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I. TOPIC

THE NOTARIAL ACT AS AN INSTRUMENT OF DEVELOPMENT IN SOCIETY

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THE NOTARIAL DEED –
A CONTRIBUTION TO THE DEVELOPMENT OF SOCIETY

Introduction

The title of this report creates the expectation that the notarial deed and the notary's office, which produces the notarial deed as a result, make a contribution to the development of society. This expectation will not be disappointed in the following sections.

After an introduction (part A), which shows which types of notarial deed are recognised by German law and the areas in which notarial deeds are used, part B outlines how the notarial office has contributed to developments in the legal system, contributes to its current operation and fulfils the State's tasks.

The notarial task of offering sufficient protection to the weaker party (not necessarily a consumer) is demonstrated. This protective function was emphasised again recently. The section shows that the German notarial profession promotes the development of law at all levels through initiatives, whether through cooperation in national and supranational legislation, through the scientific penetration of law or its practical preparation for practical use, especially through the work of the German Institute of Notaries (DNotI).

The notarial deed as a lasting and clear written document with a simple implementable and fair content as a rule safeguards legal peace. The notarial profession works with central registers to reinforce this function through improved traceability (durable powers of attorney, supervisory assistance provisions, prospective or testamentary provisions). At the same time it is necessary to ensure that these qualities of the notarial deed are not sacrificed during the use of new techniques, but also to offer such quality in this area of application.

Notarial documentation and its handing on relieves the State significantly in sub-areas from the otherwise necessary provision of information, e.g. during tax collection or concerning money laundering and required personal identification.

All of this is not limited to purely German circumstances. In fact, the German notary's work has also taken account of the increase in cross-border matters recently.

The economic importance of the notarial office is then investigated in part C. After the World Bank report ‘Doing Business 2004’ and following deemed the notarial form obligation as economically disadvantageous, it is initially necessary to clarify the extent to which this World Bank thesis is supported by their research. It will be shown here that the World Bank’s research on Germany suffers from substantial factual errors and is not able to meet its claim of valuing matters from an economic perspective. Some aspects that should be considered positively during an economic valuation of the notarial deed are then highlighted. This leads to the conclusion that the notarial deed in Germany makes and will make a substantial contribution to social development, one that also has a positive economic effect.

A.
The notarial deed:
Legal significance, types of deeds and areas of application

I.
Legal significance

The notarial deed is awarded legal significance in its most varied form under German Law.

1. Requirement for effectiveness

   The notarial deed is a requirement for the effectiveness of legal transactions as a form considered under material law. Notarial authentication is a regularly specified requirement for effectiveness but occasionally also notarial certification[1].[2] A legal transaction which does not

[1] e.g. During the rejection of inheritances, §§ 1945 Para. 1 and 3, in proxies to form a GmbH or AG, §§ 23 Para. 1 Sentence 2 AktG and § 2 Para. 2 GmbHG, declaration on the takeover of a share of a business from a capital increase, § 55 Para. 1 GmbHG.

[2] Compare with the different types of notarial deeds below in Fig. II.

have the form prescribed by law is invalid[3], § 125 Sentence 1 Civil code (BGB).

Whether a deed drawn up by someone other than a German notary fulfils the legal form provision and therefore leads to an effective legal transaction is viewed differently depending on the individual form provisions and also on an extremely disputed basis, especially in company law. As regards the authentication of declarations abroad the Federal court of justice already demanded at an early stage in an *obiter dictum* that the foreign authenticating person would exercise a function corresponding to that of the German notary's activity in terms of training and position in the legal world and would take account of a procedural law corresponding to the supporting principles of German authentication law.[4]

2. Means of proof

The notarial deed is a particularly secure means of proof in judicial proceedings.

a) Notarially authenticated declarations:

According to § 415 Civil code of procedure (ZPO) the original copy or certified copy (§ 435 ZPO) of a regular notarially authenticated declaration justifies the full proof of the process certified by the notary with the result that a view held by the judge does not play a role in this respect.[5] This applies on the one hand for proof of the completeness and correctness of the authenticated declaration,[6] and on the other hand also for the accompanying circumstances set out in the deed (time, location, authorities, authenticating person) including the identity of the participating

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[3] This invalidity is not always final, but can be remedied in certain cases specified by law by subsequent events, e.g. § 311 b Para. 1 Sentence 2 BGB, § 15 Para. 3, 4 GmbHG. Moreover, the remedy in many branches of company law occurs if entries are made in the corresponding register.

[4] BGHZ 80, 76, 78 = NJW 1981, 1160

[5] *Musielak/Huber*, § 415 ZPO margin number 8.

[6] BGH, DNotZ 1986, 78.

people.[7] Deeds, which appear to have been drawn up by a notary in terms of form and content, are assumed to be genuine, § 437 ZPO.

b) Notarial deeds with a different content

Notarial deeds with different content also justify the full proof of the facts certified in them § 418 ZPO, e.g. execution of a signature by a certain person, protest against a bill, Art. 80 bills of exchange law, or the holding of a certain meeting, as well as the arrangement and content of the decisions made by the meeting.

c) Public electronic documents

The provisions on the evidential force of public deeds apply correspondingly to electronic documents that are drawn up by a notary within the limits of his official powers in the prescribed form, according to § 371 a Para. 2 ZPO. As ‘electronic authentication of declarations’ does not exist, this primarily means that in addition to the certified copy as an equivalent evidence, electronic documents which certify agreement of the document with the notarially authenticated or certified paper document or other public paper document are effective. Inversely, according to § 416 a ZPO a printout of a public document equipped with a notarial authentication according to § 371 a Para. 2 ZPO achieves the same evidential force as the certified copy of a public deed.

These legal standards, as well as the supplements to BeurkG required for this were implemented through the Judicial communication law (JKomG) of 22.05.2005. Their practical importance was marginal in the area of the German notarial profession until the end of 2006. With the obligation to send registrations and documents to the commercial register solely in electronic form from 01.01.2007, matters changed dramatically, at least in this legal area. This form provision anchored in § 12 of the Commercial

[7] LG Berlin, Conclusion of 14.2.1962 - 84 T 4/62, DNotZ 1963, 250; *Zöller/Geimer*, § 415 ZPO margin number 5.

Code (HGB) continues the previously necessary involvement of the notary in the registration process in the era of electronic legal relations.[8]

d) Foreign notarial deeds

In principle foreign notarial deeds enjoy the same evidential value as a deed issued by a German notary in a civil case.[9] Only the assumption of the genuineness of such less common deeds is restricted for the German courts according to § 438 ZPO. However, it is accepted when the legalisation or apostilla specified for recognition is enclosed or such an additional document is superfluous due to an EU legal provision or state treaty.[10]

3. Enforcement order

Finally the notarial deed is an enforcement order according to §§ 794 Para. 1 No 5, (800) ZPO, if the debtor is subject to compulsory execution due to an authenticated declaration. The possibility of compulsory execution was restricted to payment claims up to 31.12.1998. The possibility of subjection to compulsory execution was opened up to all types of claims through the second compulsory execution amendment law entering into effect on 01.01.1999. The law only provides for three objectively restricted exceptions.[11] The notarial deed not only enjoys national importance as an enforcement order, but is recognised and applicable in the EU. With the

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[8] Law on the electronic commercial register and cooperatives register, as well as the companies register (EHUG), Federal legal gazette Part I, 2006, 2553.

[9] *Musielak/Huber*, § 415 ZPO margin number 8.

[10] *Musielak/Huber*, § 438 ZPO margin number 3.

[11] Excluding claims that cannot access a comparable regulation, claims for the presentation of a declaration of a wish and claims that relate to the existence of a tenancy relationship concerning living space.

entry into force of the EEO Regulation[12] on 21.01.2005 the execution of German notarial deeds in all EU Member States with the exception of Denmark is only subject to very few formal requirements. The same applies to the execution in Germany of notarial deeds from EU Member States, whose legal system recognises enforceable notarial deeds, i.e. all EU Member States of the Latin notarial system.

II.
Types of deeds

While the federal notarial regulations (BNotO) regulate the factual competency of German notaries §§ 20 ff. BNotO, the product of these notarial activities (i.e. the procedure for the creation and content of the notarial deed) is determined by the authentication law (BeurkG). The BeurkG makes the following distinction:

1. Notarial authentication of declarations of wishes
   The notarial authentication of declarations of wishes is regulated in §§ 8 ff. BeurkG. This occurs through the drawing up of a memorandum on the transaction, which is read to the participants in the presence of the notary, approved by them and signed in their own hand, §§ 8, 13 BeurkG. According to § 13 Para. 3 BeurkG the memorandum is also signed by the notary, who encloses his official identification.
   The memorandum contains the identification of the notary and participants, information on the location and date of the transaction, observations on the identity of the participants, their capacity to engage in the transaction, insofar this is doubted and, where applicable, proof of authorisation to represent. These observations comprise the evidential value of the notarial deed.[13]

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[12] Regulation (EC) No 805/2004 of the European Parliament and Council on introducing a European enforcement order for uncontested claims of 21.04.2004 (OJ CE 2004 No L 143 p. 15).

[13] See Fig. I.2.a)

The provisions apply correspondingly for the authentication of oaths and sworn assurances, § 38 BeurkG.

The authentication procedure must guarantee that the participants understand their declarations and their legal importance, where applicable by translating the memorandum into a language, in which the participant involved in the deed is fluent, § 16 BeurkG, or via supportive measures for persons with disabilities. To this end the notary will investigate the wishes of the participants, clarify the matter, inform the participants about the legal scope of transactions and set out their explanations clearly and unambiguously in the memorandum. In this case he will ensure that inexperienced and unskilled participants are not at a disadvantage, § 17 BeurkG. The law also assigns him responsibility for the effectiveness of the business, as well as its executability, explicitly through the obligation to highlight required judicial or public authority permits, legal pre-emption rights and the tax clearance certificate, §§ 18 - 20 BeurkG.

2. Records of declarations other than declarations of wishes, as well as other facts or procedures

The notary also draws up a memorandum during the authentication of declarations other than declarations of wishes, as well as other facts. This contains the notary's identification, the report on his observations, the location and day of the observations and the location and day the deed was drawn up. This is signed by the notary, who encloses his official identification,

§§ 37, 13 Para. 3 BeurkG.

The law does not assign the notary any responsibility for the effectiveness of the content or execution in the framework of this authentication. In practice the notary's legal advice is also sought in this context and gladly accepted.

In the context of the area of application this memorandum, similarly to the memorandum on authentications of declarations of wishes, serves to fulfil the 'notarial authentication' requirement for effectiveness and has the same

evidential value as a public deed.[14] In contrast, such a deed cannot be an enforcement order.

3. Endorsements

a) Certificates and other attestations, § 39 BeurkG

In addition to the memorandum, endorsements are also notarial deeds. They are defined as deeds, which must contain the notary's attestation, signature and seal and the location and day of issue (not necessarily on the same day as the observation) § 39 BeurkG. The endorsement also offers the evidential value of a public deed,[15] although they are only restricted to the content of its statement, i.e. the executions or acknowledgement of the signature by a specific exactly defined person before the notary or the determination of the identity of copies with their models. In contrast a deed of this type cannot be an enforcement order.

aa) Certification of a signature, § 40 BeurkG

A practical and particularly legally important form of the endorsement is the authentication of signatures and initials. It can only occur if the signature is executed or recognised in the presence of the notary, about whom the endorsement must give information. Moreover, an essential content of the endorsement is the undisputed identification of the signing person as well as information identifying their identity. This deed fulfils the requirement for effectiveness of public authentication in the sense of § 129 BGB.[16] In contrast authentication of signing a name signature (sample signature) without the associated text regulated in § 41 BeurkG is a relic of the past. Business people and persons whose representation entitlement was proclaimed via the commercial, limited partnership or cooperative register, were legally obliged up to 31.12.2006 to sign their signature for keeping in the register. This signing requirement has become sacrificed to electronic legal channels.

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[14] See Fig. I.1. and 2.

[15] See Fig. I.2.

[16] See Fig. I.1.

bb) Certification of a copy, § 42 BeurkG

In addition to authentication of a signature, the authentication of a copy of a deed is of significant importance. This copy can be prepared from original copies, first copies, certified copies but also from simple copies. This notarial deed is never a requirement for effectiveness; it solely has a proof function.

A printout of an electronic document can also be certified. If this is equipped with a qualified electronic signature under the signature law, the result of the signature verification will be documented, § 42 Para. 4 BeurkG.

b) Simple electronic certificates, § 39 a BeurkG

Since the entry into force of JKomG on 01.06.2005 the notary can also draw up certifications and other attestations in the sense of § 39 BeurkG electronically. The endorsement must be equipped with an electronic signature in accordance with the signature law. This should be based on a certificate that is verifiable in the long term. A confirmation of the notary's capacity by the responsible authority (i.e. state chamber of notaries) must be linked to the certificate.

III.
Area of application for notarial deeds[17]

1. Prescribed requirement for effectiveness

Notarial authentication is a legal prescribed requirement for effectiveness for legal transactions where the legislator deems that special protection against excessive haste (warning function), a clear and safe documentation of the close and content of the transaction (proof function) and/or a comp-

[17] From a different viewpoint compare: *Langhein*, Involvement of the notary in the context of uncontested (voluntary) jurisdiction (I. topic U.I.N.L. 1992) in BNotK (publisher.), XX. International Congress of the Latin Notarial Profession, Cartagena/Columbia 27.04. - 02.05.1992, Reports of the German Delegation, p. 5 ff.

etent instruction and advice to participants prior to executing the signature (advisory function) is recommended to protect the participants or in the interest of the general public.[18] This covers the following areas in particular:

a) Land transactions

The notarial deed plays a main role in land transactions, where it rightly has to fulfil all of the three previously stated functions. Several standards are decisive for this:

aa) Disposal of property and rights equivalent to land

The central standard for obligation transactions under debt law is § 311 b Para. 1 Sentence 1 BGB, whereby a party is obliged to transfer or acquire ownership of a site requires notarial authentication. The standard applies completely independently of the cause and purpose of the transaction (purchase, gift, contribution to a company, etc.) and also for the unilateral partial deed (offer, acceptance). It covers legal transactions relating to plots of land (partial areas, joint ownership sections).

§ 4 Para. 3 WEG and § 11 Para. 2 ErbbauVO indisputably extend the area of application to the transfer of home and partial ownership and inherited building rights, and even also where the first division of the ownership is to a person separate from the owner and thus leads to a transfer of the ownership portion.

§ 311 b Para. 1 BGB does not apply for assignment as a property law disposal transaction. It is covered by § 925 BGB, which stipulates that the relevant agreement without conditions or time specifications must be explained to the office responsible for this, as a rule the German notary, with the simultaneous presence of those concerned. This also applies to home ownership, as well as first establishment or elimination for the benefit of a third party, § 4 Para. 1 and 2 WEG, but it does explicitly not apply for the establishment, transfer or removal of inherited building rights, § 11 Para. 1 sentence 1 ErbbauVO.

