alongside their main activity as advocates (§

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24 Please note that in Germany, there are no different concours for single legal professions as in most other European countries, but the ranking in the professional exam (*Zweite juristische Staatsprüfung*) determines the access to these.

3 (2) BNotO). However, there is no provision fixing a share of advocate and notary activities in their overall activities. Advocate-notaries exist predominantly in Northern and Western German regions,<sup>25</sup> which account for about 35% of the total German population (of about 80 million), with the overall number of advocate-notaries in Germany amounting to 7,265. The considerably higher number of advocate-notaries (per population and territory) as compared with single profession notaries is due to the fact that there is no need to ensure that advocate-notaries are able to earn their living based solely on notarial activities. Also, the regions in which advocate-notaries exist pursue a more liberal admission policy. Admission as an advocate-notary presupposes at least 5 years of professional activity as a lawyer of which at least 3 years must have been spent in the district of the notarial office.

Advocate-notaries were introduced first by Prussia in the 18<sup>th</sup> century. This happened without any regulatory concept of the legislator but as a mere expedient to provide an additional source of revenue to the financially suffering profession of legal advisors (*Justizkommissare*) – who were only admitted to do out-of-court business – a profession which has long since merged with advocates.

The model of advocate-notaries is ascribed the advantage that court experience may help assess the contents and risks of notarial deeds and agreements. Its disadvantage lies in potential conflicts of interest between the notarial and the advocate function of advocate-notaries. It is true that there is a formal distinction between both functions: When advocate-notaries perform their notarial function, they do so as regular notaries (governed by the same regulation as single profession notaries), which also means that they do not represent one or both parties but act as neutral intermediaries among them. The two distinctive functions are also protected by incompatibility rules ensuring that an advocate-notary who has acted in a specific matter as advocate or notary must not subsequently act in the same matter in the other function (see art. 14 BNotO). That notwithstanding, potential conflicts of interests may arise, e.g. when a seller of land takes the buyer to the advocate-notary whom he usually consults as advocate in business or family matters. Though few such conflicts seem to reach the level of litigation, other legal professionals and experienced business actors in Germany are, according to our experience, sceptical about this potential con-

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25 Specifically, advocate-notaries exist in Berlin (including the former GDR district of 'East Berlin'), Bremen, Hesse (Hessen), Lower Saxony (Niedersachsen), North Rhine-Westphalia (Nordrhein-Westfalen, with the exception of the districts West of the Rhine formerly governed by French law), Schleswig-Holstein and again parts of Baden-Württemberg (in the Württemberg area only, where they exist alongside the other two types).

flict of roles and prefer single-profession notaries.<sup>26</sup>

Finally, advocate-notaries are allowed to exercise a set of other liberal professions including patent agents, tax advisors, auditors and accountants (art. 8 (2) BNotO). This creates a strangely different legal situation as compared with single profession notaries who are not allowed to exercise any other professional activity.

### c) *State Employed Notaries*

The third type of notaries to be found only in the region of Baden-Württemberg is that of state-employed notaries, who are civil servants receiving a fixed salary. They are not subject to the federal notarial law (art. 114, 115 BNotO), though a number of its basic provisions are applied to them by analogy. There are 630 state-employed notaries in Baden-Württemberg, the population of which amounts to 13% of the overall German population.

For historical reasons, the notarial system in Baden-Württemberg is not uniform but again split between the areas of Baden and Württemberg. Differences between the two areas exist in respect of subjective admission requirements and competences. Unlike in other regions, state-employed notaries in Baden-Württemberg also perform court functions in non-contentious matters (*freiwillige Gerichtsbarkeit*, going back to the Roman law concept of *iurisdictio voluntaria*), including those of the probate court (*Nachlassgericht*), the land register (*Grundbuchamt*), and in part also the guardianship court (*Vormundschaftsgericht*); in addition, state-employed notaries are also competent for compulsory auctions (*Zwangsversteigerung*) and receivership (*Zwangsverwaltung*).

