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Neelie Kroes  
EU Commissioner for Competition  
200 rue de la Loi  
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24<sup>th</sup> July 2006

Dear Commissioner,

**Notaries and Illegal Barriers to Competition**

I write to make a formal complaint about the restrictive practices and complete bars on competition operated by continental notaries. Ultimately, of course, the decision by the Court of Justice (which will be needed to settle these issues) will take into account the alleged defences of notaries to the points raised. However, what needs to be seen first is the scale of the problem and the fact that notaries show no desire whatever to do anything about the issues.

These restrictive and uncompetitive practices include the following:

1. Fixed fee scales, with both minimum and maximum fees
2. Bars on profit sharing, even with other notaries
3. Restrictions on advertising
4. Numerus clausus, or the restriction on the number of notaries allowed to practice at any one time
5. Nationality bars
6. Bans on notaries working outside their area of appointment or country of qualification
7. Excessive training requirements and elimination by competitive examination
8. In the case of France, the requirement of payment to an outgoing notary when taking over a practice, and the effective refusal of any right to set up a notary office anywhere other than by decree of the government or paying an outgoing notary

I wish to have continental notaries investigated and prosecuted for these bars on competition.

Although it is true that these barriers are widespread and similar in many countries in continental Europe, I wish for the moment to make a complaint about France, Spain and Germany only. It is there that I am most interested in commencing my transnational practice.

Background

## Fixed fee scales

The Commission has itself described the existence of fixed fee scales as one of the greatest evils in the field of competition, as indeed, its very antithesis. As it said in its Report on Competition in Professional Services of 9<sup>th</sup> February 2004 (page 12)

“Professional associations have also argued that fixed prices protect the quality of services. However, fixed prices cannot prevent unscrupulous practitioners from offering poor quality services. Nor do they remove the financial incentives for practitioners to reduce quality and costs. Moreover, there are a variety of less restrictive mechanisms to maintain quality and protect consumers. For example, measures to improve the availability and quality of information about professional services could contribute to empower consumers to make more informed purchasing decisions”

[http://ec.europa.eu/comm/competition/liberal\\_professions/final\\_communication\\_en.pdf](http://ec.europa.eu/comm/competition/liberal_professions/final_communication_en.pdf)

[The above is a hyperlink to this report.]

Yet the Commission appears complicit in allowing notaries to maintain such scales across the great majority of countries in Europe, at a time when the great majority of other businesses and professions have either abolished or are dismantling such practices.

The problem is even greater in the case of notaries, since it is very difficult to escape using their services. Though it is not obligatory to buy a flat or house, it is often very cost effective to do so, and in any event the majority of citizens in the great majority of EU states will do so or have already done so. When they purchase, or even inherit property, citizens are obliged to use a notary and thus pay their scale fees.

The extent of the monopoly enjoyed by notaries varies from country to country, and therefore so does the amount of times citizens are obliged to use their services. But even a cursory look will show that notaries are nearly always needed for the buying, selling and transfer of property and the administration of the estates of the deceased. Often the use of a notary is also compulsory in the setting up of companies, or the authentication of documents and contracts.

It is true that the Commission acknowledged that notaries might represent special problems with regard to competition, but the Report quoted above suggested additional liberalizing measures for notaries, not fewer. To quote the report (Page 12):

“One possible exception might be the Latin notary profession, where price regulation is combined with other regulations such as quantitative entry restrictions and advertising prohibitions that seriously restrict competition. In this market, regulators might need to take a more holistic approach to reform. The removal of price regulation might, for example, need to be accompanied by other pro-competitive reforms, such as the relaxation of quantitative entry and advertising restrictions.”

## Nationality bars

Some might argue that a few of the above points might seem to fall under the responsibility of other sections of the Commission. For example, I have heard it argued that nationality bars are a matter for the Internal Market, not competition.

A moment's thought shows this is not so. The situation is that in 19 out of 25 member states a nationality bar is in place. Only a national can work as a notary in a country operating such a rule. Although this is also, of course, a breach of the right to free movement, it is not only that.

