

Assessment and prospects of opening up the French notarial profession to competition in 2015

I. INTRODUCTION

In 2015, France undertook an unprecedented reform of the conditions for the establishment of notaries. By significantly reducing barriers to competition, the new regulation of this sector earned France a place among the five OECD countries with the lowest "Notarial PMR indicator" in 2018 (its overall score was 3.54, including 1.86 for the assessment of barriers to entry and 1.69 for practice review)¹.

The Law No. 2015-990 of 6 August 2015 for growth, activity and equal economic opportunity, known as the "Macron Law", revised the legal framework put in place to remedy the market failures inherent in the activities of certain legal professions², including notaries. In addition to their direct beneficiaries, these services contribute to the proper administration of justice³. There is also an asymmetry of information between the users and providers of certain legal services, as the latter require a high level of technical expertise which consumers are usually not in a position to assess. Therefore, the management of these public goods is essential to guarantee quality of service and ensure fair access to the offer throughout the territory.

These derogations from the principle of competition (*de jure* monopolies, regulated tariffs, *numerus clausus*, etc.) have been the subject of fierce controversy. As early as 1960, the Rueff-

¹ OECD, 2018, *OECD Product Market Regulation (PMR) Indicators: How does France compare?* The PMR varies from 0 to 6 and the higher the score, the more restrictive the regulation is of competition. France is ahead of the Netherlands and behind Sweden, the United States and Costa Rica. It should be remembered that France is a *civil law* country and, consequently, its score is more difficult to compare with that of *common law* countries, where the notary does not necessarily have a monopoly on certain activities.

² In addition to notaries, the six other legal professions affected by the Macron Law are court bailiffs, commercial court registrars, court-appointed administrators, court-appointed liquidators, judicial auctioneers and lawyers at the French Administrative Supreme Court (Conseil d'Etat) and French Supreme Court (Cour de Cassation).

³ European Commission, *Report on competition in the liberal professions*, 17 February 2004.

Armand report denounced "*situations of sclerosis, Malthusianism and maladjustment [...] in the organisation of certain professions*" which, according to the authors, constituted "*islands of resistance to the necessary adjustments [...] required by technical progress, demographic renewal and social change*"⁴. Nearly 50 years later, in 2008, the Attali report⁵ in essence made similar criticisms, pointing out the stasis of these professions and the anachronism of their regulation methods. In 2014, the Ferrand report called for them to be modernised because "*inflexibilities have set in and persisted for decades although the general interest no longer justifies them*"⁶.

The main dysfunctions in the sector were analysed by the Autorité de la concurrence (hereinafter "the Autorité") in a 2015 opinion⁷: difficult access to the private exercise of the profession (unlike salaried practice) due to a long-term stagnation in the number of offices, particularly for young graduates and women, significant geographical imbalances in the supply, a disconnect between regulated tariffs and the costs of carrying out the services concerned. This low level of competition led to secure incomes, which did not encourage innovation or quality of service improvements.

Despite considerable resistance from the professional bodies, the Macron Law responded to these concerns by modernising the regulation of the legal professions in question along two major lines: lowering the barriers to entry and redirecting fees towards costs. The legislator has given the Autorité a key role in its implementation.

More specifically, with regard to the lowering of the barriers to entry, the Autorité is responsible for identifying those areas of the country where there is an insufficient number of notaries and for assessing the number of new professionals needed to compensate for this deficit. This policy has had remarkable effects, particularly in the case of notaries, where it has led to an increase in the number of private practitioners of more than 30% in six years, as well as a significant increase in the number of women and young people in the profession.

The reason these results are so significant (IV.), just a few years after the law came into force, is that the terms of the reform (III.) adequately matched the characteristics of the notarial profession in France (II.). However flattering this initial assessment may be, it inevitably leads to an interest in improvements that could be made, in the near or more distant future, to this structural reform for the French economy (V.).

II. THE NOTARIAL PROFESSION IN FRANCE

In France, notaries are appointed by the Minister of Justice, who assigns them an office. At the end of 2020, there were more than 10,000 notaries owning or associated with an office, and

⁴ *Report on Barriers to Economic Expansion*, 1960, pp. 14 and 15.