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[18] On the function of the notarial authentication compare *Eylmann/Vaasen-Eylmann*, intro. BeurkG, margin number 3.

For the reader's understanding of other legal regulations it is pointed out that according to the separation and abstraction principle implemented in the German BGB, the debt law land transaction (i.e. obligation) and the property law disposal are independent of each other as a rule in their effectiveness and demand declarations with a separate content in each case.[19] This explains why a form requirement as a requirement for effectiveness can occasionally affect the basic debt law transaction and also the property law disposal transaction.

bb) Freedom of form in other land-related legal transactions

In contrast to the general public belief, which extends far into the legal world, the notarial deed is not a requirement for effectiveness for other land-related legal transactions. This applies to all types of land taxes including obligation transactions, but also to the establishment or removal of home ownership according to § 8 WEG or inherited building rights by the land owner itself. In this respect notarial authentication only leads to a commitment to a clarified agreement, §§ 873 Para. 2, 877, 880 Para. 2 BGB, i.e. to a reinforcement of the legal arrangement between the contract partners prior to entry of the legal amendment in the land register. However, a publicly certified entry authorisation according to §§ 19, 29 land register regulations (GBO) is a requirement for entry into the land register, without which no legal amendment occurs according to § 873 Para. 1 BGB. However, the endorsement deed of a signature authentication in the sense of the above Figure. II.3. a) aa) is formally adequate for this.[20]

cc) Subjection to compulsory execution §§ 800, 794 Para. 1 No 5 ZPO

The notarial authentication of subjection to compulsory execution should actually not be assigned to land law, but to process law. A deed is only an enforcement order in the case of regular authentication of the declaration of subjection. The justification for mentioning this requirement for effectiveness at this point is that it is actually the most

[19] Compare this with MüKo-*Rinne*, Introduction to § 854 BGB, margin number 16.

[20] Compare under this Fig. III.2.

frequent case of use of authentication of land pledge rights and the relevant subjection with effect against the individual owner under § 800 ZPO again requires entry in the land register. Ordering land pledge rights themselves does not require notarial authentication, but lending inst-itutions regularly require land pledge law and subjection to execution during property loans.
In addition to this area of application, notarially authenticated subjection to compulsory execution regularly occurs with legal transactions, which are certified in any case for other reasons and become defaulting claims in the context of forbearance agreements, as the notarial deed is an extremely inexpensive channel for acquiring an enforcement order compared with a reminder procedure.

b) Other Form provisions in debt and property law
Otherwise, notarial authentication as a requirement for effectiveness is the exception in debt and property law in the BGB:

aa) The obligation to transfer or burden with usufruct the entire assets or fractions of the entire property according to § 311 b Para. 3 BGB is practically unimportant, as all transactions concerning ind-ividually named objects are not recorded even when they comprise the full economic assets.

bb) Contracts among future legal heirs concerning the legal inheritance share or obligation share of one of them are effective following notarial authentication according to § 311 b Para. 5 BGB under German Law. They have practical importance, if direct contacts with the bequeather are not possible or wanted or if value is placed on committing the heirs to each other. However, these are rare exceptions to waivers of the inheritance share, commitment share and assignment under §§ 2346 ff. BGB.

cc) According to § 518 Para. 1 BGB a non-immediately fulfilled promise of a donation requires notarial authentication. Such cases are very rare in practice apart from land transactions which require authentication in any case according to § 311 b Para. 1 BGB.

dd) Finally the (property law) order of usufruct or lien on a right under §§ 1069 Para. 1, 1274 Para. 1 Sentence 1 BGB is subject to the (form) provisions for the transfer of the right. This means that the pledging of an abeyance of ownership to a site is subject to the provisions of § 925 BGB and the pledging of a GmbH transaction share or the order of a usufruct must be notarially authenticated according to § 15 Para. 3 GmbH.

c) Family law

Notarial authentication is more frequently found as a requirement for effectiveness in family law. The following are named here without a claim to completeness:

aa) Marriage contracts, life partnership contracts, divorce settlements, etc.:

Notarial authentication covers contracts on a matrimonial property scheme and/or alimony according to §§ 1378 Para. 3, 1408, 1410 BGB or § 1587 o BGB, the choice of the general marriage effects, Art. 14 Para. 4 EGBGB or the law applicable to the matrimony property scheme, Art. 15 Para. 3 plus Art. 14 Para. 4 BGB,[21] a waiver of a share in the overall assets and the elimination of the continued sharing of assets through a contract, § 1491 Para. 2 and § 1492 Para. 2 BGB or the declaration of consent according to § 1516 BGB. In addition, in the case of agreed divorce, § 630 Para. 3 ZPO requires the spouses to enclose an executed debt title (via a notarial deed or judicial arrangement) concerning the arrangement for the maintenance obligation to a child, the legal maintenance obligation justified by the marriage, as well as the legal relationships to the marriage home and furniture. However, this is often ignored in divorce practice.

Contracts on post-marriage maintenance have not been subject to form requirements so far. This will change soon especially due to the scope of such agreements through the drafting of a law on modifying the right

[21] Correspondingly also for contracts for entered life partners, §§ 7, 20 Para. 3 Life partner law (LPartG).

to maintenance[22]. The bill proposes to supplement § 1585 c BGB by the following sentence: *'An agreement that was made prior to the legal effect of the divorce requires notarial authentication.'* This and the clarifications in the justification of the law clearly show trust in the protection and instructive function of notarial authentication in personally difficult areas with a significant economic scope.
In Bavaria notaries are also responsible under Art. 1 of the Bavarian law on executing the life partnership law (AGLPartG) for authenticating the justification of an entered life partnership. Registration here is looked after by LNotK Bavaria.

From a legal policy viewpoint, further involvement of the notary in the divorce procedure is being discussed, especially to prepare for a consensual divorce.

bb) Filiation

The public authentication of acknowledgement of paternity, as well as relevant consent by the mother according to § 1597 BGB hardly ever takes place at notary's office, as the civil registry, the youth welfare service and the Court of Procedures are responsible for this. The same applies to declarations of concern and related consents according to § 1626 d Para. 1 BGB.
In contrast, applications and declarations of consent on acceptance as a child are practically important, §§ 1741 ff. (1746 Para. 2 Sentence 2, 1747 Para. 3 no. 3 Sentence 2, 1750 Para. 1 Sentence 2, 1752 Para. 2 Sentence 2, 1762 Para. 3, BGB.

d) Inheritance law

aa) Binding legal transactions on inheritance law during lifetimes

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[22] Federal government bill of 07.04.2006, BT DS 253/2006, introduced into the Bundestag on 15.06.2006, BT DS 16/1830 (extensive justification on p. 22), transferred to the Legal Committee after a first reading in the Bundestag.

Notarial authentication is prescribed without exception for all legal transactions which already control an inheritance or a part of the inheritance in the bequeather's lifetime, namely inheritance contracts as well as withdrawal from these, §§ 2276, 2290 Para. 4, 2291 Para. 2, 2296 Para. 2 Sentence 2, 2301 Para. 1 Sentence 1 as well as waivers of inheritance, allotment and legal shares, §§ 2348, 2352 Sentence 3 BGB.
These are legal transactions which are largely not permitted in other legal circles, especially in Roman circles.

bb) Purchase of inheritance and control of shares of patrimony

According to §§ 2371, 2385 BGB a debt law legal transaction concerning the disposal or purchase of an inheritance overall (not concerning individual inheritance objects), especially purchase of inheritance, as well as (material) control of a share of joint heir in the patrimony under § 2033 Para. 1 Sentence 2 BGB, is covered by notarial authentication. As a restriction on the latter provision, the Federal Court of Justice decided that a joint heir can leave the community of heirs by so-called consensual departure from the community of heirs in free form.[23]

cc) Declarations to the probate court

Some declarations to the probate court must be publicly certified as an effectiveness requirement (i.e. not just for evidential purposes), such as rejection and related challenges, §§ 1945 Para. 1, 1955, 1956 BGB. The application for the issue of an inheritance certificate is free form, but a sworn assurance that has to be presented to the probate court or a notary is needed to prove negative facts according to § 2356 BGB. The same applies to the will execution certificate under § 2368 Para. 3 BGB.

dd) The will

[23] BGH Urt. v. 21.01.1998 - IV ZR 346/96, NJW 1998, 1557 = DNotZ 1999, 60 m. Anm. Rieger.

As a form of individual will and the joint will of spouses[24] a drawing up in the person's own hand (§§ 2231 - 2233, 2247, 2276 BGB) is also permitted in addition to notarial authentication from the bequeather's adulthood. Freedom of choice therefore exists here, apart from in the case of people who cannot write themselves. However, the revocation of a so-called change-related disposition in a joint will must be notarially authenticated, § 2271 Para. 1 Sentence 1, 2296 BGB.

e) Legal persons, company law

The law of legal persons, as well as that of other companies and associations of persons does not have any uniform requirement for authentication.

Thus the statutory deed of formation, determination of the articles of association, amendments of the articles of association, etc.[25] in associations, independent foundations, cooperatives, business partnerships and limited partnerships are not subject to any notarial form. The same appears here for changes in the membership. Insofar as a reg-ister is kept for such persons at courts, the person itself with its name (firm) and legal form, its registered office and persons authorised to represent it must always be registered, and occasionally also other facts. These registrations require public certification, and now largely in the form of electronic public certification.[26] Further authentication requirements only apply to companies with share capital.

aa) Law on the public limited company (AG) and the share-based limited partnership (KGaA)

According to § 23 Para. 1 of the Share law (AktG) a public limited company's articles of association must be determined by notarial authentication. Authorised persons require a notarially certified proxy.

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[24] According to § 10 Para. 4 LPartG registered life partners can also create a joint will; the stipulations for the marriage spouses' will apply correspondingly.

[25] pars pro toto articles of association also for the status, partnership deed and similar items.

[26] In this respect see the following Fig. 2.c.

Moreover, according to § 130 AktG each decision by the general meeting of shareholders is to be authenticated in a memorandum recorded by a notary. The same applies to each demand by a minority under
§ 120 Para. 1 Sentence 2, § 137 AktG. An exception to this applies to decisions by unlisted companies, for which the law stipulates less than a three-quarters majority.
These provisions under § 278 Para. 3 AktG apply correspondingly to a share-based limited partnership.

bb) The law of the private limited company (GmbH)

The private limited company is most strongly subject to notarial authentication, where the same provisions apply as to the public limited company for formation and decisions amending the articles of association, §§ 2, 53 Para. 2 GmbHG.
This is supplemented by the fact that the transfer of business shares must be notarially authenticated, §§ 15 Para. 3 and 4 GmbH, and the takeover of a new business share requires a notarially recorded or certified declaration by the purchaser according to § 55 Para. 1 GmbH.
These authentication requirements are highly disputed in legal policy and are currently being challenged recurrently while referring to the competing and in this respect[27] completely free 'Limited' form under English law.
The law on private limited companies is expected to be adapted to current needs through the MoMiG[28]. The reference draft so far does not provide for any restriction of the authentication requirements, and even increases the value of the notary's position, insofar as it grants notarially submitted shareholder lists a *bona fide* rights effect for the composition of the shareholders.[29]

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[27] To see that the Limited for its part is not free of formalism, compare *Vossius*, notar 4/2004, p. 107, 115 f.

[28] Law on modernising GmbH law and to combat abuse - MoMiG, reference draft of 29.05.2006.

[29] According to § 16 of the draft law, particularly Para. 3:
'§ 16

f) Other corporate law

The reorganisation law of 28 October 1994 (UmwG) also contains an extremely important transfer task. Among other items, reorganisation contracts, §§ 6, 125 UmwG, or plans or decisions, §§ 136 (125), 193 Para. 3 Sentence 1 UmwG must be notarially authenticated. The same applies to the declaration of waivers to legally prescribed reports and audits, §§ 8 Para. 3, 9 Para. 3, 125, 192 Para. 3 UmwG.

2. Prescribed evidential proof

a) Public authentication in BGB

Civil law stipulates the obligation to submit publicly certified declarations or document in various places.[30] However this is only very rarely[31] an ef-

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Legal position during the transfer of business shares
(1) In the relationship to the company, only the person who is entered in the list of shareholders submitted to the Commercial register counts as a shareholder. The change in the list by the managing director is performed by notification and proof.
(2) Payments in arrears for the business share at the time of submitting the list of shareholders to the commercial register (§ 40 Para. 1 Sentence 1) are owed by the purchaser and the disposer.
(3) To the benefit of those who acquire a business share or a right to it via a legal transaction, the content of the list of shareholders counts as correct when the entry relating to the share at the time of the purchase was contained incorrectly in the list of shareholders for at least three years and no revocation was transmitted to the commercial register. This does not apply if the incorrectness is known to the purchaser.'

The involvement of the notary in the list of shareholders is stipulated in changes in § 40:
'§ 40 is changed as follows:
a) Paragraph 1 is changed as follows:
aa) Sentence 2 is set out as follows:
'If a notary has worked on changes under Sentence 1, he must submit the list on behalf of the managing director after it becomes effective without delay.'
bb) The following sentence is added:
'If the list is to be submitted by the notary, it and its certification must show that he worked on the changes and the changed list that has been transmitted to the managing directors, the remaining entries must match the list so far and nothing must be visible from the documents present that questions the correctness of the list.'
b) In Paragraph 2 the words 'the seller, the purchaser and' must be added after the word 'are liable'.

[30] Only see the listed stipulations in Palandt-*Heinrichs*, § 129 BGB margin number 1.

[31] Exceptions are stated under Fig. III.1.

fectiveness requirement for a legal transaction, without the provision of a suitable means of proof as a rule.

b) Land register law, § 29 GBO

A central provision of land register law is § 29 GBO, which stipulates that an entry should only be undertaken if the entry authorisation or other declarations needed for the entry can be proved by public or publicly certified deeds. This means that every modification of land rights based on a legal transaction at least requires a notarial endorsement deed (signature authentication according to § 40 BeurkG).

c) Register law, §§ 77 BGB, 12 HGB, 5 Para. 2 PartGG,157 GenG

Apart from the register of associations, which is pointlessly continuing to operate in paper form, the registers were changed over to exclusively electronic register operation on 01.01.2007. This means that documents and registrations must now be submitted in electronic form. The requirement of a public authentication of the registration was kept in the forefront despite conflicting considerations and no longer addressed separately in the just-ification of the bill submitted for this purpose.[32] The fact that notaries have taken on technical challenges that accompany the implementation phase with its own contradictions, once again shows the notaries' willingness and openness to make their contribution to future-oriented changes of direction.

