

From civil servants to liberal professionals:

An empirical analysis of the reform of Portuguese notaries

Running Head

Reform of Portuguese Notaries

Abstract

The use of market mechanisms has been progressively introduced as an alternative solution to public service delivery since the 1980s. This work addresses an uncommon public service function – civil law notaries – and seeks to analyse the factors that led to the formation of diverse market structures as a result of the choice of the privatization path over civil service status by public notaries. The Portuguese government allowed public notaries the choice to go private and regulated a *numerus clausus* of notaries by district. After the reform was completed, a diversity of market structures prevails throughout the 278 notarial districts. Our key hypothesis is that markets with multiple agents formed in jurisdictions having a larger and more profitable number of notary and legal acts that provided financial survival and profit. In contrast, monopolies formed as a result of a perceived absence of market opportunities and demand. During the period 2010-2011 we collected data from official statistics of the notary system supplemented by data on the economic and demographic features of each jurisdiction. Multinomial logistic regression is used to test the key hypothesis regarding market arrangements in the 278 notarial districts of Continental Portugal.

Points for practitioners

The trend in the deregulation of the notary profession is likely to continue to sweep European Union countries. Lessons can be drawn from the Portuguese experience, where the change from civil service status is not yet mandatory for all notaries, but financial constraints and fiscal pressures indicate privatization as the inevitable path.

Keywords: civil law notaries, privatization, government regulation, deregulation, legal professions.

‘Stop a moment, brother! Perhaps we are incurring guilt needlessly. Perhaps she is really no witch!’ said the notary. ‘If the person sitting in there declares herself ready to make the sign of the cross, then she is not a child of the devil.’

The proposal was accepted.

May Night, or The Drowned Maiden by Nikolai Gogol

Background

The use of market mechanisms has been progressively introduced as an alternative solution to public service delivery since the New Public Management reforms of the 1980s. The expectation was that competitive bidding and trading could maximize consumer choice in the market as well as lower costs of service provision. Over the years, the literature has explored privatization decisions in several service areas, including solid waste, health care and fire protection, among many others. Our work addresses an uncommon public service function – civil law notaries – and seeks to analyse the factors that led to the formation of diverse market structures as a result of the choice of the privatization path over civil service status by public notaries.

The privatization of notaries in 2004 by the centre-right government led by Prime-Minister Durão Barroso was the most important attempt to deregulate the heavily regulated notary profession. This reform allowed all notaries working for the State and operating under civil service laws to become liberal professionals. In this case, privatization meant the transfer of ownership and employment status from the state to private hands, also often described as denationalization or ‘destatization’ (Savas, 2000). The voluntary nature of the reform coupled with the option given to all notaries choosing the privatization route to return to civil service status after a trial period of five years classifies this movement as an almost risk-free venture.

Reverse privatization has been a topic of research in the privatization literature for some time,

particularly at the local level of government (Hefetz and Warner, 2004; Warner and Hebdon, 2001). However, prior research is centred on the dynamic decisions of contracting out and contracting back in undertaken by public officials and not much is said in terms of reversing property, something akin to ‘voluntary nationalization’. In addition, voluntary privatization is also a rare event that requires further investigation. If combined, these features render the Portuguese reform of the notary system a completely original approach to privatization. The unpredictable consequences of this reform call for empirical research that can shed some light on its motivations and current status, in order to enrich the literature on the topic of privatization.

Despite its unique nature and relevance for competition policy in the legal professions within the European Union, the notary reform and its impacts on notary markets and profession were never assessed. This work aims to fill this important lacuna by investigating the consequences of the reform. Research tackles two distinct, albeit related questions. First, what are the causes of the diversification of market structures generated by the privatization reform of the Portuguese notary system? Second, what are the prospects of this diversification for the clients of notary services? Taking into account the regulatory constraints still in place, we suggest additional policy initiatives to improve market competition and consumer choices.

The first section provides a brief explanation of the civil law notary profession, namely its legal status, types of services rendered and the differences between civil law notaries and their common law counterparts. Next, we discuss market failures frequently associated with the notary profession and their implications for market regulation, efficiency and quality. The third section presents the arguments of Public Choice scholars suggesting that the current regulation of notary markets generates government failures and requires significant deregulation efforts. The fourth section describes the Portuguese privatization reform of civil law notaries, highlighting the unique characteristics of the deregulation movement as well as the mixed signals given by Portuguese governments involved in the process since

2004. Subsequently, we present data concerning the market structures developed before and after reform and this is followed by a discussion of the implications of the reform for market competition, consumer choice and service quality. We conclude with a set of policy recommendations and directions for future research.

Civil law notaries: Definition and concepts

Civil law or Latin notaries are appointed by the state and vested as public officials having the power to authenticate legal documents and transactions between private parties. In most countries where civil law notaries exist, the public nature of the function is reconciled with the framework of a liberal profession contributing to the double status of the notary profession. The ambiguity of this status is expressed by the fact that very often notaries possess a functional and territorial monopoly of some services and, at the same time, compete as private entrepreneurs in a market for other services (Suleiman, 1987).

Professionals hold undergraduate degrees in law and are required to take specialized graduate training in order to qualify for membership in the professional body, in the Portuguese case the *Ordem dos Notários*. Notary services include attesting the signature and execution of documents, estate and testamentary proceedings, residential and commercial conveyance and registration, business transactions, marital agreements, divorces, contract drafting and powers of attorney. In contrast with civil law notaries, their common law counterparts have less formal training, are not licensed by the state and enjoy a much more limited set of powers.

