

OECD workshop

Regulatory barriers to competition
in professional services:
measurement and reform experience

18-19 November 2021

**OECD PMR INDICATORS FOR PROFESSIONAL SERVICES.
ARE CIVIL LAW NOTARIES DIFFERENT?**

Consumer protection and nature of the notarial services

Antonio Cappiello



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Introduction

The OECD regularly measures, through the Product Market Regulation (PMR) indicators, barriers to competition related to the national regulations of OECD and some other non-OECD small group of countries. Since 1998, OECD also measures the regulation level of some professional services (lawyers, accountants, civil engineers, architects) that are deemed to play a key role (as intermediate input) in the productivity and the growth of a country. Since 2018 notaries were analysed by the PMR as a separate profession inside the legal services sector. The intent of evaluating the regulation of the professional services is to find the right balance between effective beneficial competition and the correction of the possible market failure connected to the provision of these professional services. OECD would like to assess how well the markets for professional services are working and how these variables are linked to specific regulatory features of these markets. Moreover, the OECD would like to understand if also the behaviour of consumers has a role to play and if the demand side (including biases in consumers' behaviour) should also be considered to understand how these professions should be regulated (i.e., if these indicators should take into account the demand side factors, such as consumer biases, availability of choices and switching costs, how should these be measured).

As emphasised by the UINL and the CNUE, the civil law notaries represent a particular case inside the professional services because they are delegated by the State to provide a public service within the administration of the Justice (their particular function is also recognised by the EU legislation). Notaries ensure the compliance with the law and the credibility and certainty of the public registers. Notaries can be seen as *ex ante judges*¹ since the notarial authentication ensures that the content of the document complies with the law conferring to it probative and enforcement power.

Besides underlining the particular functions of notaries as public officers, this paper analyses the features of the PMR indicator and highlights the possible constraints and biases of its criteria when applied to notarial services (considering the public services provided as delegated of the State and the benefits for the consumer). Some considerations on the demand side of notarial services and the role of the professional bodies are also discussed in the following paragraphs.

1 Civil law notaries and PMR indicator

The aim of the PMR is to ensure the smooth functioning of the market through the competition mechanism. The main idea is to avoid barriers to entry in the market and to ensure fair competition. Then higher scores are assigned to professional services with a higher level of regulations that are deemed to be connected with lower quality services and higher costs. However, in the case of the public goods, competition does not always ensure that markets work well (e.g., market failure), and that the health and safety of consumers are protected. The provision of a service that is part of the administration of justice (public good) may therefore need screening criteria that are different from the ones used for measuring retail or other kinds of professional services. In the case of an institutional service of justice, output per capita,

¹ CNUE and UINL provided full details on the characteristics of the notarial public function and their role as *ex ante judges*.

investment and employment, may not be strictly connected to pure competition mechanisms and deserve attentive regulation in order to meet the social demand and avoid discrimination (the final OECD objective “reduce inequality through better competition” may need better reassessment in the case of evaluation of a service provided in order to guarantee the legal security to the citizens and the business operators). Therefore, if we apply the PMR evaluation scheme also to notaries, these indicators may risk to distort the evaluation made by the institutional users of these data (e.g., EU Commission and National Governments) and could produce deregulations risking to complicate the proper improvement of the supplied service. Since, as stated in the OECD brochure “the World Bank considers the PMR indicators a very useful diagnostic tool which complements their own *Ease of Doing Business indicator*”, attention should also be paid to assess the consistency of PMR and the World Bank data with the final policy aims. The State involvement may not always induce distortion, and each market should be evaluated separately with detailed assessments of all their features. The World Bank has just decided to discontinue the Doing Business (DB) report² that supported deregulations without proper assessment of features connected to the security of the business environment (a new DB methodology will be created, hopefully also considering more qualitative aspects). Therefore, DB criteria often pushed country governments to compete for improvement in the DB rankings without always obtaining a real enhancement of their socio-economic environment.

OECD claims that the values of the sector indicators for the surveyed countries show that, in general, regulatory set-ups in network sectors – which include e-communications, energy, and transport – are more conducive to competition than those prevalent in the service sectors (especially professional services). The reason for these differences may be found in the different nature of the assessed sectors and on the choice of the PMR criteria for the evaluation. Professional services are based on forcibly required competences (education, deontological rules, etc.) in order to provide an adequate output that often the consumer is not able to evaluate beforehand. More rules are therefore needed in order to avoid consumer biases and market failure. On the other hand, transport, energy and e-commerce are sectors based on the provision of a product that the interested business partners or consumers are more able to assess or can more straightforwardly learn to evaluate (because the consumption or trade is mainly settled in the long-run and the characteristics of the product are more tangible and well-known).

As it concerns notarial activity, the level of regulation (because of the nature of its public function as described above) should forcibly be higher than the other PMR analysed professions. Many criteria defined by the PMR indicator are, in this case, to be considered as a protection of the consumer rather than an obstacle to the proper functioning of the market (since the notarial service is offering a “public good”). Therefore, if we apply the PMR to the notarial profession we highly risk depriving the community and citizens of the *ex ante* legal security (removing the protection especially to the vulnerable parties). If we compare the level of the notarial regulation (as expressed by the PMR) with some World Bank indicators, we can also observe an interesting aspect: “low level of regulation” does not seem to be more correlated with better quality and lower costs, while a “higher level of regulation” is more often associated

² World Bank press communication (WASHINGTON, September 16, 2021)

with better performances in terms of quality, costs, and speediness of the procedures (see more details in the next paragraphs).

2 Is deregulation in notarial services correlated with lower costs and better performances?

The PMR measures the level of regulation in the countries adopting notaries. Nevertheless, as emphasised before, the civil law notary system may be very different from the system adopted in some countries analysed by the PMR, such as USA, Sweden, Korea and Israel (e.g., in some of these countries notaries do not necessarily need a university education in law, and they are not mandatory required in the real estate transfers and other important legal transactions; moreover, they are not compulsory required to check the legal content of the document). The following table (tab.1) shows countries adopting civil law notaries (members of the International Union of Notaries) who are involved in real estate transactions according the analysis of the Doing Business report of the World Bank³.

Tab. 1 – Countries (analysed by PMR) adopting civil law notaries (UINL members) who are involved in the real estate transactions

Argentina	Chile	Croatia	Greece	Italy	Luxembourg	Poland	Slovak Rep.
Austria	Bulgaria	Czech Rep.	France	Japan	Mexico	Portugal	Slovenia
Belgium	Colombia	Estonia	Hungary	Latvia	Netherlands	Romania	Turkey
Brazil	Costa Rica	Germany	Indonesia	Lithuania	Spain	Russia	

Source: World Bank DB report 2018 (countries in bold are non-OECD countries)

Therefore, taking into consideration the more homogeneous cluster indicated in Tab.1, we verify if a lower score of PMR corresponds to lower costs and higher performances as it concerns quality, lower number of procedures and faster processing. As indicators of performance of the notarial services, we could use the World Bank DB report indicator (*Registering Property RP*⁴) for the real estate transactions (core sector of the notarial activities).