3. Voluntary use

a) Despite freedom of form

In practical work there are fields in which notarial authentication is occasionally or even frequently wanted, although it is not demanded by any legal provision.

The first field to name is wills, where people frequently refrain from personal drawing up. In my view what is decisive here is the trust that the solutions and formulations proposed by the notary will help to make the inheritance

[32] Federal government bill of 30.12.2005, BR DS 942/05, p. 117 f.

easy and free of conflict insofar as possible and will implement the bequeather's individual wishes as optimally as possible.
Another area occurs in providential proxies, where applicable in connection with patient dispositions, for which the law only stipulates written form. In addition to the above reasons the seriousness of the corresponding declaration is emphasised in order to create an emphasis. While a proxy of this type is also suitable for land transactions, it nonetheless at least requires public certification.

b) Authentication instead of certification

Moreover, it can occasionally be seen that in addition to the legally prescribed signature authentication the notary is commissioned to design associated declarations or also contracts and where applicable also to authenticate them. This applies especially for the entire area of land transactions (e.g. private loans or contracts of use), with the latter naturally only beyond usual private leases, for which standard trading formula contracts are used. A reason for this is that in addition to the specialist competence expected from the client, the notarial service is particularly inexpensive at least for small values in the private area compared with the offer of other legal advisers due to the fees regulations in force, the so called costs regulations
An exception to this are declarations, which large businesses have to submit in large numbers. As an example of the latter named here are extinction declarations of lending institutions for mortgages, as well as easements for public utility companies. In such transactions the notarial involvement is regularly restricted to signature certification.
The situation is similar in company law, where however lawyers and tax advisers take over legal assistance from a certain scale.

IV.
The official notary's judicial functions

For the sake of completeness it is mentioned that in parts of Baden-Württemberg the function of land register office and probate court assigned to

the courts in other federal states is taken over by notaries. In the area of legacies a transfer of tasks to notaries to relieve the judicial system is also being discussed for the remaining federal states. However, a relevant bill has not been produced yet.

B.
The contribution of the notarial deed to developing society

The fact that a society whose legal order has stipulated notarial activities for several hundred years is partially stamped by notaries is obvious. In contrast, it is more difficult to describe how this activity has had an effect on the development of society. It is impossible to ascertain how German society would have developed without notaries and notarial deeds. An attempt has never been made to measure the contribution of the notarial deed to the development of society. Suitable statistical material is therefore missing and cannot be expected in the near future. A notarial deed namely makes an optimum social contribution when it fulfils all of the participants' expectations, the authenticated contract is thus settled smoothly or the desired behaviour of a (private or public) person occurs on the basis of this document. This value is not only difficult to measure but as a rule is first observed by members of society when expectations are also disappointed individually and then it becomes visible that this success is not self-evident.

However, it is possible to show the services of German notaries and the impact of their work on German legislation and the development of the German legal order. Similarly it is also possible to show current and future challenges for the development of society, as well as to describe the steps that the German notarial profession has taken to meet these challenges. This is the task of the following section.

I.
The contribution to developing the law

The notary makes a significant contribution to legal implementation through his daily activity, insofar as he formulates the wishes of the parties which justifies the rights and obligations between the participants to a notarial legal transaction. Even though the wishes of the participants must be determined individually in each case, certain configurations, interests and problems have become identified as typical in the decades of notaries' practical activity. It does not follow from this that one correct answer and especially one correct contract exists for these typical cases. Instead, a series of answers are considered whose var-ious consequences must be weighed up. If the notary allows the participants to identify their case, to ask the right questions and to weigh up possible answers against each other through his activity, he is then making a relevant and pos-itive contribution to contractual legal implementation by the parties to the contract. Some cases in which the notaries' activity also has contributed to the development of society with a wider effect will be recalled briefly.

1. Builders' contracts yesterday and today

   The builder's contract as a contract, in which a building contractor promises his contract partner to construct a building at a site belonging to the building contractor and to transfer this then with the site[33] to the contract partner has not been regulated legally yet. § 1 of the Regulation on the anticipated payments in builder's contracts (HausbauVO) has provided an (overly)[34] narrow definition of the builder's contract since 23 May 2001 and allows contractual agreements, which, subject to certain requirements, stipulates

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[33] Where applicable only a fraction, especially in the case of home or partial property or also in the area of inheritance construction law.

[34] Restriction to the construction of a house or comparable building, cf. *Basty*, Der Bauträgervertrag, 5th edition. 2005, margin number 1.

an obligation on contract partners to make anticipated payments,[35] but also contains other regulations.

The standard contract is primarily due to the financial weakness of (parts of) the construction industry. The builder or the bank financing it obtains (advance) payments at a time when ownership of the land has not been transferred yet, at least when the conveyancy of it is not yet clarified and the building is not ready yet.[36] As a result there is a substantial risk of loss borne by the contracting partner, who as a rule is also the weaker economic party; however this is not linked to the lack of transfer.

In the reconstruction period after the second world war there were neither legal regulations that protected the contract partner from such advance payments on a binding basis nor was there an authentication obligation for the purchase obligation in the context of such contracts as § 313 BGB and following only targeted protection for the seller. The construction industry and financing banks had the market power to dictate the conditions of such builders' contracts. In this situation it was the Munich notary *Koller*, who not only invented the still current indemnity bond for the global creditor at the start of the 1970s, but also implemented it on his own against large banks.[37] He was followed by the Bavarian state chamber of notaries in March 1971 with the memorandum on 'the arrangement of contracts on the purchase of new habitation buildings and condominiums', which issued standards in the form of a notarial register guideline to protect the purchaser from unsecured advance payments and their loss.[38] The standard developed there was taken up by the legislator especially through the cre-ation of a broker and builder regulation (MaBV), which entered into force on 1 September 1974 and determined the content of the builder's contract on a largely unchallenged basis until the start of the new

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[35] Showing the dispute linked to constitutionality, compatibility with EU law and the content importance of the HausbauVO requires its own contribution. Compare only with the further demonstrated *Basty*, Der Bauträgervertrag, margin number 31 ff.

[36] Cf. *Koeble* in *Grziwotz/Köble*, Handbuch Bauträgerrecht, margin number 45 ff.

[37] See *Wolfsteiner,* DNotZ 1999, 99, 101 f.

[38] See *Grziwotz* in *Grziwotz*, MaBV, introduction. margin number 8 and ff. also on the following law trans-ition.

millennium. The legis-lator did not use the option to establish further protection standards that were proposed by the notarial profession itself, without a further existing possibility.[39]

The advance payment obligation in the builder's contract is currently suffering criticism, which is not completely coincidentally in connection with the partly tax-motivated purchases of so-called scrap buildings[40] and the collapse of the property market in the new federal states, which drew a wave of insolvencies among building firms. Working on the § 632 a BGB introduced with the law on accelerating due payments some consider that advance payments can only still be demanded under the requirements stated there and the standard up to now conflicts with the law. The 'exit' of the builder's contract has been evoked.[41] The legislator has tried to put this conclusion out of the world by decreeing the house construction regulation at the initiative of notaries throughout, especially the BNotK, without being able to end the dispute on the permissibility of advance payments in the builder's contract.[42]

It is not in the power of notaries to raise the current legal standard, which as a fundamental idea is a minimum protection, by refusing to authenticate legally permissible arrangements. The financing banks in particular insist regularly on the possibility of lowering completion risks on the purchaser offered to them by law and in jurisprudence.

The Federal Chamber of Notaries is acting incessantly to contribute to the continued development of the builder's contract and to place on a legally sound basis. It proposed a discussion draft on regulating the builder's

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[39] *Wolfsteiner,* DNotZ 1999, 99, 102.

[40] Property, which is sold at excessive prices, acquired by economically inexperienced purchasers, who are frequently dazzled by (alleged) tax advantages, without prior viewing and supported solely by statements by sales professionals, glossy brochures and valuation by the financing bank. In the worst cases the properties sold were ready for demolition and had only scrap value.

[41] *Grziwotz*, ZfIR 2000, 929, 930.

[42] A concise overview with comprehensive proof is given by *Grziwotz* in *Grziwotz*, MaBV, introduction. margin number 11 - 13.

contract in the civil code in 2005.[43] It had to accept more censure than praise[44] for this, whereby the rejecting voices have refrained from formulating a draft that could hope for wider consent for their part.

But even if the builder's contract is currently a problem child in notarial practice, the current contract standard and even also a number of improvements for the weaker contract partner are the result of intensive notarial activity. This standard acted as the civil law basis for the construction of whole urban areas and as a rule with a satisfactory result for all parties to the contract. The phenomenon of the insolvent builder and buildings remaining unfinished will always exist like poor fulfilment of a contract or overly priced goods in the free economy. Equally unavoidable losses arise as a result. As long as the legislator does not impose this risk on the general public or a participant (contract partner, construction craftsman, bank) definitively, it will be the notary's task to restrict the risks to the greatest possible extent and to secure these, and at least to make them visible and thus to make a free decision on taking over the risk possible.

2. Grouping through chamber activity

Legal development will rarely be traced back so practically to a notary's activity or a chamber's memorandum as is the case in the builder's contract. But there is also a well-practised tradition in other topics that affect the notarial activity where chambers of the professional groups accompany the planned law and they are given the possibility of adopting a position, and in individual cases are also given the possibility of verbal hearings. The BNotK and in their relevant areas of responsibility the state chambers of notaries regularly use this law and are constantly aiming to improve the quality of legislation in this way. This applies especially in areas where the notaries cooperate alone with other state authorities, e.g. real estate law in

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[43] http://www.bnotk.de/_PDF-Dateien/Bautraegervertrag/050401_Bautraegerrecht_BGB_Text_BMJ.pdf

[44] For censure: Thode/Wagner, BTR 2006, 2ff.

con-nection with land register law, notaries contribute practical knowledge of experience which good legislation cannot do without.

As legal implementation is playing an increasingly important role at European level, the chambers are also trying to contribute their technical know-ledge of the legislative process there as well. This already applies to preparatory work. Thus the Council of Notarial Professions of the European Union (C.N.U.E.) has made available a total of 13 notaries as experts for the network of experts on the practical support to develop the general framework of reference (CFR) for European contract law, which is an amazingly high number for the small Latin notarial profession, given an overall total of 160 experts. Three German notaries are making their contribution here again with vigorous support from the chambers, which in view of the mass of texts produced can only be called extraordinary. If the result of these efforts is more transparent, more user-friendly and proper EU standards, this would nonetheless be worth all the effort and again is a contribution by notaries to developing society.

3. Contributions to scientific penetration

a) Notarial publications on preventive practice and on jurisprudence.

German Law does not suffer because too little is written about it. Even specialists of a narrow specialist area can barely master the flood of pub-lications, judgements, comments and proposed laws.[45] In this respect it is possible to doubt whether each text contribution, which German notaries provide to law, is an enrichment and thus makes a positive contribution to the development of society.

But not only individually, but many notaries and many far beyond the immediate area of notarial activity have made a name through publications and worked on a sustained basis on the development of preventive practice and also legal science. Citing individuals would reduce the performance of all those who have not been named.

b) The work by the Institute of German notaries (DNotI)

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[45] Among other things see the admission by *Kanzleiter*, DNotZ 2006, 246.

In view of the previously cited flood of information and the selection problem arising from this I would however like to point particularly to a German achievement here already in particular: the DNotI.
Account is taken here among notaries of the sad fact that even in the allegedly narrow specialist area of the notarial profession not everyone can know everything or can read everything that affects them professionally. In addition there is an increase in international matters whose relevant treatment is only possible with knowledge of the law applying to the case and frequently enough also foreign legal standards. With DNotI every German notary has the possibility of requesting an expert report answer for such problems, which he will acquire within 14 days and also faster if the matter is justified as urgent. Moreover, the DNotI makes copies of specialist lit-erature available on request, undertakes literature searches into its own databases and refers in the DNotI-Report to relevant decisions and literature. The associated costs are not collected in relation to a case but are imposed on all German notaries via chamber contributions, so that the legally required information can be acquired independently of the client's financial capacity, meaning that the same high standard can be guaranteed to each participant. This already contributes noticeably to improving notaries' ad-visory service and thus to utility for participants. The offer enjoys strong demand among German notaries. In 2005 given the 9,164 notaries counted across Germany, a total of 8,794 requests for expert reports and 5,077 applications for literature searches were drawn up and answered.
It is not possible to rate highly enough the associated quality assurance for the work of small notarial firms in rural or structurally weak regions where the development of an own large library is not possible and which pra-ctically do not have any access to public libraries with adequate specialist literature. The biggest German library plus databases with texts relevant to notaries are open to all notaries via the DNotI.

However, the usefulness of the DNotI is not restricted to gain in knowledge by the requesting notary. As the entire quantity of practice-related requests are processed, prepared and archived at a central location, additional know-how is created that cannot be assessed highly enough. Expert

assessments that appear particularly relevant are published in a fortnightly rhythm. These publications are again taken up by science and jurisprudence and carry substantial weight during judicial decision-making. The know-how, especially also due to the processing of international matters is used by legislative bodies. Thus the DNotI prepared a comparative law study on the process and material collision law relating to wills and the legal consequences of death on behalf of the EU Commission on 18.09./08.11.2002. This became the basis for the EU Commission green paper on inheritance and will law of 01.03.2005, KOM (2005) 65. By doing so German notaries are making a contribution to the development of law which clearly goes beyond the authenticating and consultancy activity in the individual case.

c) The German Notarial law association (NotRV)

NotRV was founded in Würzburg in 1997 with the goal of placing dialogue between the notarial profession on the one hand and lecturers and judges on a broader basis, to clarify the importance and specificity of contract preparation early and thus to promote an understanding of the notarial activity among other legal professional groups. NotRV promoted and accompanied the establishment of institutes for notarial law at the universities of Würzburg, Berlin, Bielefeld, Bonn, Jena and Munich (research unit). It organises specialist conferences and symposia, supports scientific work through printing cost subventions and every two years rewards an outstanding work in the notarial laws segment with the Helmut-Schippel prize (EUR 5,000.00). It issues two series of newsletters, the general 'NotRV series of newsletters'[46] and 'Newsletters on notarial law'[47] especially for publications by university institutes for notarial law. It finances itself through contributions from its 890[48] members. A further contribution to

[46] According to the 2006 activity report 23 volumes have appeared so far; two others are under contract.

[47] This series includes the first volume by Prof. Dr. Hager which has appeared on the topic 'Patient disposition'.

[48] 2006 figures.

the development of law is made through this private contribution by notaries at an early stage, i.e. during law student training.