Civil law notaries impartially represent the transaction assuming responsibility for its contents, proving its authenticity and giving it probative value under civil law. The transaction is armour plated with legal certainty by the civil law notary's findings, which ensures a presumption of validity that is nearly bullet proof against rebuttal by a contesting party. In order to fulfil this role of impartiality, civil

law notaries are also expected, by statute and/or by the parties, to keep a archived record of the engrossment (*escritura pública*), which contains the original seal and signatures of the transaction. Certain acts that do not require public form such as powers of attorney, covenants and notary affidavits and attestations are exempt from this requirement.

The importance of civil law notaries resides in their role of preventive legal security. Services provided by notaries help minimize transaction costs among contracting parties and generate cost savings for third parties not involved in the transaction but potentially affected by it. Notary documents reduce the costs of litigation because they have probative value that constitutes an extrajudicial form of proof. Due to their public nature, notary archives also provide information to the State on illegal activities such as money laundering at virtually no cost. In sum, the notary system and organisation is based on the willingness of society to facilitate business transactions, thus reducing the costs incurred by the State in creating a system of preventive legal certainty (Collantes, 2005).

Historically, the civil law notary profession has been highly regulated by statute. The argument in favour of regulation is based on the assumption of welfare economics that, in the absence of government intervention, the market would fail to provide the appropriate amount of preventive legal security associated with notary services (Collantes, 2005; Van den Bergh and Montangie, 2006). More recently, however, the tendency has been towards a significant deregulation of the notary profession. This deregulation movement was largely set off by the European Commission (European Commission, 2005; Paterson et al., 2003) and the OECD (2007), but the theoretical arguments favouring deregulation and privatization are derived from the economics of public choice (Peltzman, 1976; Stigler, 1971; see also Mueller, 2003). The following sections presents a summary of these conflicting views and the influence of these works on the notary profession and market.

Market failure and the regulation of notary services

Notary services are frequently described as credence goods or post-experience goods because quality is difficult to assess both before and after purchase (Weimer and Vining, 2005). Market regulation is defended on the basis of securing the cost savings obtained from preventive legal security offered by the notary system, while simultaneously avoiding information asymmetries between notaries and clients and between the clients themselves. In other words, government regulation is frequently supported as a means to correct market failures, restore competition and generate efficient outcomes.

Market entry regulation and exclusive rights

The regulation of entry in notary markets is usually defended on the basis of maintenance of high quality standards and in the interest of consumers' rights. Transactions of post-experience goods involve uncertainty about service quality and significant information asymmetries between buyer and seller. As a result, quality after purchase is accepted based on faith (Darby and Karni, 1973). Notary services have few tangible qualities that can be evaluated ex-ante by the buyer. Commercial quality expressed by the comfort of the waiting room, the sympathy of the staff, or the quality of the coffee being served can be easily assessed, but they are not part of the core services provided by notaries. In contrast, experience qualities such as impartiality, integrity and the quality of legal counselling can only be judged after service consumption. The effects associated with post-experience goods are difficult to assess because they tend to be extremely delayed in time (Nelson, 1970; OCDE, 2007; Vining and Weimer, 1988; Weimer and Vining, 2005).

Repeated plays can increase certainty because experience provides useful information to more accurately judge service quality. Large clients are better able to take advantage of frequent transactions to ascertain the quality of services rendered by notaries. In contrast, small consumers seldom require the services of notaries, which puts them in a weak position in a deregulated market (Collantes, 2005; Van

den Bergh and Montangie, 2006).

These arguments suggest that a university degree in Law, notarial internships, professional exams and licensing and mandatory enrolment in a professional association are ways to minimize information asymmetry between notaries and their clients. On one hand, because notaries act as gatekeepers of legality in private transactions, they reduce transaction costs among parties, generate benefits for third parties and contribute to an ex-ante enforcement of the law. On the other hand, standardization also produces judicial positive externalities, since public authentication and legality checks ensure evidentiary value that contributes to a reduction of litigiousness and the minimization of ex-post transaction costs (Arruñada, 1996; Van den Bergh and Montangie, 2006).

Market conduct regulation

Public goods are characterized by joint consumption and impossibility of exclusion. Joint consumption means that rivalry is absent at the time of fruition; in other words, the fact that one person benefits from purchasing one service does not preclude other individuals from reaping (external) benefits from the same service. A good or service characterized by the impossibility of exclusion means that individuals obtain benefits from the good or service being provided irrespective of their individual contributions to its production.

Notary services display both public good features. Joint consumption occurs because preventive legal security benefits not only those directly engaged in the transaction but also society in general. The impossibility of exclusion is translated by the fact that all members of society benefit from the preventive legal security associated with notary services, even though only a few individuals actually buy these services. However, if left to its own devices, the notary market will undersupply legal certainty. Even though notaries may act impartially before the parties involved in a business transaction, they will have no incentives to defend third party interests. Government intervention imposing limitations on market

conduct – price regulation, interdiction of publicity and restrictions on organisational structure – is expected to create incentives that enhance service quality and bring the amount of legal certainty to optimal levels (OCDE, 2007; Van den Bergh and Montangie, 2006). Even though this logic is normally counterintuitive in economic terms, the protection of notaries from competition is intended to prevent them from ‘cutting corners’ to maximize profits. In other words, the expectation is that restrictions in market conduct helps to secure a sizable income that minimizes incentives to defect from their obligations to clients in terms of impartiality, integrity and quality of legal counselling. Given the service features involved in notary activities, this benign view of regulation deserves at least the benefit of the doubt.