Such a bar means that there is no market penetration at all from one country to another. It is simply banned. One might argue that people can obtain another nationality, but this is of course banned in some countries. So a German notary cannot become a French notary, nor for that matter an Italian one.

This has effects both on the right to supply services, since the notary cannot supply the services other than in his home country (and often purely in his local area), and on the right to receive services, which is another key freedom supposedly protected under the EU Treaty.

This inequality of condition is of course yet another factor militating against a level playing field for competition within the EU, since a U.K. citizen, or an Irish one, can have many different nationalities, whereas a German one cannot. A suitably determined Irish notary, with enough spouses in succession, could conceivably become a notary in various states, whereas a German one is doomed only to work in Germany, if indeed he or she can find work there as a notary at all.

There could be significant cross border flow of notaries in time. Laws and language are similar in France and Belgium, and in Austria and Germany. Requalification would not be that difficult. This is of course why it is not allowed.

Many matters are cross border ones, with the parties free to choose the jurisdiction which will apply to the contract in question. In these cases, where notarial intervention is required, there is clearly no need to have work reserved to the notaries of the country in which the document is actually signed, since the chosen applicable law may well be that of another country.

Of course, the matter is resolved, in a legally rather unclear way, by the practice of letting non national notaries visit other countries and advise on notarial matters on some occasions. This anomaly, (which would appear to completely undermine the supposed reasons for excluding non nationals i.e. lack of legal competence and the alleged exemption for activities covered by "official authority") is permitted so long as the visiting notary does no notarial act in the country visited, but confines himself to giving advice.

The astute reader will notice that this exception is a fatal blow to the idea that notarial activities must be reserved to nationals of the country concerned. Quite apart from the fact that there is often much more than one party or country involved in any matter, it is accepted, as a matter of practice, that non-national notaries can give advice, and move across border, under certain conditions. Once this has been admitted, the key defences against a more widespread use of this practice, and the refusal to allow English or other notaries to do the same, can be seen for what it is , an unjustified restrictive practice.

## Bars on the supply of services

The absolute hermetic sealing off of competition created by the nationality bar, is also created, entirely separately, by bars on the supply of services from one country to another. In Spain, I have specifically been refused the right even to give advice on English law, for ten minutes a year, in my capacity as a notary. I have had the same refusal from France and Germany.

It is not enough for notaries to ensure that only their own nationals can work in a country. Even a country such as Spain, which allegedly has dropped the nationality condition, and permits any EU national to qualify as a Spanish notary, absolutely forbids a foreign notary to practice under home title, in any matter, for any amount of time. The complete lack of proportionality of such a rule is, I suggest, self evident.

Notwithstanding these restrictions, and due largely to the ever increasing numbers of EU nationals now choosing to work, marry, have children and retire in countries other than that of their birth, notaries and other lawyers in several EU states have built up practices advising clients on property transactions in other states. In the UK there are quite a number of firms of solicitors advising clients on how to acquire property in France and Spain.

They are hampered in doing effective work in France due to refusal of the French authorities to allow access to training courses in conveyancing, and by the need, even if all the title searches have been done by solicitors, for the notary in France to receive the full scale fee, even if the notary has not done the substantive work. There are even complaints in France about this, and financial magazines there have discussed the possibility of by passing the excessive fees of notaries in France by getting a consent order from a court for a sale. In an article in *L Expansion* (a French business journal) published in June 2005 the author, Gilles Tanguy, notes the comments of Pierre Redoutey, a former French notaire, now practicing as a French avocat. “Concrètement, l’acheteur et le vendeur simulent un litige bénin sur l’acte de vente, explique Pierre Redoutey, un ancien notaire devenu avocet à Montpellier. Et avant même que la justice ne le tranche, on demande au juge de valider un accord entre les deux parties. Cela lui confère la même authenticité que sa validation par un officier ministerial. Il n’y a plus besoin de notaire”.

<http://www.lexpansion.com/art/6.0.132183.0.html>

(The above is the link to the article)

One can see from this that a key activity of notaries is already open to foreign lawyers who requalify as French avocats. They can help to transfer properties by the convoluted process described above, but not by qualifying as French notaries, since that is forbidden.