II.
The contribution to legal peace

Legal peace, as a non-achievable ideal, occurs when every agreed exchange of services takes place without the use of a state compelling force and every subject of law is so happy with his situation that he sees no grounds for improving this through legal conflict. The notarial office in Germany is oriented towards working in this direction. This is served firstly by all official obligations that should ensure that effective legal transactions are authenticated, such as the determination of a capacity to engage in a transaction, the verification of authorisation to represent, the indication of the possible usability of foreign law, permit requirements and pre-emption rights, §§ 11, 12, 17 Para. 3, 18, 20 BeurkG, as a nonetheless completed exchange of services without effectiveness does not last. The verification and instructive obligations of § 17 Para. 1 and 2 BeurkG serve the faithfulness to the contract, as a transaction, that reflects the genuine will of both participants is not challenged by these, unless circumstances that were not predicted or expected arise. The avoidance of a disadvantage for inexperienced and unskilful participants creates legal peace as a genuine or at least perceived disadvantage will prompt the participants affected by this to consider legal reactions and where applicable also to undertake these.
But perfect notarial official action in every respect cannot prevent a participant from breaching his obligations or the quality of a contract object does not achieve what is promised to the purchaser for other reasons. In these crises which endanger legal peace, it is nonetheless a main task of the notarial office to keep the ensuing disruptions as small as possible.

1. Legal clarity and legal certainty
   As a dispute leads to court in particular when both parties to the dispute believe that they are right, the clarity of the material and legal situation primarily help to avoid disputes and thus to maintain legal peace. The notary

is obliged by this clarity of law and is liable if he does not fulfil this obligation adequately.

a) Clarity of observations

Clarity is first served by the entire underlying things like the exact labelling of the notary, the location and day of the transactions as well as the deposition of the participants' declarations in a deed, § 9 BeurkG, which must be read out to the participants, approved by them and signed by their own hands, § 13 BeurkG. Of course, it is also served by the obligation to identify the content of the land register, §21 Para. 1 BeurkG. According to § 17 Para. 1 BeurkG the notary is obliged to provide a clear and unambiguous rend-ition of the declarations in the memorandum. What may sound easy assumes significant specialist knowledge. Shortcomings in this area lead to a loss of the high evidential value of the deed in a dispute deciding point.
It should therefore be indisputable that the deposition of legal transactions in notarial deeds not only serves legal clarity, but also leads to high level legal clarity, provided that notaries work reliably and on a quality basis.

b) The clarity of legal importance and effectiveness

Notarial authentication not only aims for the clarity of legal transactions, but also to inform participants about legal scope. This can only be assured by someone who is familiar with the relevant law and is able to communicate its content adequately concisely to unskilled participants (laypersons). This affects not just main performance obligations, i.e. the payment and acceptance obligation on the purchaser in a purchase contract, as well as the vendor's allotment and transfer obligation, but also indications of modifications of rights and obligations arising immediately from the legal transaction such as the transfer of danger and insurance obligation, the con-tractual relationship to lessees of the premises, indications concerning public taxes and levies relating to the premises as well as other third party rights, which conflict with execution of the contract. According to constant jurisprudence by the Federal Court of Justice (BGH) this also includes securing the exchange of performances by warning against unsecured

advance performances as demonstrating solution options that avoid such an unsecured advance performance (double instruction obligation).[49]
Finally the notary also takes on double responsibility for the legal effectiveness of legal transactions, insofar as he rejects the authentication of transactions that are ineffective[50] on the one hand and in the case of transactions whose legal effectiveness is doubtful, points this doubt out to the participants and this instruction is also documented in the deed.

These performances by the notarial deed can also be awarded a positive value in the context of economic analysis of law. A starting point for the determination of the economic function in contract law is namely the thought structure of the full contract.[51] A complete contract that assigns every risk with its consequences and therefore allows the participants to have a full basis of price formation is not encumbered with risks that can lead later to a modification, removal or challenge. It is effective and unassailable.[52] The notarial deed is now a product (albeit incomplete in the sense of economic teaching) that at least distributes the most important contract risks in a way that is transparent to the participants and can be validated on a lasting basis. The notary feels the economic importance of his teaching when the participants enter into renewed price negotiations subsequently, which definitely occurs.
What is worthwhile for economists is that indisputably a contribution is made here to legal peace at the same time, as a meaningful dispute is not possible concerning largely effective and unassailable contracts.

c) Permanence

Notarial deeds are Germany's civil law conscience. Every notary is obliged to keep the deeds for his notarial premises. Insofar as deeds are not lost

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[49] Cf. *Eylmann/Vaasen-Frenz*, BNotO/BeukG, § 17 BeurkG margin number 12 with proof of the jurisprudence.

[50] Cf. *Eylmann/Vaasen-Frenz*, BNotO/BeukG, § 14 BNotO margin number 28.

[51] On this subject see *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th edition 2005, 11th chapter.

[52] *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4. 2005 edition, p. 402.

through war or other mishaps, legal transactions that were notarially authenticated a long time ago can also be understood unambiguously today. The legally stipulated keeping of directories also permits the finding of deeds from times when IT was not yet available as a search aid. This guarantees the continuing existence of legal certainty and the legal peace conveyed with this.

2. Fairness

A legal order which like German civil law is based on private independence and thus forms contractual freedom,[53] starts from the principle that the participants in a legal transaction can best decide what is good for them. A basic assumption therefore exists that a legal transaction is fair for the associated participants which has led to a conclusion by economists from Adam Smith on that a market economics system based on contractual freedom ultimately creates greater welfare for everyone. Even when legal development has long sought to tackle cases where this assumption is rejected (unilateral fixing of contract conditions, unequal negotiating positions – inadequate typing through the consumer/contractor subdivision – market dominating position, etc.), the basic assumption is not being questioned as a result. The notary must also take account of this in the authentication procedure. He not only does not provide any economic advice or instruction,[54] but also cannot intervene in the price negotiations, etc. This arises not least from his impartiality obligation, § 14 Para. 1 BNotO, which is safeguarded by the bans on activity in §§ 3, 6 and 7 BeurkG. However, this neutrality instruction is restricted by § 17 Para. 1 Sentence 2 BeurkG insofar as it is up to the notary to ensure that inexperienced and unskilled participants are not put at a disadvantage. This protection is flexible and as long it is taken ser-iously by notaries is extremely apt and effective, as the actual weakness of the participants triggers the protective assignment and not formal positions. As long as the notary proposes regulations in these cases that are suitable for

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[53] Palandt-*Heinrichs*, overview of § 104 BGB margin number 1, introduction to § 145 BGB margin number 7.

[54] Cf. *Eylmann/Vaasen-Frenz*, BNotO/BeukG, § 17 BeurkG margin number 18.

safeguarding the interests of both parties to the contract without restriction, this is compatible with his impartiality obligation.[55]

In the summer of 2002 this precise protection was supplemented by the rather schematic provision of § 17 Para. 2a BeurkG[56] in a heave-ho action. The triggers were problems with low value buildings and property sales that were aggressively advertised and implemented without adequate time for reflection for buyers. The multiple conclusion of such contracts was heavily criticised by consumer associations.[57]
The provision is schematic because the protection of the consumer is now settled in a consumer contract with a contractor and no longer the protection of the weaker party. It is also schematic because certain obligations are now exposed. The notary must ensure that legal transaction declarations are issued by the consumer personally or a confidante before the notary and that the consumer has an adequate opportunity to deal with the object of the authentication in advance. In the case of contracts that entail an obligation of conveyancy or the purchase of property, 'as a rule' it is therefore necessary to ensure that the intended text of the legal transactions is made available to the consumer two weeks prior to authent-

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[55] BGH WM 1996, 84 ff., 86.

[56] § 17 Para. 2a:

'The notary is to arrange the authentication process in such a way that fulfilment of the obligations under paragraphs 1 and 2 is safeguarded. In the case of consumer contracts the notary must ensure that

1. the clarifications of the legal transaction are given to the consumer by him personally or by a person of trust before the notary and
2. the consumer obtains an adequate opportunity to deal with the object of the authentication in advance; in the case of consumer contracts that are subject to an authentication obligation under § 311b Para. 1 Sentence 1 and Para. 3 of the Civil Code, this occurs as a rule by the intended text of the legal transaction being made available to the consumer two weeks prior to the authentication.

Further official obligations borne by the notary remain unaffected'.

[57] Cf. *Eylmann/Vaasen-Frenz*, BNotO/BeukG, § 17 BeurkG margin number 39 a; on legislative history *Schmucker*, DNotZ 2002, 593 ff.

ication. The provision is generally criticised, which applies without further ado to its schematic structure and the selected formulations. With regard to the previously stipulated ideal of the complete contract the idea of the information from the notary preceding the actual authentication procedure is nonetheless meaningful, at least when it discloses to the participants which risks plus which consequences are allotted to whom, as this has an influence on price formation. Each notary appreciates when authentication is not encumbered by price negotiations. But the notary should also contribute his part in ensuring that a price setting before authentication occurs on the most optimum basis.
It is also extremely useful to enable the weaker party to think through the economic consequences of the contract for himself in peace through a temporary extension of the preliminary procedure. Then specifically in cases where the participant refrains from concluding the contract, this procedure clearly serves legal peace more than a quickly closed contract, which the participants already regret shortly after the close. After all, the open formulation of the provision gives notaries the option of coping with this need on an individual case basis. In any case it can only be hoped that jurisprudence sees it this way in disputes, as the platform on which disputes on the regularity of the completion of notarial official obligations are decided is at best a service supervision procedure, but otherwise a liability procedure against the notary.

The fulfilment of the protective function for inexperienced and unskilled participants can definitely constitute a question of fate for the role of the German notary in land law. It can be recalled that in 1973 the area of applic-ation of § 313 BGB (previous version) to the obligation to purchase ownership of property in order to protect home buyers at the time who were regularly encumbered with unbearable advance payment risks through the procedure.[58] Since 2002 specific procedural provisions have been imposed on the notary for this authentication procedure in order to ensure a suitable level of protection for weaker deed participants. If a political evaluation is reached later that the authentication procedures modified in this way are

[58] See Part B I.1.

inadequate for the weaker party, there is a fear that alternative protection concepts (cancellation rights, compulsory party representation) will be debated. In contrast, as long as notarial authentication is the most likely path in a fair contract, its positive contribution to the creation of legal peace cannot be doubted.

3. Settlement of disputes and avoidance of disputes

The authentication procedure itself is not a settlement of disputes procedure. It assumes a consensus in principle among the participants. However, the notary's verification and instruction obligations under § 17 BeurkG are suitable for eliminating ambiguities in the case on the one hand or misunderstandings among participants that would stand in the way of agreement. Similarly the clarification work can lead to a participant refraining from an intended contract as he classifies it as not being in his interest. While this initially leads to dissatisfaction in the contract partner willing to enter a conclusion, it avoids a legal dispute which would usually probably arise when a contract partner subsequently discovers that he would have been better not closing if he had had more accurate information about the transaction.

Notaries in Bavaria are mediation sites for compulsory mediation procedures according to § 15 a EGZPO. However, the area of application of the provision is quite small.[59] These concern economically low value disputes that should be removed from the state courts.

In addition, §§ 86 ff. FGG provides for the arrangement of an assets discussion through a procedure before the notary. However this procedure leads a shadow existence in practice.[60] It is little known and dependent on the voluntary involvement of the participants. If this is available in principle, the normal authentication procedure, especially the preparation of the deed, as a rule offers a sufficient opportunity to cope with a lack of agreement and to demonstrate solutions.

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[59] Property law disputes up to a dispute value of € 750.00, neighbour law disputes and honour disputes up to a dispute value of € 5,000.00.

[60] *Sorge* in *Walz*, Form book on alternative dispute resolution, § 12 margin number 1.

In contrast, greater success is enjoyed by the notarial intervention procedure according to §§ 87 ff. of the property rectification law, whereby notaries in the new federal states after the reunification of Germany made a significant contribution to clarify unclear right and utility relationships in buildings and sites and to transfer these to the clear land register system of the BGB property law and the GBO.

4. Enforceability

Rights from notarial deeds can be implemented quickly and inexpensively. The assumption of the subjection of the debtor under compulsory execution required for an executable deed is an absolute rule in the context of notarial authentication. The notary forgetting to list the declaration can make him liable for the resulting legal proceedings costs. Compared with a judicial complaint with immediate acknowledgement an executable deed relating to the same claim frequently costs a tenth.[61] Even the judicial costs for a warning procedure are clearly above those for establishing an executable deed[62], not to mention the added lawyer's fees. Matters are even better in cases where the subjection of execution does not create any extra costs as a simple ingredient in an otherwise authenticated transaction. Lending institutions as well as collection firms always use these cost advantages, if a corresponding agreement can be achieved with debtors precisely in the context of a moratorium comparison. Securing a property loan on the basis of a mortgage executable via a notarial deed is an absolutely usual loan condition. An exception exists in the interprofessional area with high-value mortgages, which only provide for a subjection to compulsory execution for a 'finally payable partial amount' for cost reasons.[63] The approach based on

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[61] *Wolfsteiner*, Die vollstreckbare Urkunde, 2nd edition 2006, § 6.5.

[62] Compare notarial costs including expenses and 19% VAT compared with a half procedural fee under No 1110 KVGKG:

Value € 50,000.00	Notarial costs: ca. € 180.00	default summons: € 228.00
Value € 100,000.00	Notarial costs: ca. € 270.00	default summons: € 428.00
Value € 500,000.00	Notarial costs: ca. € 980.00	default summons: € 1,47800

[63] In this respect, compare *Amann* in Beck'sches Notarhandbuch, 4th edition 2006, A VI margin number 31; *Wolfsteiner*, Die vollstreckbare Urkunde, 2nd edition 2006, § 28.27 - 29.

the executable deed avoids trials and thus frees up the judicial system. This was partially the main reason for the legislator to extend their scope of application substantially by second subjection to compulsory execution.[64] EU legislation has also led to this enforceability being provided in almost the entire internal market.[65]

Of course, in addition to this execution function the weight that a notarial deed enjoys as a means of proof facilitates the enforceability of claims.[66]

III.
The contribution to the adoption of technological developments

It will hardly be possible to find a German notary who considers a deed in paper format as an expiring model and believes in its full replacement by storage media for the future. However, it is equally undoubtedly necessary to develop the notarial profession into a ready-to-operate system, safeguard participants in electronic legal relations and to make the notarial deed available for electronic legal channels. A reference has already been made to the legal basis for electronic deeds.[67] However, the notarial profession was already a pioneer in seeking and verifying its competence in electronic legal relations.[68]

1. Central Providential register, register of wills

   The Central providential register is a tool for the use of the new opportunities offered by electronic legal relations in the assistance procedure.

   Providential proxies should be found quickly, fast and securely via the register in the case of assistance. The Federal chamber of notaries set up

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[64] BT printed item 13/341 of 27.01.1995, p. 20 ff.

[65] See Part A. Fig. I.3.