Government failure and the deregulation of notary markets

Regulatory intervention in notary markets is currently under attack, both due to economic globalization supporting the free circulation of legal professionals and as a result of liberalization initiatives promoted by the World Bank and the European Commission (Patterson et al., 2003; Shaw, 2007a; World Bank, 2005). The central argument driving this reform movement is that many regulatory restrictions are likely disproportionate and out-of-date, leading to higher prices, low incentives to innovation and significant welfare losses for consumers of notary services (Arruñada, 2006; 2007; Noailly and Nahuis, 2010; OECD, 2007). Rather than promoting the public interest, regulation of notary markets is believed to embody the preferences and interests of this legal profession (Arruñada, 1992, 2006; Suleiman, 1987).

Market entry deregulation

Despite the benefits associated with professional standards identified in the previous section, certain entry regulations can be unduly restrictive of competition, resulting in welfare losses to consumers of notary services and younger professionals. An excessive barrier to market access arises when notaries

demand for increasingly stricter requirements for access to the profession, obtained either through self-regulation or by lobbying governments. Weimer and Vining (2005: 182-183) correctly point out that 'high entry standards deny consumers the opportunity to choose low quality, but low price, services; and when professional interests control the licensing standards, the standards may be set unduly high to restrict entry so as to drive up the incomes of the existing practitioners.' The existence of a *numerus clausus* (a geographical cap or restriction) and/or notary office licensing (a bureaucratic form of control) constitute other examples of disproportionate regulation of entry that limits competition and produces inefficient outcomes in the notary market.

The rationale for deregulation is that it is possible to reduce barriers to entry without compromising the overall quality standards (Arruñada, 1992). Lower requirements allow well-established professionals to still charge high prices for high quality services, while simultaneously accepting young and inexperienced professionals to charge lower fees to expand their client base. Consumer choice and access to notary services by low-income clients would increase as a result of market entry deregulation.

Market conduct deregulation

The argument in favour of government regulation of market conduct has caused more harm than good, promoting inefficiency and undermining incentives to innovation (Arruñada, 1996, 2006). Price fixing, advertising prohibitions and restrictions in business structure and organisation are some of the instruments employed by governments to 'protect the public interest'. Instead, these regulations have produced one of the closest and most symbiotic relationships between the State and private interests (Suleiman, 1987). This proximity also explains the difficulty in reforming notary institutions and the notary profession across many countries in Western Europe.

Given the privileged status of notaries in many countries in Continental Europe, fixed pricing is usually employed to prevent notaries from charging rent-maximizing prices to their clients (Weimer and

Vining, 2005). Price regulation, however, is frequently associated with regulatory capture, whereby members of a well-organized profession lobby government officials for protective legislation (Peltzman, 1976; Stigler, 1971). The use of price ceilings coupled with monopoly status generates x-inefficiency, because notaries do not feel competitive pressures to improve technical efficiency that could lead to price reductions and service quality improvement (Leibenstein, 1966; Weimer and Vining, 2005).

Most notary acts are post-experience goods that involve significant information asymmetries between buyers and sellers. Advertising can be useful when notaries are interested in developing a good reputation, because consumers are better able to make informed decisions regarding prices, legal quality and commercial quality. Unfortunately, restrictions on advertising are also rather common in legal professions to the detriment of market efficiency.

Finally, notary offices are not free to organize their activities as they see fit. Territorial dispersion of service delivery is usually interdicted, so that notaries are not allowed to open a branch at another location, even if this is a potentially profitable endeavour. This limitation compromises efficiency because notaries are unable to take advantage of geographic dispersion, more specialized structures or collaborative associations with other legal professions. The restriction imposed upon business structure and organisation remains in most countries in continental Europe, although France is a well-known example of early deregulation (since 1990) by allowing the formation of mono-professional and pluri-professional partnerships alongside with individual notaries (Shaw, 2007b).

Government regulation of notary market conduct has provided no incentives to innovation. Notaries protected by statute are not subject to the kind of competitive pressures that generate advancements in the profession. In fact, studies have shown that in countries where notaries are subject to competition from lawyers, such as Austria, quality, technological innovation and social relevance tend to increase substantially (Shaw, 2007b).

A review of public choice theory suggests that the regulation of notary services is plagued by

many of the same problems facing the presence of government in other activities, including productive inefficiency, rent-seeking activities and an endemic absence of innovation (Dunleavy, 1991; Mueller, 2003; Osborne and Gabler, 1992). Even though these arguments have become the dominant view among international organisations and have been the leading factors driving notary reform, it should be stressed that the regulation of notary services and the market structure associated with it do provide certain technological advantages. The mix of public and private functions secures economies of scope, whereas the combination of a centralized definition of quality standards with the geographical dispersion of direct providers brings about economies of scale (Arruñada, 1996). Furthermore, the minimization of transaction costs associated with notary services reduces information asymmetries and generates legal and judicial positive externalities.

The conflicting arguments between the market failure and government failure frameworks have led to the recommendation of a comprehensive policy analysis of regulation in order to justify the need and extent of government regulation of private choices in general and legal professions in particular (Arruñada, 1996; Van den Bergh and Montangie, 2006). In spite of this recognition, the reform of notary systems across Europe has progressed towards increased deregulation and liberalization. In Portugal, as we shall see in the next section, the reform followed a similar trend.