Interestingly, one notes that a notary in that article admits that up to 50% of the activity of notaries in France is not activity which is part of their monopoly

“Les notaires ne peuvent plus jouer la montre. Me Celer en a bien conscience. Il tire d'ailleurs la sonnette d'alarme : « Dans nos activités non monopolistiques (50 % du chiffre d'affaires en moyenne), comme la gestion de patrimoine, le droit des sociétés ou la négociation immobilière, la concurrence des experts-comptables, des avocats et des agents immobiliers se renforce. Actuellement, les notaires s'en fichent, car le monopole sur l'acte authentique de vente les fait bien vivre... mais quand il sautera, il sera trop tard ! »”

It is submitted that it is not widely appreciated that their activities with regard to the estates of the deceased are not monopoly activities and that French notaries, like others in Europe, abuse their dominant position by not making this clear to the public. They thus create a de facto monopoly in addition to their legal monopoly, further reducing competition.

In Spain, the authorities have recently stopped English and German notaries from sending land transfers to the Land Registry, (something English notaries had been successfully doing for over 40 years) for no good reason save that such notaries were not Spanish notaries.

This matter is still under appeal, but it is interesting to note that the Spanish judge at first instance upheld the right of foreign notaries to submit documents and recalled that the EU states were under an obligation to reduce barriers to competition.

For an interesting article by a Spanish abogado who is also an English notary and has been transferring property in Spain for years, see the following article by Manuel Martin:

<http://www.notaries.org.uk/page71/page71.html>

### The need for non nationals

The absurdity of banning services from non nationals and cross border migration, in a competition context, is again apparent with a little thought. Who is better qualified to advise you on French law than a French trained lawyer? Who better to advise on English law than an English lawyer, all else being equal? The answer is obvious. And if you are a French person in England, you want to have a French lawyer close to hand. Thanks to the liberalization of the market for services for avocats and solicitors, you can have your lawyer by your side. Unfortunately, you do not benefit from the same freedom if you need your notary by your side, since many countries forbid notaries working even outside the area they were appointed in, let alone in another country.

Of course, these rules are difficult to apply in practice, and it seems clear that a practice has developed of notaries accompanying their clients outside their appointed areas, or country of qualification. This anomaly, which would seem to clearly undermine the defence of exclusive competence of one notary in an area, is tolerated so long as the traveling notary does not sign off any document on his or her travels.

But even more important is the question of consumer choice. In legal matters, be it the buying and selling of property, the planning of one's will, the drafting of a marriage contract, the client is seeking an adviser they are entirely comfortable with and who they can converse with clearly and without ambiguity. Of course, non native lawyers can learn these skills, and become completely adept at the language and legal systems of several systems.

But many lawyers do not acquire these skills and it would clearly be a complete denial of the consumers' rights to insist that they must be advised by a foreign lawyer, who may frequently not have the linguistic competence necessary to help or even understand the client.

The paradox for continental notaries is that while they seek to undermine the competence and professionalism of UK notaries, (even denying that they exist, as we have seen) they forget that in matters which concern foreign nationals they are not the best persons to advise.

How many French notaries can say they are familiar with Dutch succession law? Very few, yet there are many Netherlands nationals who have bought property and live in France. How many Spanish notaries, for all their training, have studied Swedish successions, or British wills and property law? Look at the millions who are living in Spain, who were not born there and have completely different matrimonial property regimes. Are Spanish notaries, with their Spanish focus, the best people to advise them on the interaction of Spanish law with that of the consumers' different country of origin, and particular circumstances? Do Spanish notaries even have the time to do this, given their strict *numerus clausus* and the huge number of transactions they deal with each year?

If you were a British citizen, dying in Spain, would you choose to see a Spanish notary or an English one, when making your will? Would you resent not having the choice? If you were an Estonian dying in Britain, on the other hand, there is no U.K. bar on Estonian notaries giving advice here in the U.K, under their home title, that I am aware of.