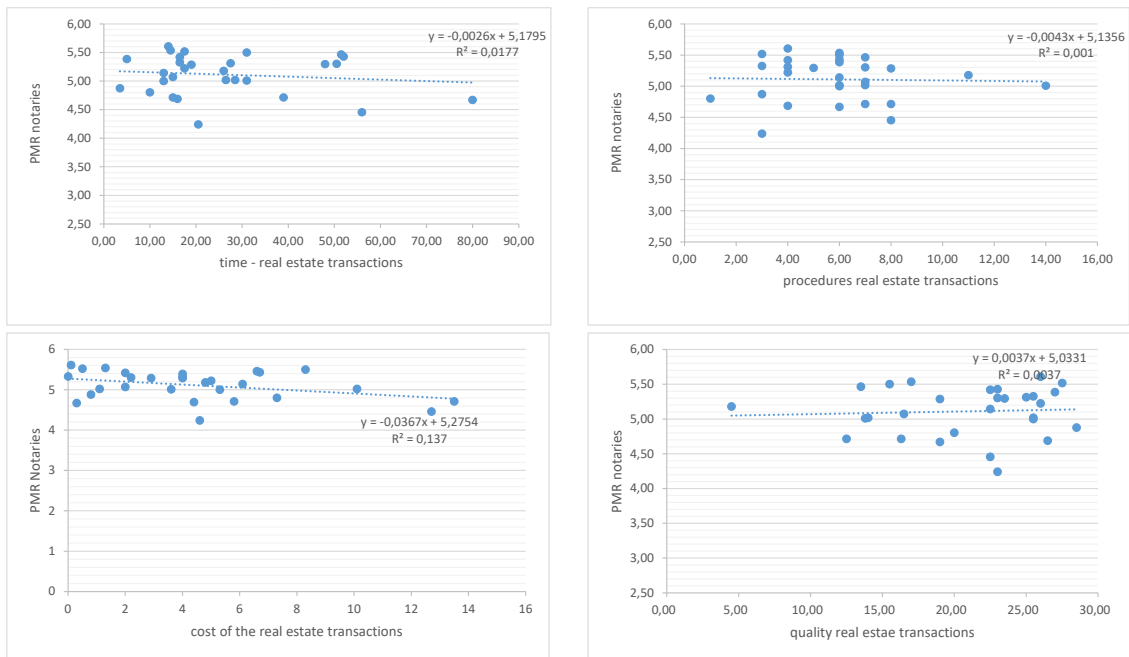
Fig. 1 (3rd frame) and Fig. 2 show a tendency underlying an inverse correlation between the level of regulations (PMR) and cost supported by the consumer for the real estate transfer. In other words, highly regulated notarial systems produce a lower final cost for the consumers. In Fig. 1 we can also observe⁵ a general tendency of (slight) inverse correlation between “PMR score and procedures” and “PMR score and time” (this means that “countries with notaries” adopting less procedures and completing them in less time have some kind of tendency to adopt a more regulated notarial system), and some sort of tendency to a positive correlation between “PMR score and quality”.

³ The table only indicates the sub-group of civil law notary countries that were analysed by the PMR indicator.

⁴ RP indicators on costs, procedures, time and quality.

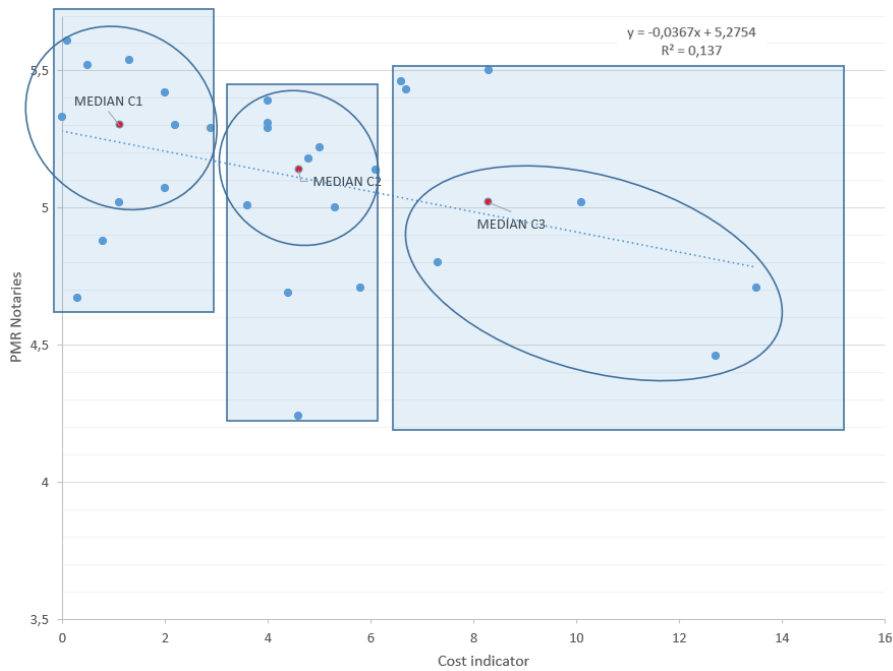
⁵ Fig. 1, 2 and 4 show slight relations that are anyway important indication of the tendency expressed by the data.

Fig. 1 - Comparison of notaries' PMR score and RP indicators in countries adopting notaries in the RE transfers



The inverse correlation (analysed in more detail below in Fig. 2) between the regulation of notarial services and cost of the real estate transactions, it seems to be slightly higher.

Fig. 2 - Countries adopting civil law notaries in the RE transfers. Comparison of PMR score and RP Cost score (the frames represent the clusters indicated in tab.2)



Tab 2 – Countries (analysed by PMR and adopting notaries in RE transactions) divided into clusters according to the RP Cost indicator of the DB report of World Bank.

	CO Cost RP	PMR notaries (level of regulation)
CLUSTER C1		
countries where $CO < 3$		
MEDIAN C1	1,10	5,30
AVERAGE C1	1,20	5,24
ST.D C1	0,96	0,30
CLUSTER 2		
countries where $3 \leq CO < 6,5$		
MEDIAN C2	4,60	5,14
AVERAGE C2	4,69	5,02
SD C2	0,75	0,36
CLUSTER 3		
countries where $CO \geq 6,5$		
MEDIAN C3	8,30	5,02
AVERAGE C3	9,31	5,05
ST.D C3	2,85	0,42

Source: World Bank and PMR indicator 2018 (2 outliers are not considered in this table).

The above clusters show a tendency underlying an inverse correlation between level of regulations (PMR) and cost supported by the consumer for the real estate transfer (highly regulated notarial systems produce a lower final cost for the consumers).

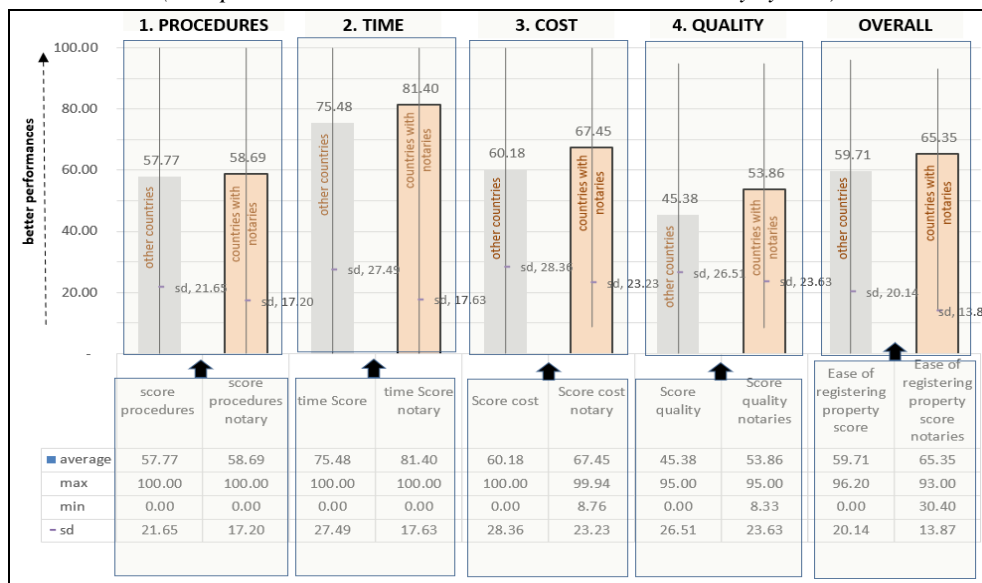
3 What about countries that do not use the notary system in RE transactions?

A comprehensive study (Doing Business Report and Real Estate Transfers: Far Better with Legal Controls and Notarial Guarantee. Working Papers 20/079, EXCAS) focused the analysis on the main sub-indicators of the Registering property (namely: number of procedures, time, cost and quality the real estate registration infrastructure) in order to assess the average impact of civil law notaries. The aggregate assessment on the 190⁶ countries analysed by the DB shows better average results by countries adopting civil law notaries in real estate transfers.