[66] See Part A. Fig. I.2.

[67] See Part A. Fig. I.1.2.c) and II.3.b).

[68] The U.I.N.L. also accepted this topic early, cf. *Bettendorf*, EDP documents and legal security, (II. U.I.N.L. topic 1992) in BNotK (publisher), XX. International Congress of the Latin Notarial Profession, Cartagena/Columbia 27.04. - 02.05.1992, Reports of the German Delegation, p. 29 ff.

the register at the start of 2003 on its own initiative. The legislator has comp-rehensively recognised this construction to enforce self-determination in assistance cases, legally anchored the Central providential register at the Federal chamber of notaries[69] and has opened it for all types of providential proxies after a transitional period in which only notarial documents were registered.
The legal basis (contained in a modification of the federal notarial regulations) entered into force on 31.07.2004.
The providential register has proved itself. On 31.12.2006 a total of 472,965 proxies were registered. Overall 92,080 applications for information were submitted by custodial courts in 2006.

Following the example of the Central providential register the transfer of currently still decentralised registration of inheritance relevant documents in the registry of births, marriages and deaths to a central register of wills also appears to be possible.[70] Once it is established it promises to close gaps in registration, the accelerated processing of calls and also easier finding of documents in international inheritance cases. In contrast to the new facility for providential proxies and assistance dispositions, which did not replace any existing state system, there is no uniform political will for this system change so far. But as the debate on shifting the probate court's activities to notaries is fully underway, much can change in this context in the near future as well.

2. The network of notaries
Since 2000 NotarNet GmbH has operated the 'notarial network' on behalf of the Federal chamber of notaries as a central security structure for notarial offices. The notarial network was one of the first solutions of this type on the market and has established multiple benchmarks. The notarial network is a secure Internet platform for notaries and their employees. The special,

[69] Law of 23.04.2004, BGBl. I 598.

[70] BnotK internal issue 3/1999, S. 3 - 7.

extensive security features for participation in electronic relations are operated, supervised and cared-for centrally. The notaries were clearly ahead of the judicial authorities at the entry into service of this network and thus proved their ability to perform in this area that is so important for the future. This commitment already established the foundation stone for notaries' technical competence. This was decisive for the pioneering role that no-taries have taken on in the area of electronic legal relations, especially in electronic commercial register entry. In addition to operating the notarial network, NotarNet GmbH is also responsible for developing and main-taining programs, which are a technical requirement for electronic legal relations with the commercial register by the notaries (SigNotar and XNotar).

Following a comprehensive technical renewal in 2006, the notarial network is enjoying constantly growing interest, as secure use of the online medium is becoming an increasingly prominent feature for notaries.

3. Electronic legal relations, especially commercial register entries

The goal of legal prescribed notarial authentication must be achieved independently of whether a document is drawn up in conventional paper form or in electronic form. High technical requirements must be set here for both the drawing up and secure transmission of corresponding electronic doc-uments. The electronic signature is being used for the production of electronic documents, both for documents originally in electronic form and to produce electronic copies of documents originally in paper form. When sending such electronic documents to the electronically managed register particular attention is paid to the security of the telecommunications connection on the one hand and the simplest possible applicability of the electronically communicated information at the register on the other. This is because the rationalisation and acceleration of procedures pursued with use of electronic media would be questioned if the recipient of electronic documents would first have to convert these into a suitable format for his purposes.

The above-mentioned outlined questions concern both the Federal chamber of notaries as well as the judicial administrations responsible for electronic legal relations and the legislator.

The Federal chamber of notaries tackled this topic early. The post and telecommunications regulation authorities (RegTP) (now the Federal network agency) had already issued a permit to operate a certification unit under the signature law (SigG) to the Federal chamber of notaries on 15.12.2000. The Federal chamber of notaries thus became the third certification unit in Germany. It can then issue certificates for qualified electronic signatures to the highest security level for all notaries in Germany. By doing so the Federal chamber of notaries guarantees a high degree of credibility and rel-iability in electronic communication by notaries with registers and other locations (e.g. customers, colleagues and authorities).

The practical emergency for this occurred on 01.01.2007 with the law on the electronic commercial register and cooperative register, as well as the company register (EHUG)[71], which forms the legal basis for electronic commercial registration. The lodging of electronic documents instead of paper documents entered into force in twelve states without a transition period, and in four states with transitions of between one month and one year. Notaries are obliged to communicate the reporting data, as well as the image file of the reporting text in structured form so that it can be used to produce the entry text immediately. The actual preparation of the register entry is thus transferred from the courts to notaries. Despite the relatively short preparation time for the judicial authorities and notaries in converting commercial register traffic to a purely economic implementation this system conversion was successful and only tied by the usual small start-up weaknesses. In the meantime electronic commercial register traffic is largely smooth. It has led to a further shortening of entry times. Thus the entry period for a private limited company is regularly just a few hours up to a maximum of three days. This was also contributed to by the willingness of notaries to develop the required technical facilities and to attend specific training measures. The chambers also have the merit of having organised corresponding events so that the required expertise could be disseminated on time.

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[71] Federal legal gazette Part I, 2006, 2553.

These examples show that the German notaries actively accompany and help to organise technical progress in the information era. They contribute essentially to a further acceleration of the entry procedure in the electronic register traffic.

IV.
The contribution in the loan security system[72]

The World Bank reports ‘Doing business in 2005’ and ‘Doing business in 2006’ places Germany in an exemplary third place out of 175 ranked states as regards options for entrepreneurs to obtain loans. The result is surprising given the restrictive loan issue practice of German lending institutions, which is often linked to the tag ‘Basel II’ especially by small and medium sized companies. The positively noted points in the ‘Legal Rights Index’ include the permission for general descriptions of debts with the result that all types of commitments can be secured, as well as the absolute precedence of secured commitments during the realisation of securities during individual execution and also in the insolvency procedure. This is due to the imposed loan security law. Both notaries and the registration of loan securities in a comprehensive land register system make their contribution to a secure, operational system and lead to sound credit conditions.

1. Land register system

   The German land register system provides extensive[73] complete information about the legal relations to property, whose correctness can be

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[72] Compare in general on loan security: *Bezzenberger*, New paths for securing loans in notarial practice (IV U.I.N.L. topic 1995) in BNotK (publisher.), XXI. International Congress of the Latin Notarial Profession, Berlin/Germany 28.05. - 03.06.1995, Reports by the German delegation, p. 239 ff.

[73] Exceptions from completeness are the construction taxes kept in public directories which vary from state to state, old rights from the time the land register was introduced, in the former western federal states before 1900, from more recent times in the former eastern federal states, as well as legal preemption rights and the liability of the property for unpaid land related contributions, costs and levies.

trusted by everyone according to § 891 BGB. In the case of an incorrect land register, which is extremely infrequent, people who are unaware of the incorrectness, can purchase the incorrectly filed legal position in good faith. For lenders this means that a correctly entered mortgage right is an absolutely reliable basis for compulsory execution and preferential satisfaction. This right can be acquired quickly. After the required data is obtained from the lending institution the notarial document can be drawn up within a few hours and also submitted to the responsible land register office depending on the communication channel. This applies independently of whether notarial authentication occurs in the form of a memorandum or (as sufficient to enter a mortgage in the land register) using authentication of the signature. In any case the notary is not involved in the economically important transaction, the loan contract, in German law. As a result, the economic dec-isions (size of loan, duration, interest, fixed interest rate, risk security of the borrower) have already been made at the order of the security or are made without regard for the mortgage. The entry periods in the land register offices vary depending on the land register office concerned and season between one day and several weeks, whereby account is taken of the need for haste. The mortgage is usually created within two weeks, during which the consumer is still entitled to cancel the loan contract according to §§ 495 Para. 1, 355 BGB. If the entry period cannot be waited for until the disbursement of the loan, the notary's confirmation that the mortgage was entered in the correct position according to the file at the land register office frequently permits early disbursement.

2. Enforcement order

   It has already been mentioned that securing a property loan through an executable mortgage based on a notarial deed is the absolutely usual loan condition. If the debtor is affected by a crisis, this allows a fast and, compared with orders contested by proceedings, very inexpensive option for compulsory execution of rights, although this is initially used as a last resort in banking practice. It is namely cheaper, faster and as a rule more profitable for the owner or liquidator to sell the secured property. Despite the statistically quite seldom use of the order its use is not waived. This

proves that the cost of the order in relation to its utility if it is needed must be extremely low.

According to the regulation introducing a European enforcement order for uncontested claims (EC) 805/2004, a domestically established enforcement order in as a notarial deed can be used across Europe. The German notary acts here as a decentralised site that is available in terms of time, competent and quick acting and is therefore an important part of the loan securities system in Germany.

V.
The contribution to fulfilling the state requirement for information/cooperation in the tax collection system while relieving state offices

The notary is involved in state information acquisition in the most varied ways. In places where the law demands a publicly certified signature, i.e. where it places special value on establishing identity, the notary takes on the associated work which otherwise would have to be performed by the identification authorities themselves. In Germany this is primarily the state register offices and the commercial register. To perform the same identification, these would have to be equipped quite differently for party transactions and personally occupied. For their part participants would have to make longer journeys which with increased centralisation of the civil service in the future would be longer rather than shorter. Of course, identification by the notary also generates costs which are paid to him by the participants. However, these are not additional costs for the participants or society, but costs that will always be incurred as long as the need for more exact identification exists and cannot be satisfied on a comprehensive basis by other means.
In addition to this central function of public authentication by the notary, the notary also fulfils other state information needs:

1. Land purchase tax

Every legal transaction concerning property or shares in property is taxable according to the land purchase law (GrEStG). This tax affects both contractors and private people equally. The tax rate to be collected has been placed in the competence of the states since 01.09.2006. It is 3.5% almost across the federal territory, although it has been 4.5% in Berlin since 01.01.2007. Determination and collection assume that tax offices are reliably informed. According to § 18 GrEStG the notary must provide the responsible tax office with written notice in accordance with the officially stip-ulated model concerning all legal transactions that he has authenticated or for which he drafted a deed and certified a signature relating to a site in Germany. Deeds, copies or certified copies can only be issued to part-icipants if the notice has been forwarded to the tax office, § 21 GrEStG. Tax collection on this basis is fast, consistent and effective. The notary cannot collect any separate costs for this activity; only the documents (copying costs, postage) are to be paid for by the participants. Electronic trans-mission of the notice is still prohibited legally, § 18 Para. 1 Sentence 3 GrEStG. The yield in 2003 was approximately 4.8 billion. [74]

2. Gift tax

   In the case of a gift, according to § 8 Para. 1 and 4 Inheritance tax implementation regulation, notaries must transmit a certified copy of the deed covering a gift or the benefit of an object among living parties to tax office responsible for managing inheritance tax while stating the value assumed from the cost calculation with an official model. In contrast to the GrESt this leads to only partial information, as gifts are also possible without notarial or judicial intervention. However, the area covered by notaries, namely gifts of property or private limited company business shares covers significant assets.

3. Corporation tax

   According to § 54 Income tax implementation regulation (EStDV) notaries must transmit notices on the drawing up of authentications or certifications relating to the formation, capital increase or reduction, conversion or

[74] www.bundesfinanzministerium.de/cln_02/nn_3478/DE/Service/Lexikon__A__Z/G/003.html

dissolution of capital companies or the disposal of shares in capital companies to the responsible tax office.

This means that nearly all processes relating to private limited companies are covered, while control of stocks or shares in foreign companies is only notified by the parties themselves due to a lack of notarial obligation. Of course the same applies to foreign authentications arising in this area as the order obligation is only addressed at German notaries.

This obligation is now extended by a new Paragraph 4 so that separate notices must be issued for a vendor with restricted tax obligations.[75]

4. Money laundering

Alongside lending institutions, lawyers and others, notaries bear an identification and notification obligation under the money laundering law (GwG)[76]. Notarial transactions appear conceivably unsuitable for laundering unknown money in Germany. In addition to obligations from the money laundering law the notary has the notification obligations to German tax offices under the above Fig. 1. - 3. Moreover, as a rule a notarial transaction assumes the personal appearance of the participants at the authentication itself in advance during the authentication of a proxy, empowerment or permit. The informed tax offices are inter-networked, so that e.g. a site purchaser, who is reported to the income tax office by the GrESt tax office, can be asked without further ado where his purchasing resources come from if the purchase does not appear plausible to the tax office. This is supplemented by the fact that the settlement of notarial contract hardly ever occurs by cash payment so that the banks' information

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[75] *'(4) In the case of disposal of shares in capital companies by a shareholder, who is not liable for tax on an unlimited basis under § 1 Para. 1 of the law, notice is also to be issued to the tax office that was responsible for the taxation of the shareholder at the end of a previously unlimited tax obligation by the shareholder or the unpaid acquisition of its legal predecessor according to § 19 of the tax code.'*

[76] Law on the detection of profits from serious crimes of 25.10.1993, BGBl I, 1993, 1770, last amended by Art. 11 of the law of 15.12.2003, BGBl I, 2676, which implements Council Directive 91/308/EEC of 10.06.1991 on preventing the use of the financial system for money laundering (OJ CE No L 166 p. 77).

systems intervene and a notary is forbidden from holding cash, § 54 a Para. 1 BeurkG.

5. Committee of valuation experts
   According to §§ 192 ff. of the construction code (BauGB) self-employed, autonomous committees of experts are to be formed among the lower administrative authorities (state council offices) to identify land values and other estimates of value. According to § 193 Para. 3 BauGB it is to compile a purchase price collection, evaluate it and to communicate land guideline values and other data required to assess value. To allow this work, each contract in the sense of § 311 b Para. 1 BGB or concerning the paid justification of an inheritance right by the authenticating site (i.e. as a rule by notaries) is to be sent as a copy to the expert assessment committee.
   The land guideline values, § 196 BauGB, are again a basis for taxable assessment, incidentally the only ones in the property area, that were classified as constitutional by the Federal constitutional court (BVerfG) in its decision of 07.11.2006, 1 BvL 10/02.
   Notaries also (obviously) provide support for the other administrations in this area.

The examples show that the notary's activity supports the state's tax activity in particular. Admittedly the law regularly imposes notification obligations on the taxpayer itself e.g. imposes the payment of salary taxes on the employer or the declaration and payment of value added tax on companies. However, the notary's obligations arise principally where tax arises on a one-off basis and not regularly and the majority of the tax obligations occur in private circumstances rather than professional ones. Here they are an important component of consistent tax collection and thus make a contribution to tax honesty and tax fairness. Transferring this contribution to others (land register offices) would certainly not lead to a gain in efficiency. As notarial deeds can no longer be altered after the close of authentication and always contain the date and location of drawing up, tax reductions due to subsequent manipulations of documents are practically eliminated which also facilitates the relevant tax treatment. Finally in many regards the notary is an exterior site for other state

authorities, takes over work from them in advance makes subsequent work partially superfluous (e.g. tax investigation and verification).