### Language skills

It is clear that for a lawyer to properly act for his or her client, there must be proper communication and understanding. It is far from clear that by forcing people to use local notaries that this basic prerequisite of effective legal work is being met. Clients are faced with a tight local monopoly, they are forced in effect to use the one person or few persons who happen to have the exclusive right to be a notary in that area. If you are a Lithuanian retiring in Spain, watch out, since your local notary will not be allowed to come to Spain, or give any advice. You will have to hope that your local Spanish notary has managed to fit Lithuanian language skills into his packed diary.

This lack of language skills will become a bigger and bigger issue as time goes by. We are no longer living in an age where no-one moves further than 80 kilometres from the town in which they were born. Millions of EU citizens are making the economies of Europe more dynamic by starting up enterprises in entirely different countries and acquiring new languages, new nationalities and new legal rights and property rights. The expertise required to deal with all this mixing of cultures and ideas will require, urgently, notaries that are equipped to deal with the problems of today, not solely those of the past.

Of course, lack of language skills is usually cited as a reason not to allow migrants. But this is because the first instinct of the protectionist is to refuse access. Such people rarely consider that the real problem with migrants is that they may hold up a mirror to our own shortcomings.

Millions of German, Swedish, Danish and UK citizens in Spain, Portugal, France and Greece need advice from their own lawyers. So do Polish, Rumanian, Lithuanian and Estonian workers in the U.K. and elsewhere. This is denied them, since the only means of doing so is to go back to the home country, or get advice by email, which is not what clients are necessarily seeking.

Incidentally, one has to question, if the concept of a notary's local monopoly is to be defended, whether such notaries could indeed give advice by fax or email or for that matter by post, since to do so would seem to involve them acting outside of their jurisdiction. Perhaps all such email/fax/post activity should be logged and inspected. Infringing notaries should, in all logic, be disciplined and persistent offenders barred from practice.

The absurdity of doing this is a reflection of the antiquated nature of the restrictions, which hail from an era which is long past. Once upon a time, you would walk to your notary's office and settle matters over a cup of tea or coffee. Now clients are traveling long distances every day, and working across countries and continents. They may be living in one country, domiciled for tax purposes in

another, but spend most of their working time traveling in yet other countries for their business or employment. The need for a purely local notary has now become a disadvantage for many, since they could never see such a notary, as their time tables and life styles do not allow this to happen.

### Restrictions on advertising

It is very difficult to sell services if no-one knows about them. The widespread bans on advertising are shown clearly in the table attached (from a talk given by Abel M. Mateus, of the Portuguese Competition Authority, in Luxembourg on May 3<sup>rd</sup> 2005).

[http://www.eco.public.lu/actualites/conferences/2005/05/03\\_journee\\_conc/mateus.pdf](http://www.eco.public.lu/actualites/conferences/2005/05/03_journee_conc/mateus.pdf)

One notes that market ignorance extends to the table itself. In England and Wales notaries are deemed not to exist as a liberal profession, and this is also alleged to be the case in Ireland, Denmark, Sweden and Finland.

I have not studied the situation in Denmark, Sweden or Finland but can confirm that full time notaries do certainly exist here in the U.K. and some in England are full members of UNIL. It is submitted that the omission in this context is no doubt due to ignorance, but dispelling that ignorance, and creating a level playing field, is indeed one of the positive functions of the advertising which is currently banned.

One notes that the number of notaries in England (around 900) is greater than that in either Luxembourg or Belgium, and the number of those who practice full time as notaries is in the region of 100.

Many continental notaries are unaware that we exist, but many more use our services when their clients happen to be in the U.K. They then insist that the relevant deeds and documents are signed in front of a notary, and sometimes legalized by apostille. All is well, so long as we supply those notarial services only in England.

It is apparent that many foreign clients do not realize that English notaries exist, and the attempts to define us out of existence, or downplay our significance, serve the interests of those currently profiting from consumer ignorance.

The key reason for avoiding advertising is that notaries are unused to the idea of competition. They assume it will inevitably drive down prices, and push out the inefficient. The consumer may well hope that this is indeed the case!