⁵ *Report by the Commission for the Liberation of French Growth*, 2008.

⁶ *Regulated professions - For a new youth*, 2014, p. 1.

⁷ Opinion of the Autorité de la concurrence No. 15-A-02 of 9 January 2015 regarding competition issues concerning certain regulated legal professions.

practising in more than 6,500 offices. In addition to the activities reserved to them (creation and retaining of authentic instruments), notaries can carry out competing activities, such as property negotiation (in competition with estate agents, for example) and legal advice.

A. THE SCOPE OF THE MONOPOLY

Notaries have the exclusive competence to authenticate and preserve documents on the one hand, and to create certain documents, on the other.

1) The competence to authenticate and preserve documents

The function of notaries is to confer authenticity on the documents they draw up and to ensure they are retained. In this context, they are responsible for designing, drafting, having the parties sign, authenticating by affixing their signature and, lastly, retaining the document.

The authentication of a document gives it a high level of legal certainty, the attributes of which are certainty of date, probative value and enforceability. The authentic instrument is fully authentic in terms of its date and content and in terms of the information established and verified by the notary, and it is enforceable by right in the same way as a legal decision.

2) Jurisdiction over certain documents

Only notaries are authorised to create certain documents. For example, notaries have a monopoly on deeds of donation, marriage contracts and property sales.

B. ACCESS TO PRIVATE PRACTICE IN THE PROFESSION BEFORE 2015

The system for creating notarial offices prior to the Macron Law was characterised by a high level of Malthusianism.

1) The modalities for accessing private practice in the profession

Until 2015, the most common means of accessing private practice was through appointment to an existing office. In this case, the candidate had to buy the office of their predecessor or acquire shares in a company holding an office. More rarely, the new incumbent could be selected by competition for appointment to a new or vacant office. The average ratio was one creation for every 15 successions⁸.

Although they had no decision-making power in the strict sense of the term, the profession's bodies were very involved in regulating the number of offices. They were part of the French Committee for the location of notarial offices (Commission de localisation des offices de notaires, hereinafter "CLON") which was responsible for assessing the need for new offices. CLON's prerogatives also extended to the abolition and transfer of offices, and to the opening of branch offices or their transformation into separate offices. CLON was also involved in the

⁸ Opinion No. 15-A-02 of 9 January 2015 mentioned above.

implementation of the compensation mechanism for notaries who felt they had suffered prejudice due to the creation of a competing office⁹. Furthermore, the profession was consulted by the government at every stage of the process of appointing a professional (e.g. opinion on character or professional capability).

When it assessed the reform in 2020, the body responsible for representing the entire notarial profession to the government - the French Supreme Council of Notaries (Conseil Supérieur du Notariat, hereinafter "CSN") - itself acknowledged that "*not enough offices have been created for years, and even decades [...]. The number of notaries in relation to the population and GDP has clearly fallen*"¹⁰.

2) A stable supply and difficulties replacing the generations

The mechanisms described above for accessing the profession have led to a stagnation in the number of offices and notaries and a disconnect between the supply of notaries and the demand from individuals and companies. In addition, they were not able to absorb the flow of graduate notaries. Between 2005 and 2015, the population of France grew by more than 6% and GDP by more than 8%. While the number of qualified notaries was estimated at more than 12,000 over the period, the number of notarial offices increased only by around 60, and the number of private notaries by several hundred. Professionals were appointed "for life" and worked well into old age, so that there was a ratio of 1:5 between the flow of those leaving and potential entrants to the profession.

Faced with these difficulties in professional integration, graduate notaries largely turned to salaried employment, or to other positions which did not necessarily reflect their level of qualification. The CSN estimated that 10% of graduates never entered the notarial profession.

3) Sub-optimal geographical distribution of offices

The system prior to 2015 guaranteed a minimum notarial presence throughout the territory, but did not take into account population density. As a result, in sparsely populated areas, the number of notaries per inhabitant was higher than in densely populated urban areas, where demand was nevertheless higher. Notarial density thus appeared to be inversely proportional to population density, which betrayed a flagrant imbalance between supply and demand.