In fig. 3, representing the average performance on the Registering Property indicator, we can notice the better performances of the UINL countries adopting notaries in all sub-indicators. Moreover, the standard deviation has significant lower value in the UINL clusters. This means that inside the group of countries adopting notaries, the distribution of the scores is more uniform. The lower gap between maximum and minimum value (overall indicator as well as cost and quality sub-indicators) for the UINL cluster is a further confirmation of the greater uniformity of performances inside this group. Considering the analysis of the previous paragraphs on the level of PMR and the notarial performances, Fig. 3 can provide an indication on the impact of regulation on professionals involved in the real estate transactions in systems that do not adopt notaries (scores are standardized on a scale from 1 to 100, 100 = best performance)

⁶ The irregularities detected by the WB audit, concerns mainly China (other minor errors were detected in the data of Azerbaijan, Saudi Arabia and United Arab Emirates). These countries do not adopt civil law notaries for real estate transfers, so the aggregate results of the analysis on 190 countries are therefore not affected.

Fig.3 – Performances of UINL countries requiring notaries in property transfers (Comparisons with countries that do not use the notary system)



Note: The line inside each histogram shows the minimum and maximum value of each considered distribution, as well as the standard deviation indicated by a spot with the acronym sd.

Source: World Bank Doing Business Report 2020, Registering property indicator 2020

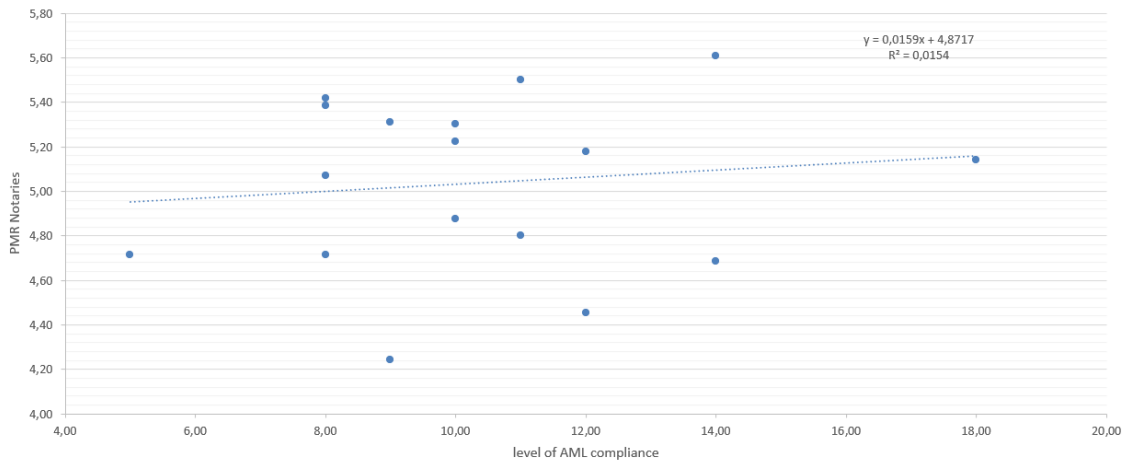
The data (see fig. 3) also shows the greatest gap between the 2 analysed clusters (countries using notaries vs. other countries) in the quality indicator (8.47) and, surprisingly against all stereotypes, also in the cost indicator (7.26). This means that the quality of the transfer is much higher and less expensive if on civil law notary control. Another consideration can be made on the gap between the procedures and time indicators, with the most evident gap being on time. This surely means that the transfer is faster in the civil law notary countries' cluster. If we consider that the indicator on the procedures presents a less evident gap, this means that on average, each procedure is completed quickly. Moreover, considering the possible distortion coming from the implication of the methodology on the calculation of time and procedures (see Cappiello 2014), a more faithful representation of the reality by these indicators would probably enhance further, the important legal control made by highly qualified legal experts (notaries) completing many checks (procedures) faster than systems that do not adopt civil law notaries.

4 Compliance with the FATF (IO and R) and notarial services

Another important aspect of professional services is the compliance with the FATF anti-money laundering (AML) recommendations, especially as concerns the DNFbps criteria (features adopted also as guidelines for the EU legislation and OECD policies on AML)

In Fig. 4, note a positive trend as it concerns the correlation between the PMR score for the notarial professions and FATF compliance as it concerns AML (as a proxy we considered IO3-7, R10-11 and R22 of the FATF standards, which are more correlated with the nature of the service provided by notaries). Therefore, more regulated notarial systems tend to have a higher level of compliance with FATF standards. Fig. 4 concerns the available FATF data on UINL countries (analysed by the PMR) adopting notaries for the RE transfers.

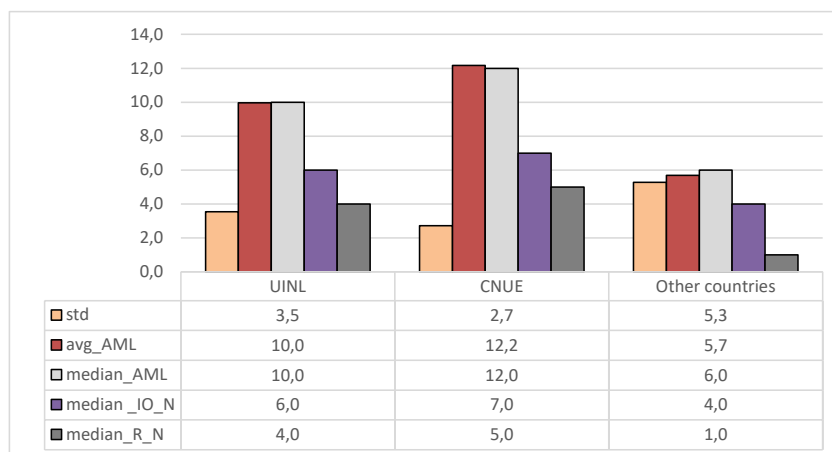
Fig.4 – UINL countries requiring notaries in property transfers. Compliance with AML standards and PMR scores as they concern the notarial profession



4.1 Compliance with the FATF (IO and R). Country with notaries vs. other countries

In the figure below, note better compliance by CNUE (European countries adopting notaries) and UINL (world countries adopting notaries) compared to countries adopting a different system for Real Estate Transfers (the aggregated results are based on the same FATF criteria indicated in the previous paragraph).

Fig. 5 – Compliance with AML standards: UINL and CNUE countries requiring notaries in property transfers vs other countries.



Source: elaboration on MER-FUR data FATF 2018-2019

4.2 Coherence among “EU, FATF and OECD AML policies”, “Professional Bodies” and “PMR”

In the last years, the main objective of international organisations (WB, OECD, FATF) and the EU, was to ensure compliance with AML policies, and to involve and oblige various professionals in compliance with minimum standards.

The FATF Guidance for Professionals 2019 (page 54) underlines the need of an effective control on professionals by Professional Supervisory Bodies “*Procedures that ensure the system for licensing lawyers/notaries prevents criminal from becoming lawyers/notaries*”. Moreover, at the bottom of the same page, it is stressed that “*it is each country responsibility to ensure there is an adequate national framework in place in relation to regulation and supervision of legal professionals (notaries included)*”

On the other side the “OECD Economic Policy Reforms 2014” (*Going for Growth Interim Report, OECD 2014 Reducing regulatory barriers to competition: Progress since 2008 and scope for further reform*) in Chapter 2, page 82 underscores that “*To ease administrative burdens and facilitate entry in network and services sectors, countries could for instance ...abolish chamber membership requirements and reduce the number of exclusive rights of professions ..in particular in the legal (including notaries) and accounting professions*”. While some OECD and WB AML handbooks⁷ still stress the importance of accurate controls of transfers by qualified and impartial legal professionals (e.g., especially for the provision of reliable information to the public registers). Moreover, many of the FATF recommendations are used as a standard for the regulatory instruments of the European Union.