### Numerus Clausus and Local Monopolies

As with the nationality bar, this effectively prevents competition on a national level as well as a local one. If the numerus clausus is linked to a geographical limitation as well (such as the right only to be a notary in Hannover or Cadiz) then one has a situation in which the only possibility for the client wanting a better service is to move town. Perhaps not even that will work if the local notary is the one who must deal with local property.

There have been various defences of this system of local monopolies, but it is notable that where it has been abolished locally (as in France a decade ago) and notaries are given country wide authority to practice, there has been no collapse of service or standards. Indeed it is very difficult to see why there should be any such problem.

One problem caused by a limitation on numbers at a national level is that it effectively denies the right of cross border movement. If the total number of notaries in a country is fixed, then notaries from other countries cannot enter the market without increasing that number.

However, if, as I suggest, and the Treaty indicates, free movement is a right, then *numerus clausus* is in itself an infringement of the Treaty rights not only of free movement, but of the right to compete fairly and effectively in the provision of services. Markets are effectively cordoned off from any outside competition whatsoever.

The interim solution, and one I suggest that must be adopted in favour of migrant notaries, is to abolish *numerus clausus* insofar as such migrant notaries are concerned. National rules forbidding, say, the existence of more than 8000 notaries in France, cannot be applied to foreigners, since they have Treaty rights of free movement which cannot be denied.

This may seem unfair to local notaries, but there is no EU rule, it seems, forbidding discrimination against your own citizens, only one forbidding discrimination against foreigners. Abolishing the rule for foreign notaries will increase internal pressure to abolish *numerus clausus* for nationals, but of course this is something which needs to happen in any event.

Another problem caused by *numerus clausus* is that the needs of consumers are not met, since there is rarely a proper balance between the service supplied and the demands of consumers. One can increase the number of notaries, but there is no incentive for the notaries so introduced to vary their services, or adapt them to the needs of consumers, since they have adequate income from producing standard services.

#### Bans on supplying services outside one's authorized area

Many notaries are not allowed even to work outside their town or district, and even more are forbidden to work outside their state. The market partitioning effect of this is obvious, but the alleged justification for the evident breach of competition rules is not.

Just why should a notary in Hannover not be able to work in Berlin, or for that matter in France, if what he or she is doing is advising on German law? Surely the law applicable to the situation is the same, it does not change simply because the notary happens to have strayed from his or her allotted patch?

Such bans again betray their origin, in medieval tax farming, and in the guild systems which sought to protect the rights of craft workers from competition. They have nothing to do with helping the client, who is indeed often inconvenienced by not being able to rely on their customary lawyer, but having to use the services of another who has "jurisdiction" in that area.

The effects of this rule are mitigated in practice, since many notaries do in fact accompany their clients outside their areas, as mentioned above. This is apparently on condition that they do not create notarial deeds outside their area, but simply give advice. However, if notaries also argue that the advice they give is inseparable from their acts - (They do this to avoid the argument that the advice itself could not conceivably be covered by "official authority" since the Court of Justice

explicitly ruled that legal advice is not an instance of “official authority” in the case of *Reyners*) - then they obviously cannot give the advice either.

To quote a CNUE position paper on the Recognition of Professional Qualifications:

“Le fonctionnement du Marché intérieur et la libre circulation des personnes, des capitaux et des biens dans les États membres de l'Union européenne a toutefois conduit les notaires européens à examiner les modalités de leur collaboration en vue d'offrir aux consommateurs et aux entreprises, assistance et conseil dans les opérations transfrontalières.

Aussi les notariats européens rassemblés au sein de la Conférence des Notariats de l'Union européenne (CNUE)<sup>3</sup> ont-ils adopté dès 1995 et ratifié un Code de déontologie commun, applicable dans l'ensemble de ces notariats. L'article 2.1. de ce Code dispose:

"Toute personne physique ou morale a le droit de choisir son notaire, de requérir ses conseils et de lui confier la rédaction de ses actes. Elle peut aussi lui demander de l'assister en collaborant avec le notaire territorialement compétent avec toute la responsabilité inhérente à leur fonction respective.

Le notaire du pays d'origine qui accompagne son client à l'étranger doit avertir son confrère territorialement compétent le plus tôt possible et convenir avec lui des modalités de leur coopération.