The Portuguese notary system: Privatization, regulation and (no) choice

Contrary to most countries in continental Europe, notaries in Portugal were public officials subject to civil service laws and not liberal professionals. This rather unique status can be traced back to feudal relationships and is 'based on the assumption that what needs to be protected by statutory measures are not the rights of the individuals but the rights of the state' (Shaw, 2007b: 167). This civil service status characterized notaries during the dictatorship of António Oliveira Salazar (1926-1974) and remained largely unchanged until 2004.

In France, the *notaires* developed a strategic approach aimed to promote internal reforms, to study the implications of the liberal agenda of the European Commission, and to exchange experiences with other civil law notaries in Europe (Shaw, 2006). In England and Wales, the profession has gone through a significant modernisation impetus, particularly in terms of upgraded training, professionalization, and market liberalisation, aiming to achieve mutual recognition of notarial qualifications in Europe (Shaw, 2000). But nowhere else has the notary profession undergone a more market-oriented reform as in Holland (Nahuis and Noailly, 2005; Noailly and Nahuis, 2010). The Portuguese notary reform has accomplished less than the Dutch reform in terms of market liberalisation, but given its starting point it has produced significant changes in the status and practice of the notary profession.

The reform of Portugal's notary system can be traced back to 2001, when the Government of the Socialist Party led by António Guterres promoted a change in the prices of notary acts charged to service users to reflect actual service costs (Law-Decree n° 322-A/2001). Despite this initiative to introduce cost-oriented fees, notary fees remained strictly regulated for each service and no price ranges were allowed.

The double status typical of the notary profession – liberal professional with public functions – was only established by Law-Decree n° 26/2004. The reform focused on privatization and liberalization policy measures. Notaries were given the opportunity to privatize, which for all intents and purposes meant a change in property ownership of notary offices as well as notary databases concerning property conveyances, mortgages and inheritances, among other services. All notaries choosing the privatization path were allowed to keep their civil service status by means of an unpaid leave and could opt to reverse privatization after a five year trial period. In addition, private lawyers and *solicitors* were allowed to compete with notaries in certain notary acts, namely the purchase and sale of real estate property.

Based on the classification by E.S. Savas (2000), this policy initiative can be described as a divestment, since it entails a positive act by government to transfer property ownership to a qualified group of professionals. However, given that the reform of the notary system in Portugal also resulted in

the reduction of the number of civil servants in this profession, it can also be classified as displacement (by withdrawal or deregulation), whereby government shrinks the size of its effort and allows the private sector to expand its role in this particular function (Hodge, 2000; Savas, 2000).

By 2005, an OECD report on competition policy developments in Portugal described the regulation of the Notaries' profession as 'disproportionate, unjustified and unnecessary to protect and pursue public interest' and recommended significant changes, particularly in terms of 'barriers to entry, price fixing, advertising prohibitions and business structure restrictions.' (OECD, 2005: 12). Up to this point, the status of the notary profession in Portugal resembled that of French *notaires*: "nationality requirement, *numerus clausus*, fixed fees, ban on advertising, and limitations on permissible organisational structures." (Shaw, 2006: 266). However, unlike France, the Portuguese notaries were not sufficiently close to the Ministry of Justice to lock-in many of their exclusive rights, particularly those related with property conveyance, firm establishment, and commercial business transactions.

Elected in 2005, the centre-left government led by Prime Minister José Sócrates sponsored a counter-reform harshly criticized by members of the notary profession that has undermined the coherence of the initial reform. Since that time, the Ministry of Justice has been committed to several initiatives designed to undercut bureaucracy by reducing the number of steps required in the creation, management and closure of businesses (OECD, 2009). These initiatives began in 2006 and include fast-track home buying, one-stop firm creation and online trademark registration, among others. Many of these actions no longer require the intervention of notaries to be valid as in the case of the creation of associations and foundations, the approval of statutes or statutory changes and the transfers and leases of commercial and industrial establishments (Autoridade da Concorrência, 2007b). Others still require notary intervention, but administrative simplification was accompanied by a reorganisation of the mission statement of existing public offices to provide these streamlined services in direct competition with notaries.

In October 2010, Alex Himmel, the Chairman of the Order of Notaries in Portugal accused the

Portuguese Government of attempting to destroy the notary profession by promoting unlawful competition by the State. In complementary services to notary acts where State agencies have monopoly power, prices were substantially increased, whereas those where State agencies compete with private notaries were priced below cost, a form of State-sponsored dumping. As a result, notaries are now competing with single-purpose public agencies as well as private lawyers in delivering specialized services, lending credence to the accusation of the Chairman of the Order of Notaries that government is engaged in unlawful competition with the profession.

Entry requirements and exclusive rights

The access to the notary profession requires a MA degree in law (usually a four-year BA plus one year Master's degree). Additional training is provided by the professional body – the *Ordem dos Notários* – responsible for self-regulation in terms of on-going training programs for their members.

Continental Portugal is divided in 278 notarial districts. A *numerus clausus* is established for each district according to demographic and economic criteria. A territorially-based occupational license is required for the operation of a notary office and awarded competitively by the Ministry of Justice (OECD, 2007). The territorial limitation of competency combined with the prohibition of notary extensions and collaboration among notaries is thought to hinder access to notary services, especially in remote areas where user choice is limited, resulting in underserved populations (Autoridade da Concorrência, 2007b).