If the system requires a high-quality standard of controls by professionals, deregulation in these sectors should be carefully evaluated, especially if important aspects of the public interest can be affected.

5 Consumer side: legislator role, private autonomy, asymmetries and public intervention

5.1 Paternalism, economic and political policy choices to protect the consumer

The particular protection of some crucial legal-economic sector (for which the legislator prescribes the notarial act) is sometimes interpreted as paternalist degeneration of a State invading the private rights⁸. This vision is against the construction of a private system informed to the prevalence of the law on the private willingness and tends to valorise the rules proposed and de facto accepted by the agents. The classic theory of legal paternalism is instead justifying the intervention of the State that constricts the personal freedom to protect the individual impeding one to cause damages for oneself, even if the individual is not damaging third parties. Nevertheless, in the case of the notarial intervention in the regulation of individual rights, the issue does not involve aspects limited to the individual field, but includes also general interests

⁷ -VAN DER DOES A., DE WILLEBOIS E., HALTER E, HARRISON R., WON PARK J., SHARMAN J., The Puppet Masters. How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It, Stolen asset recovery Initiative. The International Bank for Reconstruction and Development / The World Bank /UNODC. 2011.

-OECD, Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes. 2011

⁸ SOMMA A., «Riflessioni sul tema dell'autonomia privata», *Boletín Mexicano de Derecho Comparado*, XXXIV, n 101, 2001, pp. 589-637

as the certainty of the law and the protection of the third parties. Legal paternalism should therefore also be considered in light of the recent developments of legal analysis through the economic analysis of the law and the tools of the “behavioural law and economics”.

Behavioural law and economics that apply to the legal analysis the microeconomic method and the instruments of the cognitive psychology, tends to adopt a moderate paternalistic position that finds its justification in the consensual correction of irrational behaviours⁹. The model proposes a “*benevolent hierarchy*” where the legislator is taking the place of the irrational individual (who propends to make mistakes) and adopts minimum guaranteed standards in the contracts in order to compensate the information asymmetries. A possible negative consequence of this paternalistic model could be the inhibition of the judgement skills of the individual (Klick and Mitchell 2006) and his evolution as an individual able to make rational choices¹⁰. The anti-paternalists claim that the short run inefficiencies due to the lack of restrictive regulation by the legislator¹¹ would be compensated by the advantages in the long run where the agents would acquire awareness and develop individual rational skills. An interesting model proposed by Klick and Mitchel analyses the concept of systematic deviation from the *rational-maximizer* model, and endogenize the dimension of the cognitive bias (differently from Zamir, who assumes it as a known exogenous value) connected to the individual choice.

Zamir assumes as known the possibility that an individual is making a correct choice, Klick and Mitchel try instead to analyse this possibility considering the time factor and reference context, trying therefore to not only find which decisional model (*paternalist decision maker/ individual decision maker*) is able to produce correct choices, but also which costs are connected to the possibility that the individual can improve the capacity to correctly chose (comparing them with the costs needed for the functioning of a paternalistic system). One of the keys of the analysis is to consider the capacity of taking rational choices by the individuals (through a “*learning by doing*” process) and the paternalistic choices as a negative interference of this self-regulatory process. Moreover, the *self-fulfilling prophecy* mechanism pushes the individuals to reinforce their conviction about their inferiority position (in making the right decision) compared to the paternalistic regulatory body. Individuals are therefore demotivated to invest in knowledge and will conform to the expectation of the paternalistic regulatory body¹².

With reference to the choice by the legal system to protect (acting therefore paternalistically) some crucial transactions for economic development and the individual’s lifetime (e.g., conveyancing, company incorporation, successions), we can use an economic analysis model to evaluate the impacts in the short and long-run of a paternalistic system. Byrnes, with regards to self-regulation, claims that the key for making the correct decision is being aware of the difference between choices that are likely to produce positive outcomes and

⁹ SCOCCIA D., Paternalism and Respect for Autonomy, in *Ethics*, 318, 1990.

¹⁰ KLICK J., MITCHELL G., «Government Regulation of Irrationality»

¹¹ For instance, Korobkin expressly claims that the *psychological biases* imply inefficiencies that could be corrected by paternalistic interventions. See Korobkin, *Standard Form Contracts* (“*The design of non-salient terms is better assigned to government institutions because the market will not create pressure toward efficiency and state actors, as imperfect as they will be, at least can aim at the proper target.*”).

¹² Cf. JON ELSTER, *Selfishness and Altruism*, in *BEYOND SELF INTEREST* 44, 47 (Jane J. Mansbridge ed., 1990); Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 *WASH. U. L.Q.* 1, 52 (1995).

choices that are unlikely to produce positive outcomes¹³. The learning process can then help each individual to make choices with greater awareness and to overcome “consumer biases” through acquired experience on the functioning of the market. Obviously, the legislator will assume a paternalistic position in context to where the choices are particularly important because it would be much too costly and difficult for the individuals to research the optimal solution using their own resources.

Nonetheless it seems that the paternalism could imply negative consequences restricting the range of available options (and consequently the possibility of *self-learning*) and producing noise in the analysed context, making the learning process harder. Reducing the incentive to invest resources in knowledge, the individuals would reduce their efforts for the research of alternative solutions, and this would imply less self-learning. Moreover, we should distinguish *ex ante* e *ex post* paternalism (that is to say, before and after making a decision).

The *ex ante* paternalism obviously reduces the incentive to research information and to develop useful strategies of decision making. The *ex post* paternalism reduces the risks of irrational actions because the legislator will protect the individual from the negative consequences of his imprudent choice. In other words, the *ex post* paternalism operates as a form of insurance for the irrational behaviour. Another very important variable to consider within the learning process is the feedback of the result. In fact, not all individuals are able to elaborate upon the information in a way that is useful for their decision-making process. Nevertheless, we can assume, simplifying and generalising, that the paternalist mechanism could interfere by limiting the self-learning skills of the individuals.

5.2 Behavioural model in a paternalistic system

The formalisation of some hypothesis could help the legislator in implementing political choices oriented to correct anomalous or irrational behaviours by the individuals.

Passing in review the literature and the models proposed by Shapiro (1984) and, in particular, the model created by Klick and Mitchell (2006), we can analyse the different variables influencing the choices of the legislator and of the individuals, and the implications of these choices. In order to build a model, generally we try to find the variables that we suppose are more significant for the cost-benefit evaluation related to the possible choices to be actuated. In an *ex ante* paternalistic system the legislator adopts provisions (e.g., normative dispositions, fiscal provisions, etc.) to avoid that the individual can make a wrong choice. Even if this system impede the individuals from choosing incorrectly, could create to him a damage in terms of deterrence to improve his cognitive skills and demotivate him in spending time and resources to acquire his own set of knowledge. If we assume that to make an optimal decision, time is needed to acquire adequate knowledge k that inevitably implies some costs C , we can determine the probability p that the individual can make the choice implying a utility U_h higher than the utility coming from a wrong choice U_w .

The value of the correct choice is represented by the difference $U_h - U_w$ and from the costs C invested in the acquisition of the knowledge and in the research.

¹³ JAMES P. BYRNES, The Development of Decision-Making, 31 J. Adolescent Health 208, 208 (2002).

The individual will then try to maximize the following function F_k :

$$F_k = p(k)U_h + [1 - p(k)]U_w - C \cdot k$$

Maximizing F_k we therefore obtain the following first order condition:

$$C = \left[\frac{\partial p}{\partial k} \right] (U_h - U_w)$$

If the time spent k for the search of the optimal solution requires a cost C too high, the individual will accept a non-optimal result because the marginal value of a further research at a certain point, will not compensate the marginal cost of the time required for the research. It should be stressed that this model considers a choice to be taken once, and therefore it does not evaluate the benefits of the time spent for the research of the optimal solution. In fact, the time spent to make the best choice, even if is not immediately useful for the solution of the examined case, could be a benefit for future choices. In particular, in case the individual should solve the same problem (or a problem having the same characteristics), the costs of his research will be reduced because he has already spent time in the past on the same issue. The time spent for the research will then produce future benefits and will represent a knowledge endowment to be used also in different contexts. Within a context where a paternalistic State operates, the probability p is established by the legislator. Therefore, if p is exogenous and C greater than zero, the individual will not spend time researching the best solution because his choice is already fixed by the legislator (partially or completely according to the adopted paternalistic solution).