It follows from the above that the system for creating notarial offices prior to the Macron Law led to quasi-stagnation and a sub-optimal distribution of supply. Consequently, the increase in demand for legal services and the lack of potential competitors played a key role in the increase in the average income of private notaries and generated a strong risk of a deterioration in the

⁹ This mechanism, which provided for the possibility of compensation paid by the holder of the created office to their injured colleagues, was ruled unconstitutional in 2015. On this occasion, the Constitutional Council recalled that an office that believed it had suffered unusual and special damage could always hold the State liable on a no-fault basis due to the laws and ask for compensation on the basis of the constitutional principle of equality in terms of public burdens.

¹⁰ CSN report on the evaluation of the Macron Law, 10 August 2020.

quality of service (reduced time to devote to users, lack of incentive to innovate, etc.), particularly in areas with a shortage of notaries.

III. THE REFORM ON THE FREEDOM OF ESTABLISHMENT OF NOTARIES

The new procedures for the creation of offices set out in the Macron Law have a threefold objective:

- to improve geographical coverage, in order to bring notaries closer to the population and businesses in underserved areas;
- to open up the profession by giving young people and women the opportunity to set up on their own and offer new services;
- to preserve the economic viability of existing offices, particularly in sparsely populated rural areas.

A. THE REFORM OF THE PROCEDURES FOR CREATING OFFICES

To achieve these objectives the Macron Law requires the Autorité to submit to the government, every two years, a proposed map of areas where the creation of offices appears "*useful to increase proximity or the provision of services*". This map "*is accompanied by recommendations on the rate of establishment compatible with a gradual increase in the number of professionals in the area in question*"¹¹.

The Autorité's method for assessing and mapping the need for new notaries was set out in an opinion of 9 June 2016¹². This method, validated by the Council of State¹³, is reused to create each map and updated if necessary to take into account new circumstances, such as the effects of the health emergency after March 2020.

The geographical market

To divide the French territory into establishment areas, the Autorité considered the definition of the relevant geographical market for notarial services. It is apparent from its investigation that users still tend to choose their notary on the basis of the distance to their office. The majority of the offices' clientele would therefore be located within a radius of approximately 15 km.

On the basis of these insights, the Autorité selected the "employment zones" established by the French national institute of statistics and economic studies (Institut national de la statistique et des études économiques, INSEE) as the relevant territorial subdivisions for analysing notarial services. They correspond to the geographical area within which most of the working population resides and works. This choice led to the territory being divided into approximately 300 establishment areas.

¹¹ Article 52 of the Macron Law.

¹² Opinion No. 16-A-13 of 9 June 2016 on the freedom of establishment of notaries and a proposed map of establishment areas, together with recommendations on the pace of creation of new notarial offices.

¹³ Council of State, Decision No. 403815 of 16 October 2017.

Taking the offer into account

To measure the supply of notaries, the Autorité focused on private notaries (office-holders and partners) without taking into account employed notaries. Indeed, the latter cannot have their own clientele, hold shares in the office capital, or have the right to vote for the adoption of strategic decisions. Therefore, an increase in the number of salaried notaries increases market concentration, whereas an increase in the number of private notaries intensifies competitive emulation.

Taking demand into account

Based on an econometric analysis, the Autorité estimated in 2016 that population growth of 1% corresponds to an increase in the turnover of notaries of around 0.98%. The Autorité estimated the evolution of notarial turnover in the coming years based on population projections drawn up by INSEE and the turnover of the offices in the area over the last five years¹⁴.