Whilst in Württemberg single profession and advocate-notaries can also be admitted alongside state-employed notaries, only the latter category was previously permitted. As a result, a shortage of notarial services exists in Baden. This often affects the execution of notarial deeds, which most state-employed notaries claim to be unable to carry out due to the lack of sufficient staff and which, consequently, is left to the parties themselves. This unsatisfactory situation amounted to a 'failing monopoly' and gave rise to a regulatory reform in 2005. The reform included an amendment of art. 115 BNotO, according to which single profession notaries (not advocate-notaries) are now also admitted in Baden. Subsequently, 25 new posts have been advertised, but the appointment of new single profession notary is happening only slowly due to competitors' complaints still pending before administrative courts. Another problem

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26 The leading German commentaries on notarial law point to this potential conflict of roles as well, see e.g. *H. Schippel/U. Bracker* (eds.), supra fn. 11.

attaches to notary fees, which are levied for the state budget. The European Court of Justice decided in 2002<sup>27</sup> that in company law matters this situation is incompatible with European tax law.<sup>28</sup> According to the Court, only work and cost-based and not value-based fees may be levied, as the latter constitute hidden taxes.

The system of state-employed notaries is often criticised. Indeed, though no official enquiries exist on this subject, it may be deemed likely that due to their multiple competences, lower qualification levels in some cases and the lack of staff, state-employed notaries perform less well than the other types of notaries. Against this background, the Deregulation Commission appointed by the Federal Government strongly argued for the abolition of state-employed notaries already in 1992, but this call did not have any follow-up.<sup>29</sup> Following these manifold criticisms, it has recently been decided to abolish state-employed notaries as of 2017.

Notwithstanding the rather poor performance of state-employed notaries, the ECJ ruling in *Commission v Germany* (C-54/08) does not apply to them as they are not self-employed. Therefore, they are not subject to the freedom of establishment and the freedom to provide and receive services. It is, however, unclear whether EU citizens can rely on the freedom of movement of workers according to art. 45 TFEU (ex art. 39 ECT) in order to gain access to the profession. Due to the additional court functions of state-employed notaries in non-contentious matters, it might be possible for Germany to successfully invoke art. 45 (4) TFEU according to which the freedom of movement of workers 'shall not apply to employment in the public service'.

### 3. *Comparative Evaluation*

Comparing the three models, single profession notaries are likely to offer the best quality for the same fees, which are fixed at federal level. This is due to their specialisation in notarial matters and due to their recruitment among the top graduates of the professional exam, for whom the notarial profession is attractive. Many single profession notaries in larger cities have a considerable number of assistants, including lawyers, who prepare the deeds they have to

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27 Case ECJ, decision of 21 March 2002, C-264/00, *Gründerzentrum*, ECR 2002 I-03333..

28 Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital. , OJ 1985 L 156, p. 23.

29 Deregulierungskommission (ed.), *Marktöffnung und Wettbewerb*, 1991, p. 113.

read out to clients. In these cases, the duty of giving professional advice is not always fulfilled adequately. Conversely, single profession notaries in rural areas sometimes complain to be underemployed. Also, many single profession notaries do not seem to be challenged by the amount of routine work performed, which is particularly true in the area of conveyancing. Given the fact that the top 5% of lawyers, among whom single profession notaries are recruited, would be needed more urgently in universities, higher courts and ministries, society at large is paying a certain price for single profession notaries, as the Deregulation Commission plausibly noted in 1992.<sup>30</sup> This assessment is confirmed in the economic part of this study.

Compared to single profession notaries, advocate-notaries are far more numerous as the admission policy of the regions in question is more liberal. This also means that gains from notarial activities are distributed more evenly and that, in sum, more jobs for assistants and secretaries are made available. Particularly in complex matters, advocate-notaries are sometimes said to perform less well on average than single profession notaries. This seems to be confirmed by the reported preference of business clients in corporate law in Northern Germany for specialised single profession notaries based in Hamburg as compared with advocate-notaries in the neighbouring regions. Finally, conflicts of interest between the adversarial and the notarial function of advocate-notaries are not excluded.

Lastly, the system of state-employed notaries practised in Baden-Württemberg is generally defective. This is particularly true for the Baden area where a shortage in notarial services exists due to the relatively low number of state-employed notaries and their lack of civil servant staff. Also, notarial fees levied for the state budget constitute a hidden tax, which has been found incompatible with European tax law in the field of corporate law. As a result, it is likely that citizens and enterprises in Baden would profit most from the deregulation of the notarial profession in Germany.