It is a corollary of the *moral hazard* described by the economic analysis literature about insurance. In our case, the individuals are not incentivized to spend time evaluating the best solution to adopt because the research costs are borne by the paternalistic system. The benefits of the individual are coming from the probability function β that is chosen on his behalf by the legislator.

In the case of a non-repetitive choice, we could define the probability function defined by the paternalistic system as follows:

$$F_\beta = \beta U_h + (1 - \beta)U_w$$

Obviously, an individual can have benefits from the paternalistic system if the following condition is verified:

$$F_\beta > F_{k_o}$$

therefore,

$$\beta U_h + (1 - \beta)U_w > p(k_o) U_h + [1 - p(k_o)] U_w - C \cdot k_o$$

where k_o represents the optimal quantity of time to acquire knowledge to make a choice in a non-paternalistic context. The expected benefit of the paternalistic system $\beta(U_h - U_w)$ should always be greater than the one produced by the individual research $p(k_o)(U_h - U_w) - C \cdot k_o$ and it is assumed that the individuals, as well as the legislator, are able to make the correct choice, and that the gap between the functions F_β and F_{k_o} is determined by the costs C needed to reduce the gap between the utility functions $(U_h - U_w)$.

$$C \cdot k_o / (U_h - U_w)$$

Even if the legislator has a lower probability of making the optimal choice for the individuals, it could still be convenient to adopt paternalism if the individual costs are very high or if the difference between the optimal and suboptimal results (utilities) is minimal. For instance, the legislator could make “economies of scale” or the different options lead to similar results. Paternalism represents the best solution when the possibility that the individuals make the correct choice is very low compared to the capacity of the legislator of determining the optimal choice. This could happen because the individual efforts could hardly imply an optimal choice since the costs and time spent researching are too high (or because the individuals do not normally have adequate knowledge to reach the optimal result). Paternalism is therefore more convenient when is particularly burdensome for an individual to improve his decision-making process, especially in situations where his choices are irrevocable and there is little possibility of acquiring adequate knowledge before executing the examined transaction.

5.3 Time context, decision making and paternalism

As described by the model analysed in the previous paragraph, in a single (non-repetitive) transaction the efficiency of paternalism deepens from the capacity of the legislator of determining the optimal choice. Nonetheless in the event that the individual has to face repetitive transactions, the investment in terms of research and improvement of his decision-making process should be evaluated within a time context (from time t to time $t+I$); certainly, at the time $t+I$ the individual will have a collection of experiences and knowledge that would allow him to improve his choice.

If paternalism is restricting individual choices, there will be a parallel decreasing of the individual’s collection of knowledge (and the costs for the individuals would be equal to zero). Nevertheless, the cost for the acquisition of adequate knowledge will be reduced in time only in the absence of a paternalistic system. The individual will acquire the knowledge needed over time, to correctly evaluate the reference context and the costs to invest in a new decision-making process that would obviously be lower if part of the knowledge was already acquired in the past.

Therefore, the paternalistic option of the legislator in a domain makes the individual choices more costly in similar or connected domains where there is no paternalistic regulation, creating a “cognitive hazard” effect.

The policy makers and the legislator have to therefore evaluate the costs and benefits of a paternalistic choice, and to decide what a context would be where the individuals can make unconditional choices to reach the optimal aim through personal research deciding spontaneously the quantity of time and assets to reach their scope.

As concerns the *ex post* paternalism, the awareness on the protection by the legislator who will counterbalance possible individual mistakes, will produce an advantage for the individual only in the short run, but will not compensate the loss of long run efficiency (the costs faced by the paternalistic system to repair the mistakes of the individuals will not be compensated by increments of their knowledge because they will tend to adopt cognitive hazard behaviours)

$$F_J = p(k)U_h + [(1 - p(k))U_w + [(1 - p(k))]J - C k$$

The Judiciary system compensates a possible wrong choice increasing the utility of the individual by J

The first order condition will therefore be:

$$C = \left[\frac{\partial p}{\partial k} \right] (U_h - U_w - J)$$

This implies that every individual will be available to spend time to research the best solution until the costs are lower than the advantage acquired in terms of greater utility.

$$(U_h - U_w - J)$$

Certainly, the paternalistic choice by the legislator will imply costs related to justice administration and to private contracts. Since the tribunals will intervene to settle the possible litigation about the transactions, there will be greater uncertainty on the enforceability of the contracts, and to counterbalance the transactive costs, there will likely be a decreasing of the transactions of an increment of the prices. Paternalism will obviously be convenient only in cases where the benefits are greater than the costs related to the restriction of individual freedom, including the potential moral and cognitive hazard previously mentioned.

5.4 Paternalism in case of notarial intervention

One of the main hypotheses of behavioural *law and economics* is that the reference context can strongly influence the behaviours of the economic agents and of the policy makers. The legal system that intends to face the individual tendency to make irrational decisions could, in some cases, have negative effects such as moral and cognitive hazard (in this case the individual behaviour is considered to be an endogenous variable within the legal system). Nevertheless, the level of moral and cognitive hazard is correlated to the type of the analysed context and to the adopted regulation. In the case of the notaries (e.g., real estate transactions), the context corresponds to a “*one-shot transaction*” model because in the great majority of the cases the individuals make one single transaction in their life-cycle, or likely a very limited number of transactions that do not allow them to acquire a relevant technical legal competence through the experience. The level of knowledge of the “average individual” is obviously insufficient to allow him an adequate self-protection through progressive learning using his experience.

Instead, a protection based to the legal theory would require efforts and resources disproportionately compared to the targeted objective (the opportunity costs will lead individuals to opt anyway for professional advice) and, in some cases, it may be not feasible because of the lack of technical and cultural requirements needed to understand the complexity and the consequences of the obligations that they are going to sign.

6 EU law, internal market, professional qualifications; general interests and proportionality principles

In this paragraph we analyse the characteristics of the notarial profession and the relationship between national regulation and European normative. Specifically, we analyse (even if notaries are explicitly excluded because appointed by an official act of government and participating to the exercise of the public powers, see note 14) the Directive 2015/849 concerning the professional qualifications and the EU Directive 2018/958 (28 June 2018) concerning a proportionality test before the adoption of a new regulation of the professions. We will see that the requirement of the notarial professions is justified by the protection of the public interest (protection of the consumers, good administration of the justice, certainty of the business relationships) and respectful of the proportionality principle. The information

asymmetry and the consequent need of protecting the average consumer (who is not able to evaluate the legal competence), require some protections (academic qualifications, normative selection and territorial competence).

The obligation of membership of the territorial professional body is respectful of the proportionality principle because it guarantees the respect of the complex professional obligation of the deontological code (created to protect customers and the community, and not applied as protection of the interests of the professional category but to guarantee high standards of protection of the quality of the professional service). The incompatibility with other professional activities is finalised to guarantee independence and integrity, and therefore, always to protect the final user. The limited restrictions of advertising have the final aim to protect the users from fake and misleading advertising respecting the proportionality principle, and to offset the deficiencies coming from asymmetric information (taking into account the proportionality principle). The limits concerning the professional practice in associated form are justified and proportionate because there are many other partnership forms that are more suitable and do not compromise the personality of the professional service (professional association).

Such debates will be analysed in the next paragraphs from a legal point of view as well as through some typical considerations of the economic analysis of the law.