Recommendations for the establishment of notaries

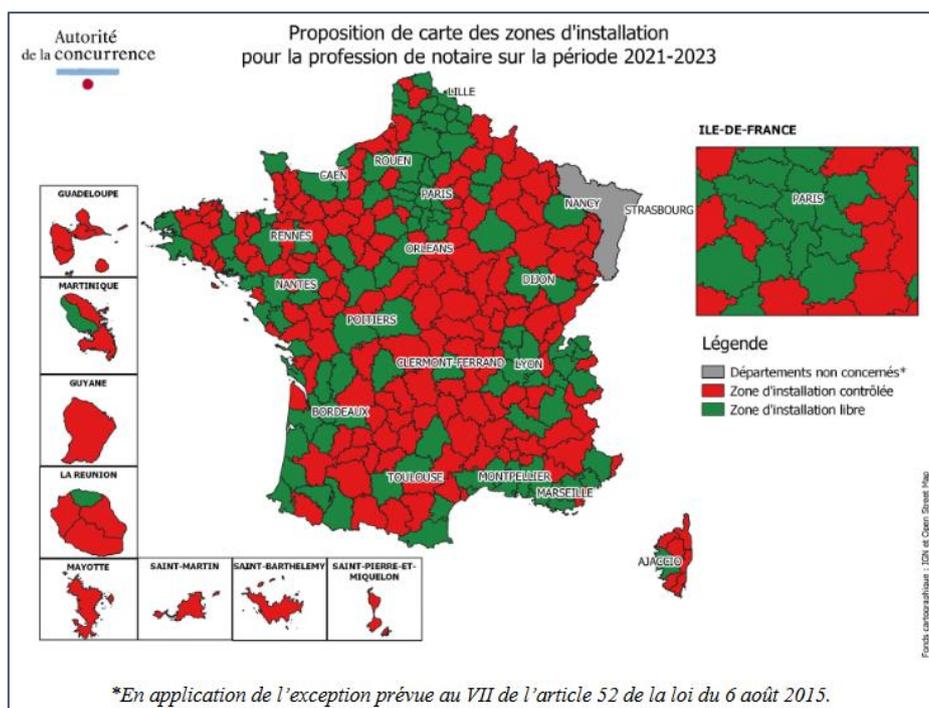
Using turnover thresholds per private notary, the Autorité quantified the number of new notaries needed in each establishment area to rebalance supply and demand by 2029. Then, to satisfy the requirement for progressiveness set out in the Macron Law, and in the light of economic factors, the Autorité determined the number of notaries to be established in the next two years, which represents only a limited proportion of the identified long-term need. The areas where the creation of notarial offices is recommended over this two-year period are called "free establishment areas" (in green on the map below), as opposed to "controlled establishment zones" (in red on the map below).

In 2021, for France as a whole, the Autorité estimated the need for between 2,400 and 2,600 new notaries by 2029. Due to the uncertain consequences of the health situation, it has nevertheless proposed to the government the adoption of a very cautious pace over the period 2021-2023 (see map below)¹⁵, allowing the private establishment of only 250 notaries (i.e. barely 10% of the identified long-term need). It had previously recommended the creation of a number of offices allowing the private establishment of 1,650 notaries in 2016-2018 and 700 notaries in 2018-2020¹⁶.

¹⁴ For the sake of prudence, the Autorité has not included the impact of the property market on notarial turnover, but corrected the turnover data to take account of the reductions in regulated rates.

¹⁵ Opinion No. 21-A-04 of 28 April 2021 on the freedom of establishment of notaries.

¹⁶ Opinions No. 16-A-13 of 9 June 2016 and No. 18-A-08 of 31 July 2018 on the freedom of establishment of notaries.



B. THE NEW CONDITIONS FOR APPOINTMENT TO THE CREATED OFFICES

The procedure for appointment to a created office depends on the type of area in which the candidate wishes to set up.

For the free establishment areas ("green"), the French Minister of Justice appoints applicants based on the recommendations on the map, and in the order in which applications are registered. However, if the number of applications for the establishment of offices registered for the same area within twenty-four hours of the opening date for the filing of applications exceeds the recommendations, the order of these applications is determined by the electronic drawing of lots, in the presence of a representative of the Autorité and the CSN.

For controlled installation areas ("red"), the French Minister of Justice may refuse the application if it finds that there is a risk of jeopardising the continuity of the operation of existing offices and the quality of service provided. The Minister must first consult the Autorité if they intend to agree to the creation of the office. In fact, with the exception of two offices established by a recommendation of the Autorité, requests to create offices in red areas have been systematically refused by the Minister of Justice over the last five years.

In addition, the Macron Law has changed the conditions for transferring offices, i.e. moving the headquarters of an office from one town to another. The latter is unrestricted within the same free establishment area, but subject to a clearance decision by the French Minister of Justice within a controlled establishment area.