### III. The Dutch System

As mentioned earlier, many regulatory features of notary law have been changed in the 1999 reform of the Dutch Law on Notaries.<sup>31</sup> Under the new

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30 Ibid., p. 459.

31 This part builds on, in part explicitly, the contributions by *A. van Velten/D. Plaggenmars*, Case Study on the Netherlands, in: ZERP et al., *Conveyancing Services Market*, Dec. 2007, Study COMP/2006/D3/003; for a more recent summary, see *L. Verstappen*, *The Dutch Situation on Regulation of Notaries*, in: N. Zeegers/H. Bröring



system, professional regulation is also adopted through self-regulation by the Dutch Notarial Organisation (KNB). This Organisation, in which membership is compulsory for all notaries and junior notaries, has now become a public body within the meaning of article 134 of the Constitution, whereas previously it was a simple professional association. This change of status was introduced because the Government wanted to transfer legislative power from the State to the Organisation in order to promote self-regulation. The role of the KNB is to promote good professional practice. Its regulations require the prior approval of the Minister of Justice. In practice, its regulations cover the following main areas: promotion of the profession; professional ethics, control of quality, neutrality and integrity; professional and legal (scientific) support; continuing (post-academic) education and training; electronic (ICT) facilities and support; ensuring the transparency of fees.

### 1. *General Features*

Subjective requirements consist of a (specialised) university degree in notarial law, a 3-year part-time professional training course and six years practice (as opposed to three years before 1999) as a ‘candidate notary’ under the supervision of a notary. As regards objective requirements, the *numerus clausus* has widely been abolished. Notaries are appointed by royal decree,<sup>32</sup> as under the old act, and may apply for appointment to an existing post that has fallen vacant, which may be a single-practitioner post (notary’s office) or an office in association with others. Additionally, under the new system, a notary can take the initiative to create a new office which did not exist before. In order to establish a new office, the reform introduced the requirement to submit a business plan.<sup>33</sup> This shall contain a market survey, a description of the office organisation, a forecast of results, and a financing plan. The business plan shall cover a minimum period of three years<sup>34</sup> and is assessed by a committee of experts consisting of three members. The chairman and one of the members should have experience in business economics, and the other member should be a notary. At present the requirement of Dutch nationality applies, and only Dutch citizens may become notaries and judges. Moreover, a conveyance deed cannot be drawn up and executed by a foreign notary. However, the nationality requirement for notaries no longer applies to EU citizens after the ECJ decision discussed above.

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(eds), *Professions under Pressure: Lawyers and Doctors between Profit and Public Interest*, Den Haag: Boom Juridische uitgevers, 2008.

32 Sect. 3 Notaries Act.

33 Sect. 6 Notaries Act.

34 Art. 2 of the Notary’s Business Plan Decree of 9 Apr. 1999.

As regards interprofessional cooperation, collaboration with two other professions (attorneys-at-law and tax consultants) was permitted before the reforms (for which rules were laid down in guidelines drawn up by the KNB), but a new statutory basis is now provided by Section 16 of the Notaries Act. According to this provision, ‘a notary may enter into a collaborative association with practitioners of another profession, provided that his independence and impartiality are not and cannot be influenced by this.’ Under the Interdisciplinary Collaboration Regulation 2003,<sup>35</sup> the possibility of collaboration is limited to attorneys-at-law (i.e. members of the Dutch Bar), tax consultants (i.e. members of the Order of Dutch Tax Consultants), and practitioners of the professions just referred to who work abroad, provided that they are subject to disciplinary law in the same way as these and have adequate professional liability insurance. In addition, the regulation contains provisions designed to ensure the independence and impartiality of Dutch notaries in multidisciplinary practices of this kind. In particular, a notary acting as the adviser of only one party is not allowed to sign the deed without consent of the other party. Notaries are not allowed to provide the services of an advocate, a bank or a real estate agent (contrary to France).<sup>36</sup> Moreover, there are no restrictions on business structure, which means that even limited liability companies are allowed. As regards geographical location, a notary is always appointed within a certain municipality. Whereas he or she is not allowed to establish a branch office or to hold clinics outside this municipality,<sup>37</sup> a notary is now free to exercise professional activities throughout the whole national territory. Clients therefore now have a wider choice of notaries, and for example, deeds for foreign clients can now be executed at Schiphol Airport by every Dutch notary. As has been decided by the ECJ in the case of advocates,<sup>38</sup> the restrictions on establishing branch offices are most likely in breach of the freedom of establishment and therefore inapplicable in cross-border situations.