Portuguese notaries have exclusive rights to elaborate public deeds and wills, but Government measures of administrative simplification have relaxed the requirements of public deeds in the fields of commercial law, property law and family law (OCDE, 2007). Private lawyers are allowed to compete with notaries in certain notary acts (property conveyances, for example). The Portuguese Competition Authority issued a recommendation to the Government supporting the elimination of the *numerus clausus*, the removal of licensing for notary offices and the end of territorial competency, but no action on

these matters was undertaken at this time (Autoridade da Concorrência, 2007b).

Market conduct: Fees, advertising, partnerships and business structure

During the first stage of liberalization, fees for notary services remained largely regulated by statute. Regulation defined either the exact amount to be charged for each act or proportional fees depending on the value of notary acts (Portaria nº 385/2004, April 16). After July, 2008, fees were liberalized for all notary acts for which competition from other professionals, public and private, is available in the market. This includes property conveyances, firm creation, attestations of signatures, certification of translations, among many others. Price ceilings remain for acts involving exclusive rights (Portaria nº 574/2008, July 4), although the Portuguese Competition Authority recommends these should reflect service costs (Autoridade da Concorrência, 2007a).

Advertising is strictly forbidden for all notary activities, including publicity regarding charged fees and service quality; the only information that notaries can publicize concerns operation hours, location and academic training. The professional organisation (*Ordem dos Notários*) is responsible for the enforcement of advertising regulations, even though disciplinary action in general is shared with the Ministry of Justice due to the aforementioned double status of civil law notaries.

Notaries are also severely restricted in terms of their business structure and organisation. The creation of affiliated societies, branches, agencies or other forms of territorial expansion is forbidden along with the interdiction of incorporation or collaboration with other notaries to take advantage of economies of scale and specialization. This prevents the adoption of more cost-efficient organisational forms and constitutes a formal limitation of market competition (Autoridade da Concorrência, 2007b). Multidisciplinary association with other elements of the legal professions such as lawyers and solicitors is also prohibited in order to preserve notary impartiality and independence.

Finally, one of the most unusual features of the Portuguese notary system is perhaps the presence

of a compensation fund guaranteeing a minimum income for notaries. In remote and less populated areas where notary activities may be insufficient to generate enough income to balance costs, notaries have access to a compensation subsidy established by statute and managed by the *Ordem dos Notários* (Preâmbulo do Decreto-Lei nº 26/2004). The compensation fund was created to level off notary incomes that resulted from liberalization/privatization, but came under heavy criticism by the Portuguese Competition Authority. The fund has been described as a disincentive to innovation and investment, capable of undermining the positive effects of deregulation upon market competition (Autoridade da Concorrência, 2007b). Informal discussions with private notaries suggest that the compensation fund has never worked properly, since higher income notaries have resisted to contribute to the fund.

The privatization decision: ‘Should I stay or should I go?’

The uniqueness of the privatization reform in Portugal lies in its voluntary nature. All notaries were public officials at the time of reform in 2004. The statute provided them the option to become private while maintaining their civil service status, by taking advantage of a five year unpaid leave. At the end of this five year period, notaries were allowed to reacquire their public employee status if they wish, thus rendering this ‘lukewarm’ reform an almost risk free endeavour for all notaries.

The privatization reform produced a significant diversity of market structures across the 278 notarial districts in continental Portugal. This variety can be attributed to individual decisions by notaries to either maintain civil service status or opt for the privatization of their services. What are the causes of this diversification of market structures? Given the outcomes of the reform, what are the prospects for the clients of notary services?

The current trend of deregulation of notary markets is largely the product of the widespread perception among international organisations (e.g. OECD, World Bank and the European Commission) that significant efficiency gains can be obtained from the deregulation of notary markets. Moreover, the

large number of notaries present in the market (plus younger professionals wishing to enter) indicates that consumer welfare gains are likely to offset firm losses resulting from deregulation (Weimer and Vining, 2005). However, since notary services entail positive externalities and display public goods features, some government regulation is still needed and should be designed to protect against these market failures, while simultaneously avoiding undue intrusion in the market. These countervailing pressures have resulted in diverse market structures depending upon the conditions present in each notary district.

If the assumptions regarding deregulation and market competition are correct, market diversification should be largely related with the size of the market for notary services (Noailly and Nahuis, 2010). Notarial districts with more population represent an opportunity for profit and, as a result, are expected to have more private notaries.

The choice of privatization is also likely driven by specific opportunities provided by the demand of notary acts. The number of private notaries should be positively associated with new housing construction, elderly population and marriage certificates, which are linked with an increased number of property transactions, wills and testaments and marriage contracts, respectively.

Besides new housing, the average property value can also be regarded as a demand factor (Noailly and Nahuis, 2010). Higher property values can be positively associated with privatization because they represent potentially higher revenues to be captured from deeds and conveyances. We also expect to find more private notaries in districts characterized by higher income per capita and population growth. These hypotheses regarding the diversification of markets for civil law notaries assume that these are economically rational agents responding to incentives for liberalization created by the notary reform.

Data and methods

This research addresses two related questions. First, what are the causes of market structure variation generated by the reform of the Portuguese notary system? Second, what are the prospects for

consumers resulting from this reform? In order to answer these questions, we analyse data from notary markets describing market structures before and after the reform and attempt to identify the causes for the increasing diversity of structures in the aftermath of the reform.