IV. THE ASSESSMENT OF THE REFORM IN 2021

Six years after its entry into force, the collected data indicates that the outcome of the reform is largely positive.

A. TOOLS FOR MEASURING THE EFFECTIVENESS OF THE REFORM

The Autorité has a range of quantitative and qualitative data collection tools, which enables it not only to draw up its map proposals, but also to monitor the effects of the reform on the notarial sector.

The law states that, prior to drawing up the proposed maps, the Autorité must carry out a public consultation with all the interested parties: practising notaries, candidates for establishment, bodies representing the profession, approved consumer associations, notaries' groups and trade associations, etc. The survey covers various topics such as the appointment procedure, the impact of newly created offices on existing offices, salaried notaries, clients, the impact of the reform on the access of women and young people to the profession, and the regulation of advertising. The Autorité always collects several hundred contributions on this occasion.

The Autorité also receives annual data on the activity of each office: location, number of private notaries and salaried notaries working there, turnover, results, etc. The analysis of this data has shown in particular that the creation of offices since 2017 has not, at this stage, led to a drop in the average turnover of the notaries already in place (even if it may have slightly slowed the growth of their activity). In addition, most of the offices created in 2017 experienced sustained growth. For more than 70% of them, revenues would exceed €100,000 in the second half of 2019¹⁷, after only a few months of operation.

Lastly, following the Autorité's recommendations, the Ministry of Justice regularly publishes information and statistics on current appointment procedures (number of offices created, number of applications per area, etc.).

B. THE OBSERVED EFFECTS OF THE REFORM

The offices created since 2015 have allowed graduate notaries, especially women, to have greater access to the private practice of the profession and better meet the demand of individuals and businesses.

1) Increasing supply in areas with shortages

The reform has resulted in the establishment of nearly 2,300 new private notaries since 2017, an increase of more than 30% in supply. The median number of notaries per 100,000 inhabitants thus increased from 14 to 17 between 2016 and 2020.

This increase in the number of professionals serving the population and businesses has been focused on areas with the greatest shortages, mainly urban and coastal areas. However, no new office has weakened the economic situation of existing offices in areas where the supply was already sufficient to meet demand, mainly rural and overseas areas.

¹⁷ Opinion No. 21-A-04 of 28 April 2021.

2) Opening the profession to more women and young people

There has been a significant increase in young people joining the notary profession. Although practising notaries were able to apply for the created offices, 87% of the new offices were set up by notaries who had never previously practised privately. The average age of private notaries has fallen from 49 to 47¹⁸. The generational transition has also been greatly encouraged by the introduction of an age limit, fixed by law at 70, for practising as a notary¹⁹.

Furthermore, in 2016, women represented two-thirds of salaried notaries, but only one-third of private notaries. The reform has helped to reduce this imbalance. For example, in 2018, 60% of the candidates appointed to an established office were women. Overall, the female workforce in the notarial profession, both salaried and private, has increased from 35.7% in 2016 to 54% today²⁰.

However, the proportion of women taking up private practice is still clearly out of step with the percentage of female graduates: in 2020, only 43.8% were practising privately, whereas women have represented around 70% of notarial graduates for several years.

3) Other positive consequences

Other improvements brought about by the Macron Law were highlighted by professionals in the course of the various public consultations conducted by the Autorité.

A majority of respondents, especially notaries appointed under the Macron Law, consider the impact of the office creations to be positive for clients. This improvement in the quality of the service provided resulted in greater availability of notaries, a reduction in the time taken to process files and increased use of digital tools²¹.

Furthermore, the reform has improved the working conditions of salaried notaries. Competitive pressures have driven up their salaries, as employers compete for the best professionals. In addition, salaried notaries point to increased opportunities for recruitment and association, better consideration from associate notaries and improved working conditions, including the possibility of teleworking and more flexible hours²².

V. THE FUTURE OF THE REFORM

For the reform to continue to be successful, it is important to look at possible developments in the longer or shorter term.

¹⁸Opinion No. 21-A-04 of 28 April 2021, mentioned above.

¹⁹ Article 53 of the Macron Law.

²⁰ Website of the French Conseil Supérieur du Notariat, *Le notariat en chiffres*.