VI.
The contribution to international use of law

Even though notaries are conferred with their state's sovereign authority and in this respect exercise state authority, their activity is not just restricted to national processes. In fact the matters which the notary faces are becoming increasingly international. Every notary must initially deal with this himself and so acquire the necessary basic knowledge. An increasing number of manuals are appearing in German, at least for the European area, which also communicate the material law of other states.[77] In addition to multiple continuing education events offered by various providers in European law and in international private law the Council of the Notariats of the European Union (CNUE) implemented the continuing education programme 'FORMANOTE' in 2004 with the support of the European Commission, in which notaries' knowledge of the relationship between their profession and EU law was deepened. The events were successfully held in Berlin and Bochum on 01.10 and 04.10.2004 with many participants. But apart from this sufficient examples of development in the international area are available.

1. Internationalisation of the notarial deed[78]

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[77] *Süß, Rembert/Haas, Ulrich,* Erbrecht in Europa, 2004; *Süß, Rembert/Ring, Gerhard*, Eherecht in Europa, 2006; *Süß, Rembert/Wachter, Thomas*, Handbuch des internationalen GmbH-Rechts, 2006; *Wachter, Thomas/Frank, Susanne,* Handbuch Immobilienrecht in Europa, 2004 (Dr. Rembert Süß, a lawyer, works at DNotI in Section III – Foreign and international private law, *Thomas Wachter* and *Dr. Susanne Frank* are notaries in Munich).

[78] This was already a congress topic from a different perspective, cf. *Wirner/Ott*, the importance and effect of a foreign deed for the domestic notary, (IV. U.I.N.L. topic 1992) in BNotK

The internationalisation of the notarial deed, i.e. in particular its cross-border recognition and execution assumes a fundamental trust in the quality of the notarial function in general and the notarial deed in particular, there is a reticence to accept documents and their basis especially in the area of compulsory execution. In this respect the entry into force of the EEO Regulation[79] on 21.01.2005 was a genuine quantum leap, as a national enforcement declaration procedure was no longer required to obtain an enforcement order. Instead, as in the case of decisions on uncontested claims, an order recognised in the original state as a European enforcement order or confirmed public deed according to Art. 25 Para. 2 EEO Regulation can be enforced without further ado.

Where the evidential force is involved, it only requires proof of genuineness for equivalence with a domestic deed, especially through use of the so-called 'Apostilla'. This test of genuineness can be performed now in an already large and constantly growing number of states.[80]

As in the past it is clearly more difficult to answer the question of when a foreign public deed is suitable for fulfilling the requirement for effectiveness set by the German form provision of notarial authentication.[81] The question only arises where the material law applicable under IPR[82] legally prescribes notarial authentication as an effective form. The answer changes from case

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(publisher), XX. International Congress of the Latin Notariat, Cartagena/Columbia 27.04. - 02.05.1992, Reports of the German delegation, p. 163 ff.

[79] European Parliament and Council regulation (EC) No 805/2004 on the introduction of a European enforcement order for uncontested claims of 21.04.2004 (OJ EC 2004, No L 143 p. 15); already see above Part A. Fig. 1.3.

[80] According to Internet information from the foreign office (http://www.auswaertiges-amt.de/diplo/de/Laender/Konsularisches/Urkundenverkehr/Urkunden-verkehrTeilB.html#t3) the Hague convention currently applies to 80 other states.

[81] Already see above Part A.I.1. at the end.

[82] Decisively and particularly, but not exclusively, Art. 9 Para. 2, 3 and 6 of the Rome EEC convention on the law applicable to contractual debt of 19.06.1980 of Art. 11 of the introductory law to the BGB (EGBGB); future Art 10 Rome I VO (cf. KOM(2005) 650 final, proposal for a European Parliament and Council regulation on the law applicable to the contractual debt relationship (Rome I).

to case,[83] which is due to the diversity of the form provisions and their function.[84]

2. International Programmes
   It is not necessary to report on the activity and importance of the U.I.N.L. and the Council of the Notariats of the European Union here. On an additional basis mention must be made of the increasing number of events that foster familiarity with, further training of and an exchange of experience and expertise among neighbouring notariats in the area of national borders.[85] Here again networks are created that are essential for the proper control of international cases.

3. The German Institute of Notaries
   The role of the DNotI has already been appreciated several times in other places in this report. The DnotI's contribution to international use of law is obvious. According to the 2005 activity report, 2,521 expert opinions on foreign and international law were drawn up for notaries in 2005, and even more last year. These opinions are available to German notaries via the Internet database, fax consultation or following an individual request. They offer a reliable basis for the use of law in international matters.

To summarise it can be said that German notaries are taking account of the internationalisation of their function and a number of impetuses are coming from the notarial profession that seek to improve and simplify the control of inter-

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[83] See above Part A III.1 concerning these cases.

[84] § 925 BGB does not demand a notarial authentication but the handover of a declaration with the simultaneous presence of the participants before the responsible site, especially German notaries. Notarial authentication in § 311 b BGB demands that all of the regulations relating to the legal transaction must be included in the deed, while § 15 Para. 4 GmbHG is content with the conveyancy declaration and § 518 Para. 1 BGB with the authentication of the gift promise.

[85] e.g. Polish-German Practitioners conference from 27 to 29.10.2005 in Görlitz and Zgorzelec; DAI further education in notarial legal relations with France on 26 May 2006 in Strasbourg; 35th Bavarian-Salzburg notaries conference, 15./16. September 2006 in Berchtesgaden.

national legal problems. There is vigorous involvement in projects to harmonise law.

C.
The economic importance of the notarial office for social development

The economic importance of the notarial office has not been researched yet. Although an economic analysis of law has also reached German science for over twenty years and has led to numerous papers, no deliberations on the form of the legal business as an economic factor can be found in the German standard manual[86] let alone concerning the notarial deed. Compulsory conclusions cannot be derived from these but it can be ventured that the costs incurred due to form requirements in Germany are not significant enough to assign them their own position in the economic analysis of civil law. In this case this obvious does not just refer to the notarial costs, but all of the transaction costs[87] that can be assigned to the form requirement.

This report cannot provide a comprehensive economic analysis of the deed either. It will nonetheless show that the assertion published in the World Bank reports that the prescribed involvement of notaries is an impediment for economic development is based on faulty assumptions and an inadequate knowledge of law and practice at least in the case of the German legal order. Moreover, the criteria selected for this evaluation are inadequate to evaluate the performances of the relevant legal orders economically. Following the criticism in the World Bank report reference will therefore be made to other viewpoints, whose consideration is essential for an economic overall view. These can lead to the notary's contribution being viewed as positive within his legal system.

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[86] *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th edition 2005.

[87] Including where a watertight definition of transaction costs is not given, cf. *Schäfer/Ott*, above Fn., p. 101.

I.
World Bank reports: the law as an economic factor

The impetus for dealing with economic aspects of notarial authentication was not least given by World Bank reports (Doing Business). Sections from the 2004 report[88] in particular contained attacks on the notary's function. In Chapter 2 of the report ('Starting a Business, p. 17 ff.') is stated bluntly: 'The use of notaries for the authorisation of documents related to business registration can also be eliminated... Where notaries are needed to authorise documents this is frequently the most expensive part of company registration.' Diagram 2.7 has the caption 'notaries – an unnecessary burden' and proves the waste of costs and time linked to notaries.[89] Less directly but nonetheless clearly enough, chapter 7 (The Practice of Regulation) raises the advantages of common law, as well as the laws of Nordic countries, a finding which also has indirect repercussions on the civil law notary.[90] Finally it is not particular satisfactory for a G 8 state that is keen to see itself among the leaders to find itself ranked number 21 in the evaluation of how easy it is to run a company.[91]

There is no point in taking the reports for granted, as they are aimed at establishing the Anglo-American legal world as an international standard and thus to create advantages for business and legal advisers from the US and UK in particular.[92] This already conflicts with the explicit praise for Nordic countries whose system differs significantly from the common law system.

In contrast, a closer investigation is made of the report with regard to questions relevant for the notarial profession and based on these findings the statements in the report there is a verification of the report's statements, which relate

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[88] Doing Business in 2004, Understanding Regulation: A copublication of the Word Bank, the International Finance Corporation, and Oxford University Press (cited: Doing Business 2004).

[89] Everything can be found on p. 26, Doing Business 2004

[90] Doing Business 2004, p. 89.

[91] see http://www.doingbusiness.org/EconomyRankings/

[92] The fact that the implementation of legal standards is a tool in power and business policy can hardly be doubted in contrast, e.g. in the copyright area see *Haedicke*, Urheberrecht and die Handelspolitik der Vereinigten Staaten von Amerika, Munich 1997.

directly to the notarial profession and the profession and the legal system where the notariat has its traditional place.

1. Starting a Business

   As the criticism of the notarial system proved to be particularly harsh under the point 'Starting a Business' and Germany occupied an unflattering number 66 position in the ranking, this part will be investigated first.

   a) The case study

   The World Bank's assessment is made while assuming a 'typical' formation case, which is defined as follows:

   - A private limited liability company is founded, which is the commonest form albeit with several options. In Germany this is the GmbH.
   - This is done in the city with the most working residents, in this case Berlin.
   - The founders are five natural persons from Germany.
   - The starting capital is 10 times the per capita income in Germany, paid up in cash. The World Bank assumes $ 34,580 as the per capita income.[93] The capital is therefore $ 345,800.00, at a dollar exchange rate of approximately $ 1.28 i.e. around EUR 270,000.00.
   - The business object is production or trading activities which do not require any special permits.
   - The company does not have/acquire any property; it rents.
   - It does not obtain any special subventions.
   - One month after commencing business it employs 50 employees, who are all German citizens.
   - It has a minimum turnover of 100 times the per capita income, i.e. approx EUR 2.7 million.
   - The company deed is ten pages long.

   b) Valuation in the report[94]

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[93] http://www.doingbusiness.org/ExploreEconomies/EconomyCharacteristics.aspx

[94] The data is taken from the 2006 report.

The report lists three criteria according to which the formation friendliness is evaluated, i.e. the number of steps needed until the company can begin, the period taken up for these steps and the associated costs. In Germany according to the report this process lasts 24 days, during which 9 steps must be completed. The costs amount to $[95] 1,775.19, with a euro exchange rate of approx. $ 1.28 assumed, which therefore represents costs of approximately EUR 1,386.86. This is 5.1% of the per capita income.

These costs are only incurred during three steps, namely during the notarial authentication of formation and articles of association ($ 1,183.23), during the registration in the commercial register ($ 553.58) and in trade registration ($ 38,38).

Compared with the leaders in this category this does not appear very good, as

- in Canada and Australia the entrepreneur only needs two steps, which are completed in 2 (Australia) or 3 days (Canada), i.e. registration in the companies register and registration with the tax authorities;
- The entrepreneur requires three stages in Denmark (provision of a digital signature, payment of the starting capital into a bank account and electronic registration in the central register of trades and companies), for which five days is assumed as the duration.

The costs for the entrepreneurs are substantially lower, at $ 590.10 in Australia, $ 278.06 in Canada (each for company registration) and $ 0.00 in Denmark.

However, this comparison already relativises a criticism of the World Bank report, namely the requirement of minimum capital to found a GmbH. The World Bank report labels this superfluous, undifferentiated and inefficient.[96] In Denmark 44.6% of the per capita income must be paid in as minimum capital, which is almost equivalent to the current German value of 46.2%. The duration of the deposit process is the same in both countries (1 day). However, this point is not matched by a very good valuation. If the GmbH reform[97] is introduced in Germany, the minimum deposited sum will be

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[95] If no specification is made, US $ are intended.

[96] Doing Business 2004, p. 26.

[97] See A.III.1.e)

reduced to EUR 5,000.00, which represents just 18.48% of the per capita income.

If the World Bank criteria are assumed, the following goal is reached: a reduction of the process to one step that can be completed in one day if, for example, the two registrations named in Australia and Canada can be completed online.

Not every position in the ranking can be explained convincingly from the abovementioned criteria. Japan has abolished the requirement for a minimum capital for capitalised companies and thus jumped to position 18 in the ranking. In the bare figures of the report eight steps are needed to found a company there, these last 23 days and cost 7.5% of the per capita income, i.e. it is approximately equally complex, lasts around the same period and is 50% more expensive than in Germany. It must be other (unnamed) factors which justify the advance of 48 positions over Germany.

c) Criticism of the report

The report on Germany must first be corrected or at least clarified as regards some points.

Time and working steps

Of the nine stated steps, the first (i.e. verification of the company at the local Chamber of Commerce and Industry) is not a necessary step, just an option ahead of possible utilisation problems to also to clarify legal permissibility. The assessment should therefore then be reported on the basis of 8 steps and a period of 23 days, which nonetheless does not improve matters hugely. The period is essentially accounted for the registration and entry in the commercial register and which has to be accepted as a realistic ave-rage before conversion to electronic registration if the notary in the individual case can make a significant acceleration to one working day.

A total of seven days are allocated to steps 5 to 9, which are required for the trade registration (3 days), notification to the IHK, registration with the

employment office, the social insurance providers (health and pension insurance) and tax office (one day each). There is no visible reason why these registrations and notifications which have to be completed within a specified period after the formation of the business management cannot also be completed on one day or at least if the notification involves transmitting forms, which have to be completed and returned, completion should not be possible in two working days. The World Bank report sees the possibility of multiple completion but does not consider it for Germany here. As these items are outside the remit of the notariat, they do not have to be dealt with in greater depth here. What is critical to point out that is that the previous completion of steps 5 - 9 are not absolutely necessary and therefore do not necessarily cause a delay. However, the associated costs remains.

Costs

What counts more is that the assumed costs do not match the report's own suppositions. The assumed formation fee of $ 1,183.23 reflects the fee for a GmbH formation with an original capital of EUR 270,000.00, i.e. EUR 924.00. However, there is no law that specifies that the required start-up capital must equate with the original capital. The private limited company can thus be founded without further ado with EUR 25,000.00 in capital, to which the barely 11 times capital is paid in immediately. The required costs then amount to EUR 168.00, which is equal to $ 215.04. If more is authenticated the additional costs are by no means required formation and registration procedure costs, but the authenticated reciprocal contractual obligation to pay in a certain amount.

The costs for registration and entry into the commercial register should also be ascertained on this basis. The only requirement is a signature authentication by the notary for a registration of EUR 25,000,00, with costs and documents of approximately EUR 28.50, the commercial register costs of exactly EUR 100.00 (incidentally which is independent of the value) and the costs of publishing the entry, which vary from place to place as they depend on daily newspaper rates (estimated at EUR 130.00 in the report).