En tout état de cause, seul le notaire territorialement compétent est autorisé à instrumenter."

L'article 2.2. précise: "le notaire se conforme lors d'opérations transfrontalières au droit de son pays d'origine, au droit du pays d'accueil et aux règles du présent code."

Cette coopération transfrontalière des notaires est jusqu'alors bridée par la nécessité d'accomplir certaines démarches administratives pour faire reconnaître l'acte authentique en provenance d'un autre Etat membre; démarches qui ne se justifient plus au regard de la confiance mutuelle acquise. Ainsi la légalisation de l'acte ou l'apposition de l'apostille de La Haye reste souvent requise, à défaut de ratification par l'ensemble des Etats membres de la Convention relative à la suppression de la légalisation des actes dans les Etats membres de la Communauté européenne, signée à Bruxelles le 25 mars 1987.

<sup>3</sup> Il s'agit des notariats allemand, autrichien, belge, espagnol, français, grec, italien, luxembourgeois, néerlandais, portugais. (cf. <http://www.cnue.be>)"

So it is accepted that some notaries can move across border, but not English ones. The CNUE refuses to admit English notaries, claiming that they are not entitled to join.

The real reason will be apparent to the reader. Once admitted to the CNUE, English notaries would be able to avail themselves of this right to move, albeit on the conditions specified above. They would also be admitted to be equals.

One has to note that one of the key freedoms of the EU is not simply a right to supply services, but a right to receive them. This point is endemic throughout any consideration of the problems posed by notaries, and one has to suggest that all monopolies, local or state wide, and all restrictions on the right of the notary to provide services outside his or her area or state, have a corresponding effect in denying or restricting the services that consumers wish to receive.

#### Bans on profit sharing even with other notaries

Although the Court of Justice in *Wouters* decided that a ban on multidisciplinary partnerships could be justified, it is clear from that judgment that the reason for this was the competing professional rules which applied as between lawyers and accountants, and their correspondingly different duties to the State.

[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999J0309](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999J0309)

Notaries in many countries are barred from sharing fees with anyone, even fellow notaries in another country. This is particularly odd, since notaries are proud, (under the umbrella of UNIL) to assert their similarity in terms of ethical training and function. Indeed, one notes from the CNUE site (representing most of the notariats of Europe) that trainee notaries (who are usually obliged to spend two years in practical training in their own country as part of their professional qualification), can spend up to six months of this in another EU country in a notary office and that this six months in another jurisdiction is valid for exemption from up to a year of equivalent training in their own country.

“Toutefois, les Etats membres pourraient mettre en place un système selon lequel un stage limité (6 mois ou 1 an) effectué dans un autre Etat membre serait automatiquement reconnu au titre de la formation notariale. Ce système devrait s’accompagner d’un programme d’échanges.”

[http://www.cnue-nouvelles.be/pdf/pdf\\_fr\\_20030913081704-2.pdf](http://www.cnue-nouvelles.be/pdf/pdf_fr_20030913081704-2.pdf)

This recognition of equivalence only makes sense if it is admitted that the job and the ethical and other rules governing notaries are substantially the same in the various states.

When it suits them, notaries are clear to insist on the many factors which they share in common. But if this means sharing fees, the situation is entirely different.

The ban on fee sharing applies even if the notaries are working for the same client in different countries. This works to the detriment of consumers, since they are less likely to benefit from the scale economies which could be created by transnational profit sharing arrangements or indeed partnerships.

#### Excessive training requirements and refusal to allow requalification

Requalification from the beginning is of course something that cannot be demanded of a migrant wishing to work in a State other than that in which he qualified. Yet this does not prevent Spain, for example, demanding just that of notaries who wish to work in Spain.

Not only that, but such migrant notaries would have to pass the same examination as is set for

Spanish notaries. This is of course a competitive examination, designed to eliminate all candidates save those who are needed to fill any vacancy created by deceased or retired notaries.