6.1 Directive 2005/36/CE and proportionality test

The Directive (UE) 2018/958 of the European Parliament and the European Council, 28 June 2018, concerning a proportionality test before the adoption of a new regulation of professions, applies to regulated professions subject to the application of the 2005/36/CE (considerandum 8). First, it should be emphasised that the Directive 2005/36 contains the explicit reference to the notarial profession in the considerandum 41. This considerandum disposes that the Directive is without prejudice to the application of Articles 39(4) and 45 of the Treaty concerning notably notaries, in particular, and therefore excluding from the freedom of establishment the activity participating, even if occasionally, to the exercise of the public powers¹⁴.

Nevertheless, as an exercise of analysis, hereafter we consider the application criteria of the Directive on the proportionality test, in order to assess the fairness of the notarial regulation. Therefore, we will examine, as an example, the Italian national regulation on the notarial profession in light of the disposition of the EU Directive. In Italy, the requirements of the notarial professions are justified by the need to protect public interests and conform to the proportionality principles (i.e., as unrestrictive as possible to reach the results deserving protection). Clearly in order to violate the proportionality principles, they should be applied in a compatible way with the imperative needs (protection of the users, good administration of the justice, certainty of the business relationship), avoiding every automatic rejection to the demands by the EU citizens:

¹⁴ Moreover, notaries are explicitly exempted from the Directive on professional qualifications (art. 2 par. 4, as modified by the Directive 2013/55/UE and considerandum 3 of the Directive 2013/55/UE). Since the directive on the proportionality test has the same field of application of the Directive on professional qualifications (art. 2, par. 1 and considerandum 8 of the Directive on the proportionality test), it implies that also notaries are outside the application field of the Directive on the proportionality test.

a) entry barriers:

Since 2003, Italian citizenship is no longer required for the acceptance to the notarial profession.

Obviously, there are other entry requirements that are deemed justified, namely:

- academic qualification and compulsory apprenticeship: the asymmetric information and the consequent need to protect the average user (who is not able to assess legal competence), make it necessary to require an Italian University degree in law (*laurea in giurisprudenza*, or a foreign degree considered equivalent by an Italian University), in order to practice in the notarial profession. The compulsory apprenticeship is reduced to 18 months (compared to the previous 24) and can be anticipated of 6 months during the university course. For lawyers and judges with one year of experience, the apprenticeship is reduced of 8 months to avoid (considered already acquired experience in the field of law) prolonging the traineeship and to respect the proportionality principle.

- Competitive examination and *numerous clausus*: The provisions encompass the requirement for guaranteeing the quality of the offered services and to avoid risks for the users. The Examination Commission is not only composed by notaries (needed to evaluate the competence of the candidates), but also by judges and University professors. This all guarantees the proportionality principle because the State has maintained the entry control (through Academic and judicial components) without delegating it to private operators, and also ensures compliance with the competition law as affirmed by the decision Mauri C-250/03.

- *Numerus clausus* and territorial competence: They are defined by law and compliant with the proportionality principle because they are linked to demographic parameters. In order to avoid an over restrictive approach, territorial competence was expanded and now includes the district of the Court of Appeal, even if respecting the assignment of a specific seat and the obligation of assistance to the assigned seat in order to guarantee the service on the territory to the users who are not able to move.

b) Subsequent barriers

- Obligation of being part of the territorial professional body and respect of the deontological code: This obligation is respectful of the proportionality principle because it is connected to the role of the District Councils and Archives to verify the respect of the complex professional notarial regulation and conduct code that protects the citizens and the community. The deontological control (CO.RE.DI) represents the correct balance of the different needs (impartial evaluation of infractions by third parties). In particular, the conduct code should not be applied as an instrument of protection of the professional category, but rather as shared regulations to guarantee high qualitative protection standards of the professional performances (i.e., notaries have strict compulsory obligations concerning continuous professional training). Moreover, the international organisations (e.g., FATF, OECD, World Bank) emphasize the importance of the professional bodies, especially concerning supervisory entities in relation to the conduct of their members and the correct application of the guidelines on anti-money laundering and the deontological controls¹⁵. In fact, the legislative decree (Dlgs 90/2017) transposing the Directive 2015/849, has attributed to the professional bodies, regulatory and

¹⁵ FATF Guide for professionals, June 2019, see in particular SRB Self-Regulatory Bodies.

sanctioning powers. This is a crucial role because it aims to clarify to their members the actual provisions abstractly foreseen by the primary law.

- Incompatibility with other activities: The incompatibilities foreseen by the notarial law (i.e., the notarial activity is not compatible with other business activities, civil servants, lawyers and bank directors) are finalised to guarantee the independence and integrity of the profession and therefore to protect the final user. As also decided by the Italian Supreme Court (Cassazione - Decision 5270 of the 4th March 2013), the objective of such restrictions is to safeguard the impartiality that characterises notarial functions. Moreover, there are some limits to these incompatibilities (for instance, the possibility to exercise academic activity in Schools and Universities) that make them proportional to the objective.

- Tariff: In Italy there are no restrictions because they have been abolished. Nevertheless, a tariff established by law could give clearer reference and protection to the users as in almost all the EU notariats adopting fixed or proportional tariffs for their public services. Twenty on twenty-two CNUE notariats (including Belgium, Germany, Luxembourg and Austria) adopt tariffs.

-Commercial promotion (advertising): The limited restrictions now existing at deontological level were created to protect the users from fake and misleading commercials filling the gap coming from the information asymmetries and respecting the proportionality principle also in light of the jurisprudence of the EU court of Justice on the issue (*Société fiduciaire nationale d'expertise comptable*, case C-119/09; *Doulamis*, case C-446/05).

- Associate exercise of the notarial profession (professional and multi-professionals associations): Mono or multi-professional associations are not foreseen by the law. with regards to mono-professional associations (associations among notaries), the Ministerial Decree 34/2013, implementing the Directive 200/123/EC, excludes notaries because of their public function. This choice is justified, besides the limits disposed by the European Directive, and is proportional because there are other suitable forms of association (professional partnership) that do not jeopardize the personality of the service provided. The prohibition of multi-professional associations does not create a problem of proportionality as recognised by the decision *Wouters* (C-309/99). Moreover, in recent years, the European Council in the “recommendations of the Council to Italy on the national program of reforms and stability” did not mention the notarial profession, but rather criticised the weakness of the Italian economic system connected mostly to the fiscal and labour policies, and to the lack of infrastructures.

6.2 Notaries, EU law on professional services and market failure

Some professional services need an attentive regulation because it would guarantee the equitable provision of public goods and the social interest. Mainly in the case of public goods, the lack of State intervention and correction measures may cause market failures. In this case, deregulation may not always imply positive effects for consumers and social welfare. The presence of information asymmetries and the need – especially in the company and real estate sectors - of producing positive externalities (benefits for the entire community, even for those who are not directly paying for the services), forcibly require a regulation restricting the provision of these services only to high-level public officers.

The following table summarizes some features and consequences of the main types of market failures and the reasons for regulation through a public function (i.e., notaries).

Tab. 3 - Market failure and need for State remedies

Market failures typologies	Features	General remedies to market failure and/or possible causes
Obstacles to pure competition	Entry Barriers	- Due to regulation and self-regulation (if not correctly planned)
	Entry Barriers for no nationals	- discrimination related to the denial of similar 'national treatment' - intangible barriers due to dominant positions and difficulties for new service providers to be cost competitive
	Lack or inadequate application of competition law	Enforcement of law
Externalities	Intra-sectorial policies	- Preventing failure with specific sector and intra-sectorial regulations
Internalities	Information asymmetries	- guarantees and transparency - reliable signalling by high qualified providers (Self and State regulation) - Self-regulation on the basis of framework laws - Setting minimum quality standards for the involved professionals (e.g. diplomas and licensing)
	Moral hazard	- discipline rules (counteracting empirical undesirable behaviours on the market) - professional guidelines and rules to guarantee the 'quality' of the provided services - Technical regulation
	Adverse selection	-impartial behaviour and supervision – disciplinary rules

In the case of notaries, their services are characterized by relevant positive externalities for the whole society. In fact, notarial legal control is a propaedeutic step all the information recorded in the Public Register (Real Estate and Business Registers). That is to say that notarial services produce a benefit not only for the clients involved in the transaction, but also for third parties (e.g., banks and creditors) and for the community. For these reasons, notaries, in addition to being highly-qualified professionals, are first and foremost, Public Officers mandated by the State to the legal control of very delicate transactions (their functions are equivalent to those of the judges, from the point of view of preventative justice).