These costs therefore come to a total of EUR 258.50[98], which is equal to $ 330.88.

This produces registration costs in Germany for the case of

Notarial costs for formation and establishment of articles:	$ 215.04
Registration and publication costs	$ 330.88
Costs of trade registration	$ 38.38

Overall costs	$ 584.30
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The costs are therefore slightly below those of the leader Australia, albeit far above those of the other two leading candidates.

The approximately 3 times higher costs assumed by the World Bank result from a comparison between apples and pears. The incorrectly higher assumed registration costs can only be clarified by the fact that the report does not consider the required signature authentication, but also the drafting of the registration text by the notary and its submission to the court as a necessary activity and the costs incurred are therefore included. Drafting by the notary is admittedly often demanded but is not necessarily specified. In the three leaders in the ranking no one drafts anything for the participants, who have to do the work themselves or have it done a paid basis by third parties.

d) Improvements in the German legal system

The above criticism does not imply that there is not sufficient potential for optimisation in Germany. The average formation time of 24 (23) days and the need for eight individual steps are far from optimum. The question is whether notaries oppose such an optimisation or an approach to the optimum can be reached in the German legal system with notaries. The answer can only be: improvement is possible in the context of the German legal system with notaries and (assessed optimistically) is already

[98] Even registration with a business value of EUR 270,000 only demands notarial costs of € 123.00 insread of € 28.50, while all remaining costs of registration and entry remain the same. Instead of $ 553.58 a maximum of $ 451.84 is therefore accurate.

underway. The introduction of an electronic commercial register and the bill to amend the GmbH law have already been cited above. Assuming the correct oper-ation of the electronic system, the transfer times between notaries and the commercial register would be eliminated. As notaries are obliged to send registrations to the courts as structured data, which can be input there, the work at the registry court is reduced to checking correctness and a few implementation steps. The 14 days time identified so far for this processed could therefore be reduced to 3 days. Of the remaining 12 days a total of 4 are accounted for by the notary and commercial register system, one more for payment capital into the bank, which in the Internet era however can also be performed and confirmed on the same day as the formation and the seven days for steps 5 to 9, which in principle are outside the notary-commercial register system. If there is a wish to retain these registration obligations[99], in this Internet era it is primarily a question of the technical will to make all of the notification obligations open to completion via a central portal. It could reduce these formalities to one working procedure and if the required tax and insurance numbers are produced and transmitted quickly, reduce the time frame to one working day. A realistic optimisation goal is thus five days (1 day for formation with the notary and deposition of the capital, 3 days for registration and entry in the Commercial Register, 1 day for other registrations), where the day for the other registrations could coincide with the period for the registration and entry in the Commercial Register.

Bringing the notary even further into action during this optimisation can be envisaged. LNotK Bavaria is participating in a project with the working title of Bavaria Founders' Agency[100], whose goal is to establish a so-called One-Stop-Shop'[101] for company founders. The notary as the required contact point for verification of identity would take on the task here of making the required registrations not just at the Commercial Register, but at the

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[99] This is not the place for discussing the need for the individual facilities. These are (socio) political decisions, which in any case are not an immediate problem at the start of commercial activity.

[100] See http://www.gruenderagentur-bayern.de/anmeldungen/gewerbeamt.html

[101] Completely in line with the World Bank report, cf. Doing Business 2004, p. 25.

remaining locations as well. This equates with a central portal, although with the significant difference from the Internet that the notary must be looked up personally and cannot be clicked on. However, not everyone perceives this as a disadvantage today.

The optimisation goal is described as follows:

- two steps, namely central undertaking of all required actions at the notary and payment of the minimum capital.
- time required: 3 - 4 days, whereby every day that extends beyond the second day is due to delayed processing in the notary's office or delayed processing in the commercial register and so is unnecessary.

This shows that the notary, unlike in common law and Nordic countries, also manages to act as the decentralised external site for other facilities and thus not the source of additional bureaucracy. Instead, he is a successful form of state proximity to the citizen. However, it is up to notaries themselves to fulfil this claim, to take the required technical steps in particular and to create a positive image through office organisation and customer friendliness.

There is hardly any potential optimisation with regard to costs, if the abovementioned minimum costs are assumed. The publications in the daily press which the World Bank rated at a rather low € 90.00 will be eliminated following the changeover to electronic media. If this $ 115.20 is deducted, minimum costs of € 469.10 remain. This is extremely inexpensive and certainly cannot be corrected downwards further in the system. These costs do not match the current paid costs either, as the notarial drafting and execution function is awarded outside the legally prescribed minimum, and the drafting and where applicable also authentication of the first minutes of the general meeting of shareholders, the draft of the registration, the list of shareholders to be submitted to the court and the submission of these documents to the commercial register now occur in electronic form since 01.01.2007. Depending on the scale of the commissioned activity this increases the level of the costs by $ 200 - $ 500, with the result that overall costs of approximately $ 700.00 - $ 1,100.00 are currently incurred, which will be around $ 100.00 less after elimination of publication in the daily press.

To use the notary as a central contact point in the sense of the optimisation model, these costs would also be necessary costs as long as the requirement for the authentication of formation and the articles of association is retained.[102]

It is up to the legislator to satisfy the need for the quickest possible acquisition of a legal person with limited liability further. Making the entry before the payment for it could also be envisaged while retaining a minimum capital and making the limitation of liability dependent on payment within a reasonable time frame. The MoMiG is now pursuing this path with respect to permit requirements, which will significantly shorten entry periods for permit obligations for corporate purposes. However, it would be more consistent to decouple the question of the permit completely from the existence of the company and its purpose and only to subject business activity itself to the permit requirement. Ultimately the situation is the same for natural persons and partnerships. The object of the company would then only be important for the shareholders and the company's organs, but not for third parties. The need to clarify the object would then lie in the shareholders' hands. If these wanted to found a company whose goal is every activity that is legal, they could be permitted to do so and respect for legality would then be checked as the activity develops.

e) Overall criticism

The above statements are already apt to deflate the stigmatisation of the notary as a useless burden. However, it depends on what these notaries provide and what the value of this service is. This existing criticism must therefore be expanded by the question of whether the World Bank reports are suitable for evaluating the economic effects of different legal systems correctly and fairly. This criticism will again only deal with the investigated field of company formation.

<u>aa) Costs</u>

[102] The same to this question.

If the viewpoint of costs are then examined closer, it emerges that these are restricted to the required costs of formation forms. All other costs that usually accrue are masked when the company in the example is implemented. It would have to be removed from reality for five entrepreneurs would not dedicate time or know-how to the question of how they are going to structure their cooperation, apart from the necessary formation formalities. In fact, they would require advice on the most varied things including also legal advice and tax consultancy. How cost efficient a system is can only be factually assessed when these costs are included in the evaluation. However, good legal advice in the Anglo-American legal sector does not have the image of being inexpensive. But this question is not investigated sensibly via a fictitious cases, but by an empirical record of actually occurring company formations. As public limited companies are obliged to disclose their balance sheets, the formation, legal and tax consultancy costs of the first trading year should be completely identifiable. Of course, the expenditure must be rated at a higher amount than a fictitious case by questionnaire.

A second objection emerges. According to the criteria of the study a company formation in Denmark is arranged optimally when it costs nothing, or more correctly when it is for free for the company. However, this company-related approach is not necessarily correct as costs naturally accrue from a regular registration of the company and the public accessibility of the register, which are not necessarily optimally distributed from a macroeconomic viewpoint, as they are borne by the general public instead of the company. In fact, some factors argue for imposing these costs on the generator, at least partially and perhaps even completely. Ultimately it is not unusual to pay the costs for a change of status and the deeds certifying this e.g. the marriage registry office costs and family register, but also simple doc-uments such as identification cards, driver’s licences etc. as a ‘generator’. But we also end up here very quickly in a general discussion on the fairness of distribution, as also held relating to college fees, the costs of nursery places and schools, illness and care costs, just to name a new examples, whose economic relevance (if the quantity of money used there is considered) is much greater than the costs of a company formation.

This will not be followed up further here. However, it must be remembered that it is not necessarily a wrong economic decision to let the entrepreneur bear the costs that it causes by taking on a business activity. A legal system is economically efficient when it contributes to generating such costs to the lowest possible extent, whereby deregulation must be restrained in any case when it occurs at the expense of others including the general public if these costs exceed the savings made by the entrepreneur.

bb) The example and the reality

The selected example itself offers a further approach to the criticism. The data selected there on company formation would obviously be grounds for great pleasure for every German location if they were a reality. This is true because new formations of companies on this scale are the exception, already in terms of the capital, but also as regards the figure of 50 employees and a turnover of more than $ 5.0 million in the first year. Even Bill Gates started smaller, if we can believe the rumoured formation history. A very recent survey[103] among German notaries on the transaction values during the transfer of GmbH shares revealed that barely 45% of transactions reach a value of up to EUR 12,500.00, another good 25% a value between EUR 12,500.00 and EUR 25,000.00 and 18% a value of between EUR 25,000.00 and EUR 100,000.00. Founders who start their company with shares worth EUR 54,000.00 each for example are certainly in the upper 20%. In this respect the conclusion of the business value of transfers relative to the orig-inal capital at formation tends to excessive figures because, as shown above, the original capital can be far below the contributed capital and as a rule is so because entrepreneurs shun the commitment linked to the orig-inal capital and value the greatest possible repayability of the contributions.

It is not a convincing step to evaluate a legal system as done in the example, which is statistically more on the periphery. As a rule all of the figures (stakeholders, capital, employees, turnover) are much smaller than in the example. Thus competition also occurs between forms of companies

[103] Published in notar 2/2006, p. 53 ff., can be read at http://www.dnotv.de/ (link: notar magazine).

in Germany, and as a result of jurisprudence from the European court of justice primarily between the GmbH and companies without minimum capital, especially the Limited under English law, i.e. in an area where cash of between EUR 12,500.00 and EUR 25,000.00, that is to be contributed for the corporate object, is a relevant and even impassable barrier for founders.

cc) The added value of 'obligatory' legal consultancy

Furthermore the question must also be raised as to whether the use of a notary also creates added value for the participants, which not only offsets the 'disadvantages' of the notariat raised by the World Bank but even leads to a positive balance.

However, the burden of proof for the added value of the form obligation for the participants subject to it is borne by notaries, because an individual will voluntarily do what is obviously good for him. In contrast, if the law orders a particular form, the objection is at hand that the added value of this 'compulsory pleasure' is not immediately obvious for the individual and even worse may not exist at all. Taken strictly, the above objection is valid for all types of regulation (all form provisions, cancellation rights, consequences of breaches of obligations and other disruptions of contracts). However, it is economically recognised that it is useful to embed contracts in regulations that apply without the wishes of the parties or even against them, as the theoretical goal of the complete contract is better approached than in a regulation free area.[104]

The different forms of notarial deed activity listed at the outset are relevant here. While authentication of a signature in the context of the commercial register registration essential concerns the interests of the general public, namely to be able to determine entrepreneurs and management bodies with certainty and to save the register from unenforceable registrations, i.e. to all simple, efficient work by the registration unit, prescribed notarial authentication (instead of authentication or even just written or text form) of formation, articles of association/statutes, modification of articles and

[104] See *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th edition 2005, p. 401 ff.

transfer of business shares are hardly justified by the interest of the general public. The goals of notarial authentication[105] are firstly directed at the parties involved in authentication.

However it is not imperative for an economic justification for notarial services to offer all companies added value or even the same added value. If the added value is primarily in the legal consultancy provided and then perhaps in protection against over haste, then it is clear that a person who is optimally informed about legal affairs and a person with business experience will find this superfluous. Admittedly a person like this may be happy from the viewpoint of opportunity cost[106] about not having to deal with such easy matters because they can be done on a time saving basis and comparatively inexpensively by the notary. This person in particular will visit the notary voluntarily anyhow.

However, this person is the exception, not the rule statistically. Even business people are often amazingly unskilled in matters that affect the internal constitution of their company. Contracts involving capitalised companies are usually ones that are oriented towards the long term and at least in the case of the private limited company also assume good effective coop-eration among the shareholders. Economically, there is first the danger with such contracts rather than with other contracts, which the environment or also the joint shareholders will change for the worse. Secondly they involve contract-specific investments that can later lead to compulsory measures.[107]

In addition to respecting legal provisions, notarial legal consultancy also means that shareholders consider unpleasant changes (death, insolvency, the divorce of a shareholder), orderly break-up, agreements for those departing and the solidity of the commitment (saleability of the share, options for notice of departure) and make arrangements for these, which would have to remain left undone in most cases. It is obvious that such reg-

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[105] Inter alia see Part A. Fig. III.1.

[106] On this topic cf. *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th edition 2005, p. 81 f.

[107] Concerning these risks see *Schäfer/Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th edition 2005, p. 396.

ulations have added economic value and this is also recognised by the credit industry for example when they include a company's constitutional structure in their rating.

2. Acquisition of property

The second case being investigated affects the core of German notarial self-understanding so to speak. The purchase of a property is the notary's core transaction with, as described above, almost unchallenged sole responsibility. The position 42 reached here is admittedly better than the 66 in the previous case, but is far from German self understanding and moreover 9 places worse than in 2005. As in the first case it is necessary in fact to analyse what can be actually taken from the report and where possibilities exist to eliminate revealed weaknesses while retaining the German legal system and its notaries.

a) The case study

The World Bank evaluates while assuming a 'typical' purchase contract, which is defined as follows:

- The purchaser is a private limited company in the city with the most inhabitants, Berlin. It is 100% privately owned by German citizens, has 50 employees, who are all German citizens and does not engage in more specific trading.[108]
- The premises being purchased is a property with a value that is 50 times the per capita income, which produces a purchase price of EUR 1,351,576.00.
- The seller is a different private limited company with headquarters in Germany.
- The property is surveyed, and registered in the survey office register and land register. There are no ownership disputes.
- The property comprises a site (557.4 sq m) and erected buildings, a store with a 929 sq m surface area. The building is 10 years old, in

[108] What is remarkable is all of the criteria in these sentences do not play any role in acquiring a property in Germany, i.e. the purchase of the property is completely independent of the shareholder structure, the employees and the company's activity.

good condition and legitimate from all perspectives. Everything is being transferred as a unit.

- Renovations or extensions are not provided for.
- Trees, sources of water and natural/monumental protection features are not included.
- Special permits due to special use are not required.
- The property is empty and is not exposed to claims by third parties.

b) Evaluation in the report

The report lists three criteria according to which the business friendliness of German law is judged relative to the case example, i.e. the number of steps needed until the new owner is registered, the period taken up for these steps and the associated costs. According to the report this process in Germany lasts 40 days, during which four steps have to be completed. The costs amount to $ 76,778.82, which represents a cost of 4.5% compared with the value of the building.