Regarding market conduct, the Dutch notary, too, acts on behalf of both parties, with independence, impartiality and neutrality being his or her core duties. These duties also translate into notarial instruction duties (information

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35 Regulation of the KNB of 18 June 2003, approved by the Minister of Justice on 18 Sept. 2003.

36 For example, this rule restricts the freedom of a German *Anwaltsnotar* to establish a branch of his notarial office in the Netherlands. This rule is, therefore, within the scope of application of the fundamental freedoms only applicable in as far as it can be justified.

37 Sect. 13 Notaries Act.

38 ECJ, decision of 12 July 10984, C-107/83, *Ordre des Avocats au Barreau de Paris v Klopp*, ECR 1984, 2971.

of parties involved or ‘*Belehrung und Beratung*’). Moreover, the Dutch notary has a duty to provide services in core functions such as authenticating documents (family law, real estate, company law) and certifying signatures or administering oaths. Professional standards include the duty to inform the parties on the results of the various checks and on the consequences of certain contractual arrangements including their alternatives. Conduct control is exercised by the local disciplinary chambers of notaries and by the BFT (Financial Supervision Office). A ‘designated client account’ was introduced with guarantees for the safety of clients’ money deposited with the notary. Compulsory indemnity insurance has a guaranteed amount of 25 million € 1,000,000 € insurance by each notary individually, and additional 24,000,000 € by the KNB (collective insurance). Continuing education of at least 40 hours per two years is mandatory for each notary and candidate notary and is administrated by the KNB. Special legal advertising restrictions are inexistent, with the ordinary law against unfair competition applying to notaries as well. In its Professional Rules of Conduct Regulation<sup>39</sup> approved after the 1999 reform, the KNB has permitted practitioners to use advertising, provided that in doing so they observe a standard of care befitting the profession. Such publicity may not involve a comparison of the notary’s services with those of one or more other notaries, unless representative and verifiable elements are compared and the publicity is not misleading. The Dutch Competition Authority believes the professional rules on publicity should still be further relaxed.

Alongside the abolition of *numerus clausus*, the abolition of fixed fees was the most important element of the 1999 reform. In a first step, a scheme had been adopted to reduce the fixed fee rates (scale charges) for conveyancing practice and family law practice in stages over a period of three years (from 1999 to 2003). The fees in company law practice were already free of restriction. Maximum fees for people of limited financial means were introduced for family law practice. The results of this fee deregulation were considered and described in the Final Report of the Notarial Profession Monitoring Committee.<sup>40</sup> The findings of this study were so positive that the Government completely abandoned the system of fixed rates as of 1 July 2003, while maintaining the maximum rates in family law practice for people with limited financial means.

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39 Regulation of the KNB of 21 June 2000, approved by the State Secretary for Justice on 15 Sept. 2000.

40 Final report of the Notarial Profession Monitoring Committee, period 1999-2003, Feb. 2003.

## 2. *The Impact of the Reform of 1999*

Assessing the impact of the reform is most interesting as regards its two major components: the abolition of *numerus clausus* and fixed fees. Following the first measure, the number of notaries has not increased dramatically up until now. Thus, 721 business plans for existing and new notarial posts were lodged in the period from the introduction of the new Notaries Act (1 Oct. 1999 to 1 Jan. 2006). Only 22 of the 721 plans were not approved, and there has not been any trend to protect established notarial offices. In 1999, when the new Notaries Act and its deregulation provisions came into force, there were 1,332 notarial posts. After the reform, notarial post number 1,500 was filled only in January 2007. Moreover, the physical accessibility of notaries has been slightly improved as the number of inhabitants per notarial office has fallen by 8.7% from 12,365 (in 1998) to 11,284 (in 2003)<sup>41</sup>.