Such a rule obviously infringes the free movement provisions of the EU Treaty. However it also acts, I suggest as a breach of competition rules. It is a restrictive regulation which distorts competition. States are bound, under Article 10 paragraph 2 of the EU treaty, to comply with the goal of completing the internal market, and this must mean neither promulgating nor supporting rules against fair competition.

The rules are freely flouted when necessary, as is shown by the case of the Corredores de Comercio in Spain.

It is accepted by all that professions have a right to raise their standards and this indeed benefits the consumer, so long as by so doing the pool of applicants is not so reduced that the consumer suffers from the lack of practitioners. It is also necessary, it is submitted, that the means of access to the profession be controlled in an equitable, transparent and non-discriminatory manner.

The Spanish system, for many years, has been one of holding competitive examinations. These typically take many years to pass, which of course militates in itself against equal access, since few have the resources to maintain themselves without working for so many years.

However, leaving that problem aside, one notes that the competitive exam system for all notaries was subject to a very large exception made in 2000 by Royal Decree 1643/2000. In that year, after many years of continuous competitive exams for all would-be notaries in Spain, the Spanish government decided to make over one thousand Corredores de Comercio into notaries, without any examination at all.

In order to become Corredores, the corredores had to have a degree. But this could have been in economics, or indeed many other subjects, it did not have to be in law. The Corredores did have to study some law in the competitive exam they did to become Corredores, but one can see from a careful examination of the points awarded for the various parts of this examination that this legal element was very much less than that demanded of would be notaries in the competitive examination for notaries.

It is submitted that by this act of admitting the Corredores, the Spanish authorities have admitted that it was not and is not necessary to study all the subjects required of notaries in the competitive examination now set for them. Equivalences are allowed, and that equivalence can be set no higher, in terms of legal knowledge, than that demonstrated by the Corredores.

#### French Notaires – Obligatory payments for taking over a notary's practice

Notaries wishing to practice in France need to be introduced to the practice by a notaire departing that practice. The notaire has the right of presentation of his successor to the French Ministry of Justice, who formally appoint the incoming notaire. The introduction is made at a price, often extremely high, which the incoming notary pays to the outgoing one.

There are several points here.

Firstly, the cost of doing so is one which in itself reduces the number of potential buyers. In classical economic theory, it is a barrier to entry of the most obvious kind. Women, ethnic minorities, the young and those from poorer backgrounds know that this sum would be demanded

of them, and so tend to avoid seeking a job as a notaire, since they cannot afford to be one. They instead enrich the other legal professions by their presence there. However, one aspect of the service expected by the consumer, and not readily obtained, is to obtain advice from people with whom they have some affinity. To receive such advice, in the main, from older white, middle class or indeed upper class males is another reduction of their rights to receive the service they desire.

It is well known that French notaries are often sons of notaries. With the advent of examinations for notaries in the 1970s in France (before that date the post was basically simply inherited from the father), the number of such transfers of a practice from father to son has diminished. However, it is submitted that the tendency of such businesses to remain “in the family” will continue so long as the outgoing notary can charge such large sums for his practice and the incoming notary has the obligation to pay them.

It may be objected that this payment is only akin to a goodwill payment, representing the same sort of charge as is made by any business owner to the person who buys his business. The difference here is that in a normal business there are competitors and the goodwill has to be wholly earned by supplying a good service to the clients. In the case of a notarial practice, there is, (thanks to the lack of ability to create an office where you wish), a captive market, and the payment for the practice is not only an unearned super profit but the barrier to entry mentioned above.

Secondly, the right of presentation of one’s successor is another way of controlling access to the market. Not only do the conscious or unconscious biases of the outgoing notaries influence their choice of successor (with no doubt unfair effects on those unlike themselves i.e. women, the poor, ethnic minorities etc) but the right of presentation acts to select by dissuasion those who do not want to put themselves through such an arbitrary and capricious procedure. One is simply not able to set up in business for oneself.

Thirdly, the need to pay an enormous capital sum at the outset of one’s business means that newcomers are scarcely likely to be interested in price discounting to bring in business. On the contrary, they are a strong voice for retaining the existing tariffs, since they need every penny of revenue to pay back the sums borrowed to gain entry to practice.