The dependent variable is the characterization of the market structure in each notarial district. It is coded as follows: private monopoly (coded 1), duopoly (coded 2), market with three or more private agents (coded 3) and market with three or more public and private agents (coded 4). The omitted category is public monopoly as this was the market's default prior to notary reform. The 278 notarial districts in 2011 are classified as follows: 87 public monopolies (31.29 percent), 110 private monopolies (39.57 percent), 46 duopolies (16.55 percent), 18 markets with three or more private agents only (6.47 percent) and 17 markets with three or more public and private agents (6.12 percent). The dependent variable is measured in 2011, to reflect the most recent decision faced by all notaries to become private, stay private, reverse to public or stay public.

Multinomial logistic regression is appropriate when the categories of the dependent variable are discrete, nominal or unordered (Long, 1997). The model assumes a reference category and provides the odds, in probabilistic terms, of the other categories (Borooah, 2002). Maximum likelihood is employed for estimating regression coefficients because the errors do not follow a normal distribution and do not have constant variance. Robust standard errors are calculated with the Huber/White/Sandwich (HWS) variance estimator.

The econometric analysis includes a series of independent variables that capture market size and potential demand for specific notary services. The size of the market is gauged by the notarial district population and by the number of notary acts performed in the previous year. Both variables appear in natural log form. The demand for conveyances (property transactions) is measured by the number of new housing construction (natural log) and by the average property value measured as the ratio between the total value of real estate transactions divided by 100,000 and the total number of transactions. The

potential demand for wills and testaments is measured by the proportion of citizens aged 65 and older. The number of marriages per 1000 inhabitants is the proxy for marriage contracts signed by the parties and attested by notaries. Population growth is the variation in notarial district population between the years of 2001 and 2010. The effects of the coefficients for all variables of interest are expected to be positively associated with alternative market structures to public monopolies. Following Noailly and Nahuis (2010), income per capita (natural log) and youth population (0-14) are included as control variables.

Data for this project were assembled from official sources made available from the Ministry of Justice and the professional association of public notaries. Data on population structure and evolution, income per capita, the number of new housing construction and the average property value per notarial district is available from the National Bureau of Statistics (*Instituto Nacional de Estatística*). Data concerning market structures were gathered from the Public Institute of Notaries (*Instituto de Registos e Notariados*) and the professional association of notaries (*Ordem dos Notários*). Data on notary acts was collected from the Directorate General for Justice Policy (*Direcção-Geral da Política para a Justiça*). All variables are 2010, unless otherwise indicated. Table 1 displays descriptive statistics for all variables included in the analysis.

[Insert table 1 here]

Empirical findings

Table 2 presents data on the evolution of notary market structures for the 278 notarial districts in continental Portugal. Before privatization was allowed in 2004 there were only three possible market structures: Public monopolies comprised 87 percent of all notarial districts, with the remaining jurisdictions characterized either as public duopolies (7.5 percent) or by three or more public notaries (5.4 percent). After privatization, a significant proportion of the 278 notarial districts are still characterized by a single notary office run by an official with civil service status. The year 2005 marks the first time

notaries were allowed to choose liberal professional status over civil service status, but 80 out of 278 districts remained public monopolies (29 percent). The majority of market structures are now private monopolies (41.9 percent). Market structures with only private agents represent a small percentage of the total (8.8 percent).

[Insert table 2 here]

Table 2 also presents data regarding the second moment of decision. After the first five year period, notaries were again asked to choose between liberal professional (private) status and civil service status. Data concerning the 2011 decision indicates that changes were marginal, including a slight trend towards the reversion of privatization. Overall, notary markets are characterized by the pervasiveness of monopolist or quasi-monopolist structures, largely as a result of the *numerus clausus*. These findings allow us to question whether the expected effects of liberalisation have been captured by consumers or, conversely, whether liberalisation has resulted in limited competition and unwarranted market power by private notaries.

[Insert figure 1 here]

In order to supplement the analysis, figure 1 provides more detailed information regarding the transformation of market structures. Close inspection points to a limited conversion of public monopolies into multiple agent market structures. In fact, from the initial situation of 242 public monopolies in notarial districts only seven were converted into market structures with three or more agents (private or mixed). This further reinforces the idea that the privatization reform in Portugal had very limited effects in terms of promoting competition among notary offices.

[Insert table 3 here]

Table 3 displays multinomial logit model estimates for the formation of alternative market structures to a public monopoly for the provision of notary services. The findings concerning market size and demand for conveyance services are consistent with the general predictions of deregulation and market attractiveness. Market diversification is associated with increased population and number of

notary acts as well as with higher average property values. Notary districts which combine these features are more likely to display private or mixed multiple agents.

Districts characterized by higher housing prices attract more agents and, at least in theory, this favours the emergence of increased competition. Likewise, the data indicates that there are more agents in more populated areas and where the number of transactions or notary acts is higher. Without data on notary fees it is impossible to ascertain if prices decreased as a consequence of market diversification, but the analysis indicates that there is at least some potential for substantial gains in consumer welfare in urban areas as a result of notary reform.

The only result inconsistent with this conclusion is the population growth variable, which displays negative and statistically significant coefficients for markets where three or more agents are in operation. In substantive terms, this means that jurisdictions experiencing significant population increases are not characterized by market diversity. In practice, these findings partly contradict the idea that emerging markets are better suited for expansion and choice by clients of notary services.