In relation to fee deregulation, the Dutch Government made the following assessment:

“There is fee rate differentiation and cost-price-related charging. The costs of conveyancing in particular have fallen, sometimes by over 30%. The continuity and accessibility of the notarial profession have not been jeopardised by abandoning the system of fixed fee rates for property transactions. Many politicians had expected that this would have had the effect of reducing fee rates right across the board. But this expectation has been borne out only partially. Notaries have begun working in a more cost-conscious way, but partly as a result, fee reductions have been evident only in conveyancing work (and then mainly for the benefit of commercial clients), while fees in family law practice have risen. The charge for a will has actually almost doubled. It seems as though private clients – as weak market participants – have benefited only slightly from the abolition of fixed rates. However, the position of people of limited means has been protected by the statutory maximum fees. The government agrees with the Hammerstein Committee that the present level of fee rates does not warrant a return to the system of fixed rates. The aim of the biennial Notarial Profession Trends Report is to identify any problems in good time. This form of monitoring is in keeping with the transitional stage in which the notarial profession still finds itself.”<sup>42</sup>

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41 Hammerstein Committee Report 2005.

42 Almost literal quote from the 2006 Government position.

The former fixed fee system was characterized by cross-subsidisation between various notary services. Fixed rates for most conveyancing deeds were set at excessively high values, and these gains were in turn used to subsidise the mostly unduly low rates for family and inheritance law work. After the fixed fee system was abandoned, fee rates fell in cases where they were substantially in excess of the actual underlying economic value of the service, especially in conveyancing, and rose in cases where they had been set below the economic value, especially in family and inheritance law. Further important effects of the reform include the amelioration of client-orientation of notary offices and an enhancement of speed of the transaction. Conversely, despite expectations and fears often voiced, the quality of notarial work does not seem to have suffered to any measurable extent.

In sum, the Dutch reform is considered to be mostly a success story, though deregulation made re-regulation in several quality-related fields of notarial activity necessary, so as to maintain the overall quality of notarial work.<sup>43</sup>

#### **IV. Overall Evaluation**

Despite the Dutch reform, both the German and Dutch systems are still part of the family of Latin notary systems. Their prominent core feature of a neutral professional acting for both parties distinguishes them from competing systems such as the Anglo-Saxon lawyer system and, at least in the field of conveyancing, the Scandinavian agent system.

However, within the family of Latin notary systems, the Dutch system seems to be superior to the German one. This is especially true with a view to the anachronistic and inefficient splitting of the profession in Germany, which is in urgent need of reform. But also when single profession notaries are compared, the Dutch model still seems to be preferable. If, as is the case, the availability of notarial services at adequate and fair conditions and prices is ensured on the whole national territory, there seems to be nothing wrong in clients having to pay the true market value of the services which they request. Indeed, cross-subsidisation, as is still occurring under the German system of fixed fees, is never a sufficiently targeted and fair system of redistribution. The same is true for an artificial limitation of the number of notaries below what the market allows. Indeed, in a macro-economic perspective, a liberalisation of notarial services as under the Dutch system also leads to more jobs and growth in the

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43 *L. Verstappen, supra fn. 32.*

sector.<sup>44</sup>

Finally, apart from the ‘nationality clause’ which must not be applied to Union Citizens in the future and other minor issues, all Dutch regulation seems to be compatible with the European market freedoms.<sup>45</sup> Conversely, this is probably not the case for core regulatory features of the German system such as fixed tariffs and *numerus clausus*. Therefore, in order to establish a modernised notarial system in Germany, which is in line with EU law, the Dutch experience would seem to provide a most valuable starting point.

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44 See *G. Lee*, Case Study on Germany in: ZERP et al., Conveyancing Services Market, Dec. 2007, Study COMP/2006/D3/003.

45 It is true that many regulatory features of the Dutch notary system restrict the market freedoms in the meaning of the *Kraus* judgement of the ECJ (supra fn. 16). However, since the notarial services are of great importance and in the public interest, as has been recognized by the ECJ in the ruling *Commission v Germany*, C-54/08 (supra fn. 7), discussed in this contribution, most of these restrictions seem to be proportional at least at first glance.

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