²¹ Summary of the 2020 public consultation, Annex 1 of the aforementioned opinion No. 21-A-04 of 28 April 2021.

²² Summary of the 2020 public consultation, Annex 1 of the aforementioned opinion No. 21-A-04 of 28 April 2021.

A. POSSIBLE IMPROVEMENTS IN THE SHORT AND MEDIUM TERM

1) Advertising

In its various opinions, the Autorité has called for a relaxation of the rules on advertising to enable new entrants to become known and develop their customer base.

Notaries are not currently allowed to advertise their services. Since 2019, they have been allowed to make “customised soliciting”, but this mode of communication appears restrictive, as it can only take the form of "*a postal mailing or an e-mail addressed to an identified natural or legal person*". It therefore does not allow the use of tools such as physical or telephone canvassing or social networks.

In addition, the creation of a website must be approved by the professional body to which the notary belongs.

2) The extension of the reform throughout France

At present, the system for the creation of offices under the Macron Law does not apply in three *départements* in eastern France, due to local features linked to their history.

In the Bas-Rhin, Haut-Rhin and Moselle regions, access to the profession is by competition only. Once admitted, the applicant notary is registered on a list of suitable candidates. They are appointed by the French Minister of Justice following a proposal by a commission composed of three judges and two representatives of the profession. Moreover, the CSN is still involved in the process of creating offices in these departments, unlike in the rest of France.

Although this system might seem more meritocratic at first sight, in reality it reinforces the very favourable situation of those notaries already established, because cases of offices being created are particularly rare and the appointment commission includes notaries practising in the region. There is thus no reason why the creation of offices in these *départements* should be exempt from a needs assessment by an independent authority.

The Macron Law provided for a government report to be submitted to Parliament in 2017 on the advisability of extending the freedom of establishment of notaries to Alsace-Moselle. Six years after the reform, the Autorité regrets that this report has still not been presented to the national representation.

3) Market developments

The notarial sector is undergoing a major change, in terms of both supply and demand.

As an example, the computerised entry of exchanges has been greatly accelerated by the health situation. In the spring of 2020, notaries were allowed to create authentic instruments

remotely²³, thanks to a system of video-conferencing and electronic signature. This possibility was then perpetuated for acts that can be performed by proxy²⁴.

The development of remote authentic instruments could profoundly change user behaviour. Indeed, according to the CSN, in 2016, "*more than 80% of the clientele [was located] in the immediate vicinity of the office, which [accounted for] approximately 73% of the turnover*"²⁵." However, the ability to perform certain acts remotely could remove the constraint of proximity between notaries and their clients. If this trend were to be confirmed, the size of the relevant geographical market used until now to define establishment areas would probably have to be enlarged.

Furthermore, coupled with the remote creation of documents, the increase in the number of professionals on the market could encourage clients to change notaries more regularly than before. This would stimulate competition between notaries.

B. THE EVOLUTION OF THE REFORM IN THE LONG TERM

While the objectives set by the legislator are being achieved, the question now arises of the direction to be taken by the reform.

The Autorité's latest work predicts the rebalancing of supply and demand for notarial services by 2029. In this regard, it is legitimate to ask whether the current system should be perpetuated or whether it should move towards total freedom of establishment. However, such a development cannot be envisaged without taking into account the issues of general interest and market failures specific to the notarial sector, which the Autorité regularly verifies in its opinions to the government.

VI. CONCLUSION

After six years of implementation, it seems that the Macron Law has succeeded in lowering the barriers to entry and creating more competitive emulation in the notarial services sector. It has allowed new, younger and female professionals to enter the profession in large numbers.

In the future, the Autorité will remain fully committed to the implementation of this reform, so that its positive effects are sustained over time and benefit both notaries themselves and their clients.

²³ Decree No. 2020-395 of 3 April 2020 authorising notaries to draw up a notarial deed electronically when one or all of the parties or any other person contributing to the instrument are neither present nor represented.

²⁴ Decree No. 2020-1422 of 20 November 2020 introducing the remote notarial power of attorney.

²⁵ Opinion No. 16-A-13 of 9 June 2016, cited above.