Conclusions and policy implications

The reform of the Portuguese notary system entails unique features that deserve careful analysis. This project attempts to answer two critical questions associated with the reform. First, we analysed the causes of the reform for the diversification of notary markets. Despite the incentives for the conversion of public notaries under civil service law into liberal professionals, many notarial districts remain either public monopolies or districts where at least a few notaries are public officials. Partly, this is due to voiced concerns about excessive competition between agents operating in each notary district that could significantly reduce notaries' incomes. However, this unease was toned down by a series of regulations such as the system of *numerus clausus*, the compensation fund and protective regulation concerning market entry and conduct that rendered the privatization decision a rather 'risk-free' alternative. This is

hardly surprising, since prior work on Portuguese privatization initiatives reports the systematic formation of monopolies in other sectors, such as public utilities, with the state unwilling or unable to counteract the weight of economic pressure groups (Rocha and Araújo, 2007). Given this setting, the only surprise is that so many notaries remain civil service employees, something that can only be explained by less tangible aspects, namely risk aversion and state dependence associated with the entrepreneurial culture in Portugal (Araújo, 2002).

This study also aimed to understand the motives that drove the privatization decision. The analysis indicates that the conversion to liberal professional status occurred predominantly in more urban and populated areas, where the demand for notary services has been historically higher than the national average. As it happens in many other countries following the Latin notary tradition, the purchase and sale of property are one of the most relevant sources of income for notaries (Arruñada, 2007; Shaw, 2007a) and the privatization decision seems to result from the analysis of market opportunities in terms of the number of past transactions and the value of properties transacted.

The results of the analysis underline one evident outcome of the privatization reform. The initiative did not go far enough in terms of deregulation and promotion of market competition. Although the argument often employed is the concern with possible market failures related with significant market deregulation, the fact is that this strategy worked primarily to alleviate the state from the significant budget pressures associated with public notaries' sizable salaries. In contrast with this unstated budgetary goal, the concern with clients' choices was suppressed along the way, so that only a few notarial districts present real alternatives for individuals demanding notary services. Hence, this privatization initiative in Portugal seems to confirm the historical tradition that government intervention in notary services exists to protect the rights of the state rather than to safeguard the rights of the individuals (Shaw, 2007b).

Our analysis suggests several policy implications. First, further deregulation is needed if real choice is to be achieved by clients of notary services. The *numerus clausus* severely limits the formation

of competitive markets, even in urban areas where one would expect to see more private agents operating. Prior work has found slow entry in notary markets, even in The Netherlands, where the cap in notary districts has been lifted (Noailly and Nahuis, 2010). In Portugal, this problem is likely to be more serious, given not only the strict *numerus clausus*, but also the licensing requirements and the interdiction to collaborate among professionals.

Second, the need for deregulation is particularly evident in the case of market conduct, namely in terms of ending the prohibition to advertise. Information provision is a crucial element in market competition. If notaries are not allowed to advertise their prices and quality levels, it becomes more difficult to promote wiser consumer choices. Even though clients are not prohibited from choosing notary services from notarial districts outside of their own, the fact remains that without quality and price comparisons, it is extremely challenging to make informed choices.

The reform of the notary system in Portugal has reached a crossroads. The absence of a clear strategy resulting from different options taken by successive governments is compromising the initial reform efforts. Many former public notaries that initially opted for privatization already expressed their wish to return to civil service status, forcing the current government to extend the trial period for another three years in an attempt to salvage market competition. The notary reform has failed to treat deregulation and liberalization as a package, with adverse consequences for consumer choices and welfare. Further deregulation is necessary to attract notaries to liberal status, improve market competition and secure the expected gains from privatization.

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Table 1. Descriptive statistics

Variable	Indicator	Obs.	Mean	Std. Dev	Min	Max
Dependent variables						
Market structures	0 = Public monopoly; 1 = Private monopoly; 2 = Duopoly; 3 = Three or more private agents; 4 = Three or more mixed agents	278	1.317	1.422	0	4
Independent variables						
Population	Natural log	278	9.818	1.113	7.421	13.081
Income	Natural log	278	6.679	.161	6.368	7.419
Youth	Population under 14	278	5496.673	9330.909	224	81004
Elderly population	Proportion of population aged 65 and older	278	22.086	5.839	10.506	40.766
Average property value	Ratio between total value of transactions (divided by 100,000€) and the number of transactions	278	1.156	.517	.421	4.266
Notary acts	Natural log	278	8.25	1.222	5.642	12.816
New housing construction	Natural log	278	3.766	1.359	0	8.437
Marriages	Number per 1000 inhabitants	278	3.639	1.113	0	7.7
Population growth	Variation 2001-2010	278	-.781	10.284	-20.3	45.1

Table 2. Diversification of notary market structures (2004-2011)