6.3 Barriers created by national services regulation

In some cases, domestic regulation may create some barriers in the EU market. These may be justified by the general public interest and some national peculiarity to be preserved in order to reach better social utility. The following table illustrates the most significant forms of discrimination that may occur in the market and can be classified as “arbitrary” and/or “necessary” (in case of market failure).

Tab.4 - Possible discrimination in the EU market and their justification or arbitrary

	Allowed barrier (and justified in case of market failures)	Arbitrary barrier (discrimination)	Adequateness of Notarial regulation and activity
Discrimination vs no-nationals	In very few cases may be allowed (general interest)	[protectionism]	
No discriminatory, in case ‘regulatory differences’ among Member States	√lack of harmonisation or different standards for guaranteeing the public interest	not justified (Purely arbitrary)	√ e.g. requirement of national public competitive examination in order to guarantee the competence and high quality standards of legal control

In the European Union, measures to correct market failures can be taken at two “levels of government”:

- 1) at EU level: in these cases, all barriers will be eliminated among member States (in some cases only few barriers can still persist);
- 2) at country level: This may happen often because EU countries still have in practice some discretion in services regulation and supervision in order to guarantee the public interest and the best results with the minimum effort in terms of utilised resources (e.g., local diversity can justify national regulation, trough subsidiarity and proportionality principle, in order to guarantee the maximisation of the general interest and the best possible results).

Sometimes, standards and licenses/certification are set in order to impose limitations or guarantees on the quality of certain activities; the evaluation is often carried out with an ‘economic needs’ test applied to the entry competitors. If the rules are justified by market failures, they do not represent offensive ‘barriers’ to the services exchange and freedom of establishment (they can still be defined as ‘barriers,’ but they are appropriately justified by the emersion of a market failure). In the case of notaries, the national rules and the selection mechanism are justified from the general public interest point of view and to correct an inevitable market failure (see also Tab. 3 above).

6.4 Notarial activity: public good and positive externalities for the community

The supply of public good (guarantee of secure legal transactions) implies State intervention in order to reach the Social Demand (LCS) in the optimal way; i.e., maximizing the number of beneficiaries (citizens) at an equitable cost for the direct beneficiaries and the whole community.

Fig. 6 – Supply of public good and State intervention to meet the social demand

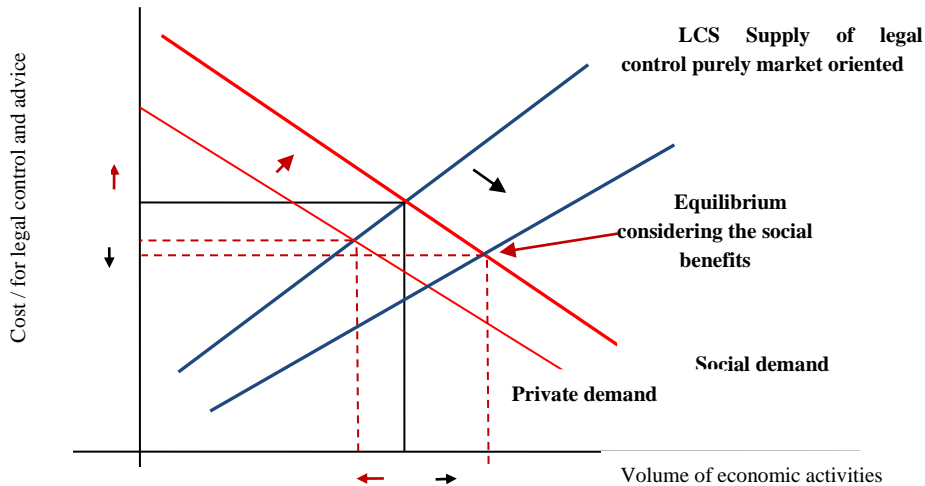
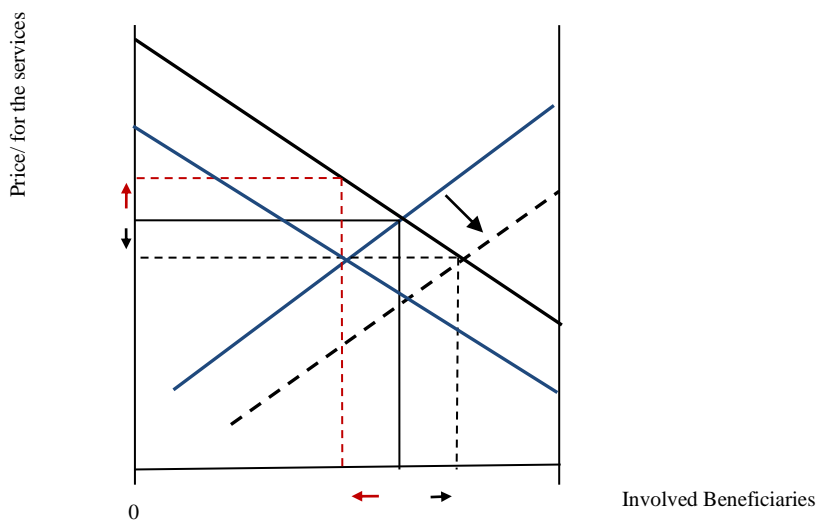


Fig. 7 – Internalities and State intervention in order to reach the suitable social utility

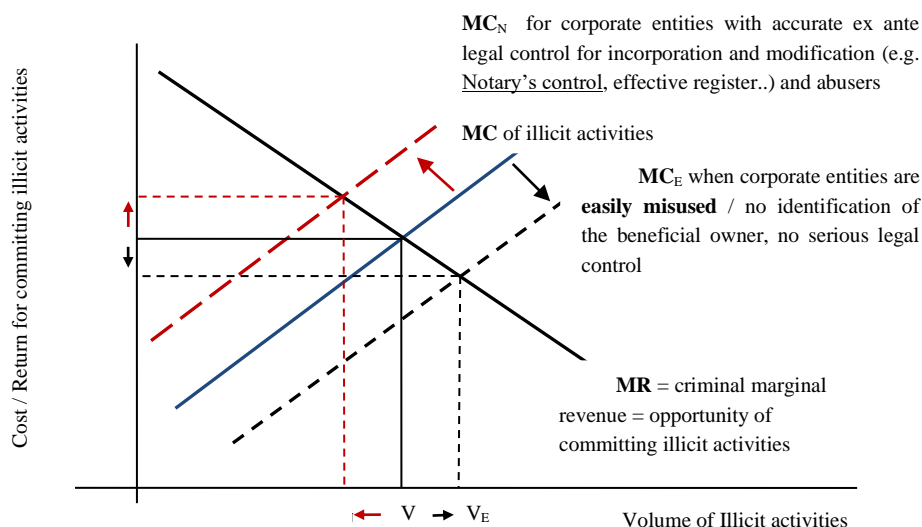


6.5 Effects of the lack of impartial legal control

The lack of legal control (e.g., real estate transaction), considering a simple supply-demand model of the illicit activities, may imply a decrease of the marginal cost (from MC to MC_E) for the abusers, with consequent increase of the total volume of the illicit activities (from V to V_E).

An accurate legal control (high legal standards) would imply an increase of the marginal cost (from MC to MC_N) for the illegal agents, a consequent reduction of the illegal activity (from V to V_N) and an improvement of the socio-economic context.

Fig. 8 – Effects of the reduction of compulsory legal control



6.6 Italy: peculiarity of services provided by notaries (general interest and social utility)

The main requirements in order to guarantee the high-level competence and independence of this public function are (as entry requirements) the academic qualification (together with a compulsory apprenticeship) and the selection through a public competitive examination. The determination of the number of notaries, in order to guarantee the public interest, is set by law according to demographic criteria (*numerus clausus*). The information asymmetries and the consequent necessity to protect the weakest parties (consumers) require that the high-level legal experts (supervising the transactions) possess high academic qualification in Law. The remuneration of the notarial activity is not regulated by tariffs anymore (fees are now freely negotiated with the clients).