### Notaries’ arguments

The defence of notaries’ monopolies is usually almost laughably inept. They fail to make the distinction between being appointed to a post by the government and actually exercising official authority. They claim that they are not subject to EU competition rules since they exercise such authority but in fact would be subject to these even if they were exercising such authority.

In fact, many professions are nominated by the state, from judge, through lawyers, teachers and road sweepers. Who else could nominate them?

Additionally, the case law of the ECJ has repeatedly demonstrated that such “official authority” has to be given a community meaning, it is simply not up to the individual states to mention the word, like a magic talisman, and exempt the profession from compliance with EU law.

The recent ship captain case is quoted by CNUE as follows:

“En outre, la Cour de Justice a constaté, dans son arrêt du 30 septembre 2003 rendu dans l'affaire "Colegio de Oficiales de la Marina Mercante Española", que "le droit espagnol confère aux capitaines et aux seconds des navires marchands battant pavillon espagnol, d'une part, des prérogatives liées au

maintien de la sécurité et à l'exercice de pouvoirs de police, notamment en cas de danger à bord [...] et, d'autre part, des attributions en matière notariale et d'état civil, qui ne sauraient s'expliquer par les seules nécessités du commandement du navire. De telles fonctions constituent une participation à l'exercice de prérogatives de puissance publique aux fins de la sauvegarde des intérêts généraux de l'État du pavillon."<sup>10</sup>

2.8 Il en découle clairement que le notariat participe à l'exercice de la puissance publique. Etant donné que la Commission constate elle-même que l'exercice de la puissance publique n'est pas une activité économique,<sup>11</sup> les acteurs des activités notariales ne peuvent donc pas être considérés comme des entreprises et ne peuvent donc pas être soumis à la logique des articles 81 et suivants du traité CE."

[http://www.cnue-nouvelles.be/pdf/pdf\\_fr\\_20040604101930-2.pdf](http://www.cnue-nouvelles.be/pdf/pdf_fr_20040604101930-2.pdf)

The quote ignores the fact that the notarial functions were not fully considered by the Court and that another ship captains' case decided the same day came to the opposite conclusion.

One can see that the Court did not fully consider the notary matter closely because the functions it mentions, registering of births, deaths and marriages, are not in fact notarial functions. Oddly, CNUE fails to mention this.

The decision in the above case can be properly decided, (as is indeed apparent in the words of the Court) by the fact that ship captains have strong coercive powers in the case of emergencies or disturbances of order. They can lock people up in the brig, or indeed have the decision making power in cases of life or death, such as shipwreck. This coercive power, outside the general law, is a constant theme of Article 45 cases, and is a power not exercised by notaries.

<http://www.lex.unict.it/eurolabor/en/documentation/sentenze/causa405-01en.htm>

The *Anker* case on sea captain's came to the opposite conclusion

<http://www.lex.unict.it/eurolabor/en/documentation/sentenze/causa47-02en.htm>

### The argument about enforceable debts

The one case notaries always quote, execution of agreed debts, fails also to make out the point they wish to argue. The debt and enforcement is something that was agreed to by the debtor, not one imposed on him regardless of his will. It is thus not an instance of official authority.

The French Cour de Cassation has specifically ruled that notaries there do not exercise such public authority. They are purely private lawyers, it has ruled.

For further argument please see the linked article.

<http://www.notaries.org.uk/page32/page30/page30.html>

### Conclusion

As the Commission itself has stated, notaries have some of the most restrictive, and most anti-competitive practices in Europe. You have the situation, you have this complaint, which I make again, after having had my complaints on this score rejected by your department.

I make them again now, publicly, and will be publishing this letter on the Internet, together with your reply.

I look forward to hearing from you urgently. Evidently, there is great pressure from notaries for you not to sue. They are not so confident as to their legal arguments as to wish to expose them to the judgment of the Court of Justice, nor indeed to engage in open debate. They wish simply to put pressure on you internally.

This is not acceptable. If there are arguments, let them be public, open and freely available.

Yours faithfully,

Mark Kober-Smith

Notary Public

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