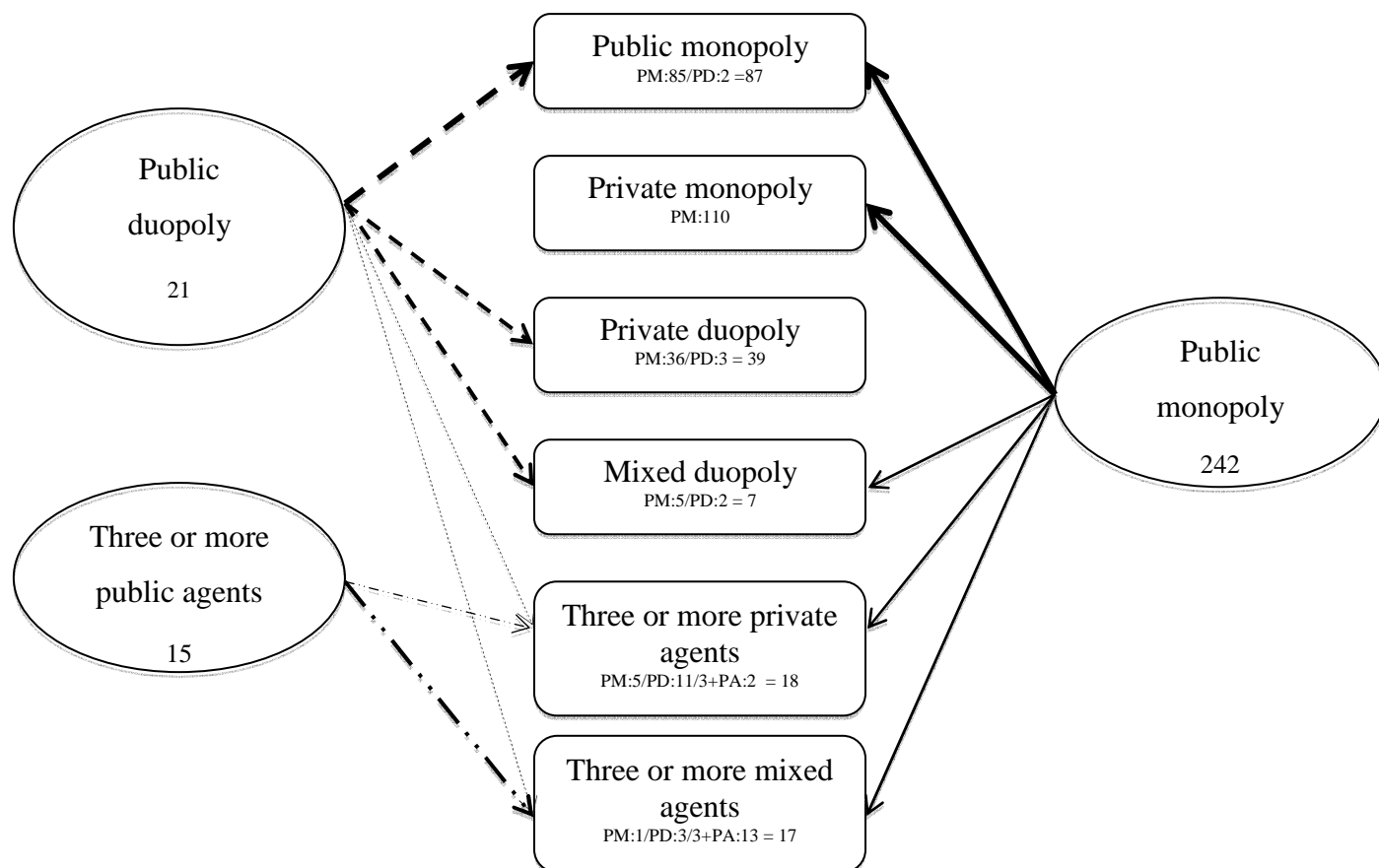
	2004 (initial status)		2005 (after 1 st privatization decision)		2011 (after 2 nd privatization decision)	
	Obs.	Percent	Obs.	Percent	Obs.	Percent
Public monopoly	242	87.1	80	29.0	87	31.3
Public duopoly	21	7.5	0	0	0	0
Three or more public agents	15	5.4	0	0	0	0
Private monopoly			116	41.9	110	40.0
Private duopoly			44	15.8	39	13.9
Mixed duopoly			2	0.1	7	2.4
Three of more private agents			24	8.8	18	6.4
Three or more mixed agents			12	4.4	17	6.0
Total	278	100	278	100	278	100

Table 3. Multinomial logistic regression analysis (dependent variable: Market structures)

	Private monopoly	Duopoly	Three or more private agents	Three or more public and private agents
Independent variables	Coefficient (RSE)	Coefficient (RSE)	Coefficient (RSE)	Coefficient (RSE)
Population	2.990** (1.483)	3.803* (2.110)	22.031*** (4.642)	19.161*** (4.624)
Income	.379 (2.433)	.054 (6.640)	2.827 (10.920)	.749 (10.255)
Youth population	.000 (.000)	-.002 (.002)	-.001 (.002)	-.001 (.002)
Elderly population	-.001* (.001)	.001 (.001)	.000 (.001)	.000 (.001)
Average property value	-.016 (.360)	3.452* (1.955)	3.504* (2.081)	4.112* (2.358)
Notary acts	2.796*** (.829)	7.608*** (2.541)	20.421*** (3.960)	25.301*** (4.509)
New housing construction	.230 (.455)	1.779** (.860)	.566 (1.827)	1.860 (2.171)
Marriages	.251 (.335)	-.166 (.705)	-.871 (.927)	1.429 (.954)
Population growth	.051 (.065)	-.079 (.093)	-.501*** (.172)	-.376** (.186)
Constant	-49.869*** (15.085)	-114.967** (51.239)	-448.312*** (91.643)	-460.504*** (98.087)
Observations	278			
Wald chi2	559.64			
Prob>chi2	.0000			
Pseudo R2	.7314			

*p<.10; **p<.05; ***p<.01; Two-tailed tests. Public monopoly is the base outcome. Robust standard errors (RSE) in parentheses.

Figure 1. Transformation of market structures in the Portuguese notary system (2004-2011)



PM: Public monopoly

PD: Public duopoly

3+PA: Three or more public agents