Entry requirements

requirements	reasons/ comments / justification
Academic qualification and compulsory apprenticeship	(University degree in Law – 5 years) and compulsory apprenticeship under the supervision of a notary (respectful of the proportionality principle)
public competitive examination (numerus clausus)	These requirements are important to ensure the quality of the provided services and to protect the consumers. The examining board of the public competitive examination is mainly composed by University Professors and judges (under the direct supervision of the Ministry of Justice).

Professional requirements and conduct rules

requirements	reasons/ comments / justification
respect of codes of conduct and Professional Body membership	Membership is required in order to control the compliance with the laws and the code of conduct (and to protect consumers and the whole community). The Disciplinary Courts (CO.RE.DI) are composed of notaries and of judges. Moreover, the code of conduct represents, besides the interest of professionals, a regulation for guaranteeing the high-quality standards of the profession.
continuous professional training	A compulsory number of credits should be gained by notaries on a regular basis.
incompatibilities with other activities	Notarial practice is not compatible with some other activities (e.g., it is not compatible with civil servant employment, being a lawyer, commercial activities and the bank

requirements	reasons/ comments / justification
	director position) these rules guarantee the independence and reliability, and therefore, protect consumers and the whole economic system.
advertising	Some advertising limits may be set to protect consumers and overcome information asymmetries (see also ECJ case-law of the issue <i>Société fiduciaire nationale d'expertise comptable</i> , case C-119/09; <i>Doulamis</i> , case C-446/05)
associated exercise of profession (professional companies and multidisciplinary practices)	notaries cannot be members of multidisciplinary practice companies. A specific law (d.m. 34/2013) conceived to create new types of companies for professional activities (implementing directive 2006/123/EC in Italy), explicitly excluded notaries because of their public functions directly delegated by the State

6.7 Are the criteria of the notarial professions proportional to the objective of public security?

Hereafter, we report some claims of the ZERP study¹⁶ that even if led by liberal ideologies, recognise some peculiar characteristics of the notarial activities. The ZERP study (commissioned by the EU) about professionals involved in real estate transactions, among many statements in favour of free market, also claims that “*mandatory intervention of a notary or a lawyer may only be proportional in transactions if it extends to the drafting of the contract as well. However, if the procedure for consumer transactions, including the registration, is sufficiently standardised and summarised in understandable step by-step instructions, adequately informed consumers should be able to handle such transactions themselves*”¹⁷. The core point, therefore, seems to be “the drafting of the contract” (but this is exactly what civil law notaries do), neglecting that the registration is also a delicate part of the entire procedure because it produces legal effects (a legally-controlled input of the register produces positive externalities and legal certainty). The ZERP study also claims that “*exclusive rights of notaries may in a first respect be plausibly justified on grounds of consumer protection (trust in the quality of legal advice) and, more generally, commutative justice, i.e., to receive adequate value for money. Anyone, consumer or business, who seeks the assistance of a professional, should be able to fully rely on the competences and skills of the professional and the quality of the service “bought”. Indeed, even an informed consumer or a business cannot be expected to control a professional. To the contrary, reliable quality standards decrease the transaction costs for consumers and other clients who do not have to spend time and money undertaking quality checks*”.

6.8 Restrictions or Consumer Protection (CP)? A CP index?

As we previously analysed, considering the public interest and the public function of the notaries, some of the PMR features may be reconsidered as an index for consumer protection. The ZERP study used and elaborated data regarding legal professions and also integrated its indexes with a consumer protection index taking into account, for instance, “professional insurance”, “quality control education requirements”, “continuous education,” and “obligation

¹⁶ SCHMID, C. , SEBASTIAN, S. LEE, G. , FINK, M. AND PATERSON, I., *Conveyancing Services Market* Centre of European Law and Politics (ZERP), University of Bremen, Study COMP/2006/D3/003.

¹⁷ Given the complexity and the various legal implications of the real estate transfers, a standardised procedure will not guarantee the consumer. The final consumer will receive full protection and better assistance with a specific contract drawn up by a public officer on the basis of the peculiar needs of the given case.

to provide the service”. Therefore, starting from this scheme, the PMR index could be reassessed, improved and integrated with a Consumer Protection Index CPI (of course the PMR criteria should be rebalanced in order to make it compatible with the CPI)

Tab. 5 - Consumer protection index: a possible scheme

Sub-Index	Themes/questions	weight	scale	method	score	notes
CP1	Compulsory indemnity insurance					
CP2	Conduct control/quality control / Independent supervision					
CP3	Education requirements					
CP4	Continuing education					
CP5	Obligation to provide services					
CP6	Probative value /enforcing power of the deed					
CP7	Cost transparency /Clear indication of the service provided					
CP8	Switching costs					
CPI	Country scores (0-6)					

7 Final reflections

7.1 Which part of the PMR criteria for notaries really has a positive effect on the consumer?

If we accept the paternalistic choice of the legislator to protect the consumer and we agree on the high standards with respect to education and selection of the public officers guaranteeing the credibility of the entire property transfer process, we should reconsider the PMR scheme. If we think that professional standards are needed and are proportional to the objective, the open issue is the quantification of a fair compensation of the services provided by the notaries and which criteria have to be used. In other words, if we agree on setting high standards and these are deemed proportional to our objective, the criteria of selection and conduct (high education, continuous education, selection through a competitive examination, avoiding misleading advertising, etc.) have to be considered as “a protection for the consumer” instead of an “entry barrier” or a “conduct regulation” limiting free competition. Moreover, the fact that the overall PMR indicator is highly aggregated, as it incorporates in a single figure over 1000 data points, could be an obstacle rather than an advantage for the policymakers. This aggregation could hide the subsector score and therefore, the policymakers - missing the detail of each particular aggregated feature - may fail to individuate the right aspect where to intervene.

7.2 Do we really need to focus on sporadic notarial services? Which other recurrent services for the citizens are we neglecting to assess?

Protection of the consumer is often based on competition, nevertheless the analysis of the consumer biases (for example switching costs or misrepresentation of the offer) and of the nature of supply market should guide the assessment of possible distortions and defend the consumer, ensuring transparency and clarity on costs, services and products (taking into account the final burden for the consumer and the simplification and clearness of the supplied services and products). The simplification and supervision of some relevant financing, intermediation and collateral services (offered to the companies and the individuals) may boost the productivity of all sectors connected to them. These intermediate inputs may have a greater impact on the cost, quality and productivity of all their connected trades and services.

7.3 PMR criteria for notaries. Can we avoid a race to the bottom?

In the previous paragraphs, we analysed the peculiarities of the notarial profession and expressed some reservations of the suitability of the PMR in order to measure the features of the notary system. Nevertheless, one could argue that differently from other public officers, notaries directly receive compensation from the clients and this could be a type of market with monopolistic features. In paragraph 5 and 6, we analysed (from a legislative and economic point of view) the public interest and the risk of market failure that justify the need for a different regulation of this profession. The analysis in paragraphs 2 and 3 show that the final effect of the regulation in many cases produces lower costs and better quality of the notarial services (better results than other system). Likewise, the assessment on the FATF requirement for AML (see par. 4) shows that a more regulated system of professionals guarantees better compliance with the anti-money laundering policies, and therefore, useful externalities for the consumer and the

whole country system. As long as costs are fair, and services are guaranteed with high quality standards, we may need to reconsider the assessment scheme of the PMR¹⁸.

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¹⁸ Notaries, as underlined by the EU legislation (see introductory paragraphs), can be seen as ex ante judges as concerns the nature of their services that must necessarily be highly regulated in order to ensure the correct administration of the Justice. The PMR assessment scheme may have less adaptability to professions who are part of the administration of the justice.

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Antonio Cappiello



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