This divides up as follows on an itemised basis:

1. Provision of the land register extract and authentication of the land contracts: 5 days $ 13,848.37
2. Execution of the purchase price maturity (reservation, pre-emption right request, etc.: 20 days $ 1,010.18
3. Payment of land purchase tax and receipt of clearance certificate: 15 days $ 59,473.39
4. Transfer of ownership and extinction of reservation in land register: 15 days $ 2,446.88

Once again it does not look very good compared with the leaders in this category, as

- in New Zealand only two steps are required which last exactly two days and actually cost $ 1,024.47;
- in Lithuania, which stipulates notarial authentication of the purchase contract, there are three steps in three days for $ 2,312.33; in Slovakia, a near neighbour of Germany, there are three steps over 15 days without a notary for a ridiculous $ 268.54 and

- in the Netherlands, ranked clearly ahead of Germany at place 22, two steps take up five days on the basis of 6% land purchase tax, although with costs of EUR 112,534.83.

If the World Bank criteria are assumed, the following goal arises, as in the case of the company formation: to shorten the procedure to one step that can be finished in one day and where possible does not cost the buyer anything.

c) Criticism of the report

In contrast to the report on forming a company the item on registering land ownership is so poor in its criteria that no assessment to be taken seriously can be derived from it. Even the slogan ‘Registering Property’ shows that the matter investigated in all countries entails quite differing procedures. Account is always taken of all the steps needed for the buyer’s acquisition of ownership to be registered. A system which links the purchase contract and the securing of the exchange of services with the registration of acquisition of ownership is compared with regard to all of these services with a system that entails independent registration. However, independently of the scale of the performance, the decisive factors for the evaluation are only the number of steps required, the time needed for these and the costs linked to state arrangements. In this case apples are not being compared with pears – a fruit basket has been compared with a plum and it was noted that the latter can be obtained faster and less expensively. This is a genuinely impressive performance. In this case, it is unrecognised that in the German legal system the time for transfer of ownership in the land register is of subordinate importance for the buyer as a rule and also in the case study.

No effort will therefore be spared to check the report against the German reality more closely.

<u>aa) Time and working steps</u>

To state matters in advance: the entire period of forty days, from the registration of the purchase contract with the notary up to the close of the

transfer of ownership occurs does not match my Bavarian experience. As a rule the process lasts substantially longer whereby the involvement of the notary itself hardly takes time, which is taken up by other units especially the tax office.

1. Step: Authentication procedure

As regards the notary, five days from the registration of a contract up to its authentication are a good value, which is certainly feasible but is not the rule. The requirement is for the purchase contract to have been negotiated as regards all critical points. As registration often occurs without preliminary legal advice even with a transaction on the scale of the example taken, this cannot be expected. In this case the notary draws up the contract for both sides after the result of the land register extract and the participants' statements and forwards it for examination. Questions arise for the participants on the basis of the text which had not been considered sufficiently and are then negotiated in this phase. The notary and his employees act as a neutral adviser to the participants in this phase, eliminate difficulties in understanding and offer formulation proposals for solutions found. If the participants then agree the finalised text is authenticated. As said, this is done in five days, but this involves the creation of the contract and the steps that are also called 'filing', 'signing' and 'closing' in new German, whereby no 'signing' occurs between the first and last.

2. Step: Execution up to purchase price maturity

The second step, namely the fulfilment of all conditions for purchase price maturity, is set quite high for the type of case taken at 20 days. The 7 – 60 days stated in the extensive report are only understandable if genuine anomalies are involved in the pre-emption right application. Given the simplicity of the stated case it could proceed faster (5 - 15 days), as only the entry of the reservation and the pre-emption right certification for the responsible district would have to be executed. In the latter case specifically the duration depends on whether exercise of the pre-emption right will be considered at all due to the location of the premises. In this rather rare case 20 days is mostly not sufficient, because the district council or construction

committee are dealing with it. In other cases well organised districts are able to forward the certification without further ado in five days. This certification is necessary so that the property can be transcribed.
But the report's rigorousness ends here. All other maturity requirements for a transfer of ownership are unnecessary in the sense of the report and should even not be considered. They serve to secure the exchange of services, i.e. the payment of the purchase price on one side and the provision of ownership and transfer of possession on the other. Of course these are regularly a component of the German land purchase contract, because the notary is liable for losses from unsecured advance payments and the participants want this security in their own interest. However, this wish will also exist in New Zealand, Lithuania or Slovakia and secured by the parties through a corresponding contractual arrangement without finding itself in the report on these countries.
Why the report also deals with issues of release from encumberments, although the ownership is unencumbered according to the case, cannot be answered here.

3. Step: tax clearance certification

The next step, namely payment of the land purchase tax and then the issue of the clearance certificate by the tax office is necessary for the transfer of ownership and unfortunately, from my experience, is unrealistically too short at 15 days. As a rule it takes twice as along before the tax notice is issued. On access the buyer has a month to pay, and commercially speaking there is no reason to hurry with the payment. However, it is correct not to take account of this delay caused by the purchaser himself as it is unnecessary. Once he has paid it takes a further five days up to the issue of the clearance certificate, if matters proceed effectively.
It is correct that this procedure takes place in parallel to the other execution of the deed which also begins in time from the day authentication commences. As a rule everything except for the transfer of ownership itself is arranged before the clearance certificate arrives.

4. Step: final execution

The final execution, i.e. land register submission, transfer of ownership and extinction of the reservation can take place without further ado in 15 days and even much faster where appropriate. This is necessary, as the buyer only acquires ownership with entry and entry is also the end of registration in the sense of the report.

bb) Costs

A lot of the calculated are strange; the questions must have been asked badly and/or answered badly.

Notarial costs

The detailed report gives notarial costs of between € 6,000.00 and € 12.000,00 for the first step. This is already surprising because only one correct fee arises for the stated case, not a fee estimate. At a purchase price of € 1.351.576.00 this is a contract fee of € 4.164.00. This is supplemented by all the required costs for the documents inclusive payment (€ 32.50 for 100 cost bearing copies), items for the telephone etc. (€ 20.00) and the land register retrieval fee (a necessary € 5.00), and, as there are two GmbH contract parts, two representation certificates that each cost € 13.00 and the associated register fees of € 4.50 multiplied by two. Overall this actually comes to € 4,256.50, equal to $ 5,448.32, i.e. approximately 39.34 % of the value stated in the report. Was everyone asleep here?

Even when the notary's complete usual execution activity, i.e. collection of the negative certificate (€ 209.70), communication of the maturity of the purchase price (€ 336.00) and submission for transfer of ownership after prior verification of payment of the purchase price (€ 238.50) is included, this only comes to a total of € 5,026.20 or $ 6,433.54 (i.e. circa 46.46% of the value stated in the report), whereby these $ 985.22 are not required costs for transfer of ownership but the usual costs for securing the performance of execution. Only this partial sum can vary slightly from notary to notary, because minor room for play concerning valuation exists.

Costs of the reservation and pre-emption rights certification

The errors continue but in this case it firstly more expensive:

The reservation correctly costs (§ 66 Para. 1 Sentence 1 KostO) € 1,041.00, together with the € 25.00 for the pre-emption right certificate, i.e. $ 1,364.48, which is $ 354.30 more.
However, reservation is not necessary to purchase property at all. It helps to secure and accelerate the exchange of services. The necessary costs are therefore just the € 25.00 ($ 32.00) for the pre-emption right certification, the report cannot include others in its current form.

Land purchase tax

The land purchase tax (€ 47,305.16) also leads to a deviation upwards at a euro rate of $ 1.28, namely to a value of $ 60,555.61 (added costs of $ 1,077.21). It appears that a euro rate of 1.2572 was chosen, which is not the same as in 'Starting a business'. This was possible for the valuation but is of little importance.

Final execution

The final execution was also incorrectly valued, and was clearly too cheap as previously at the land register. The correct value is:
Transfer of registration, § 60 Para. 1 KostO: € 2,082.00
Extinction of the reservation: € 520.50
Together this comes to € 2,602.50, which corresponds to $ 3,331.20, i.e. it is $ 884.32 more than stated in the report.
If the reservation is eliminated (as in the case of the report's hypothesis), its extinction is also removed. $ 666.24 must then be deducted from the additional costs so that only $ 218.08 then remains.

Overall costs

If all the ambiguity concerning the land purchase tax is ignored, the overall costs fall to the required $ 67,774.83 ($ 69,773.55, if the reservation is entered and re-extinguished) i.e. $ 9,003.99 ($ 7,005.27) compared with the overall costs assumed in the report. The overall costs of € 54,668.50 ($56,230.00), i.e. independently of dollar fluctuations, comprise 4.04% (4.16%) of the value of the property (not 4.5 %, as the report states), of which exactly 0.54% (0.66%) are accounted for by the notary and land register. Of this 0.315% represents necessary notarial costs.

d) Improvements in the German legal system

The errors of the report do not change the fact that improvements could still be made in the German legal system, especially during the shortening of execution times. Firstly it is up to each notary himself to execute all measures incumbent on him as quickly as possible. However, this already appears to be assumed in the report's execution periods.

All processes that end with a simple required legal decision (i.e. no consideration and no verification of external circumstances), e.g. entry in the land register (steps 2 and 4), could be reduced to a period of 1-2 days in the ideal case. However there are no electronic legal relations in this area yet, so this development will still last. Incidentally, the speed of the land register is a question of the staff and equipment at hand, both of which people are keen to save on.

The procedure at the tax office for levying the land purchase tax and the issue of the tax clearance certificate could also be accelerated without further ado. In the example the time required by the tax office could be reduced to five days in the case optimum staff and equipment conditions, and reduced even further if electronic channels are used. However, this is supplemented by the period in which the land purchase tax is paid after issue of the notice. In individual cases where there is actually a need for haste, the land purchase tax itself is identified and paid even before notice is issued. This advance payment option could be arranged as a general offer so that the buyer would personally control how fast he obtains the clearance certificate.

However, limits on acceleration exist where external factors are involved in the decision-making process and/or the decision assumes discretion or consideration. There is no fixed correct answer immediately on request. This applies occasionally for the district's pre-emption decision, other legally prescribed approval decisions and unfortunately due to the complexity of German tax law in a series of cases in land purchase tax law. Only an elimination of pre-emption rights or permit requirements and a simplification of tax law would help here.

Creditors, especially lending institutions, also require a certain time to issue the declarations needed to extinguish mortgages and to identify the correct liability statement which must be fulfilled prior to extinction. This section can also be accelerated be electronic legal regulations, but will still take 10 days on average.
All of these factors that slow down the process do not apply to the example so that it could be shortened to an overall 7 –10 days while maintaining the process (5 days of contract preparation and close, 1-2 days to implement the maturity requirements, a simultaneous prepayment of the land purchase tax and notice to the notary, 1-2 days for the final execution.
However, the reality is still far removed from this, but I believe that the complete changeover at least to electronic legal channels within the next ten years is not unrealistic. Ultimately the land registers have been kept electronically for years.
In the costs, the figures impressively show that the decisive improvements or deteriorations depend on the scale of land purchase tax. In this respect the report for 2007 will be a shambles as, of all things, the land purchase tax has been raised by one percent to 4.5% of the purchase price in one federal state, Berlin, where the example is set.

e) Overall criticism

Unfortunately the individual criticism in c) is not dealt with in this report. In fact, fundamental omissions must also be criticised:

aa) Unsuitable criteria

After the report was already very worthy of criticism in its practical findings, unfortunately it must also be stated that it also misses its point with regard to German law. The goal should be to determine how easy it is for a company to purchase property in Germany or in the narrower formulation of the report to have the purchase registered. The decisive factors here are the scale of the procedure, the time required and the costs payable. However, the interests of the company acquiring the property should rightly be made a yardstick. These can be described on a simplified basis as follows:

- the purchase of a secured legal position that allows him to invest in the acquired property without a legal risk and
- transfer of possession, utilities and charges.

Apart from in cases of immediate onward sale (not the case in the report) the purchaser is almost indifferent about the time when he is entered in the land register as the owner in Germany, and an interest in fast payment does not exist at all. From an economic viewpoint, the buyer would even prefer to keep the purchase price as long as possible.

The individual steps required to purchase property, i.e. especially their number, are also regularly a matter of indifference to the purchaser as long as they do not burden him with costs in the economic sense (payment obligations, as well as the commitment of otherwise usable capacities).

The economically important factors for the buyer are therefore the duration from the desire to purchase up to the close of the contract, and then the period between the close of the contract and the purchase of the secured legal position on the one hand and the transfer of possession, use and burdens on the other. The time expenditure for this should be as small as possible. Furthermore the financial expenditure and further execution up to the transfer of ownership should be as small as possible. In Germany the buyer's necessary activity between the close of the contract and final execution is restricted to two things to reach all of the goals:

Firstly: the payment of the purchase price, as otherwise as a rule he would not obtain possession, utilities and the burdens. This could not be essentially different in any country in the world.

Secondly: payment of the land purchase tax as otherwise he cannot be entered as the owner.

It is therefore hard to imagine that a buyer in Germany having to make a major effort after the close of the purchase contract, once the scale of payment, especially the land purchase tax, is disregarded.

Put even more positively: in German practice the entire process from drafting the purchase contract via its close, the execution and finally the acquis-ition of the required permits and tax exemptions is arranged via the notary. For the buyer this is a 'one stop shop' in the very best sense, as once the payment demands are disregarded, which he receives immediately from the tax office or responsible state judicial treasury and

must pay, all the required steps are performed by the notary. He can concentrate fully on the negotiation with the seller and only has to be concerned about a secure contract settlement, for which the notary is liable to him. The same also applies from an inverse perspective to the seller.
With regard to ‘Doing Business’, to supply a relevant report on the purchase of property, the parameters therefore ought to have been amended as follows:

1. where possible identification of the period it takes to draw up the purchase contract, starting from the point in time when the participants agree in principle on the fundamental data (premises and purchase price) up to the actual close of the contract (‘closing’). It is only possible to work empirically here.
2. identification of the time span that elapses between the close of the contract and the acquisition of a secured legal position, as this is the period when the purchase price is paid and possession, utilities and burdens can be transferred.
3. identification of other formalities and their duration, although independently of their costs with little weight, as these are unimportant for the buyers.
4. identification of all costs for 1.-3., including the costs of a secured settlement of performance, as this is extremely important for both companies.

It is clear that this report cannot be compiled by sending out a few questionnaires. Empirical investigation in particular requires the actual recording of a persuasive number of individual cases. But as transactions by comp-anies with balance sheet obligations are concerned the quantitative mat-erial should be available in principle. Without a certain effort, the report is unsuitable for making economic statements concerning a legal order in this area.

bb) Examples and the reality

A glimmer of hope lies at least in the fact that the selected example is apt in principle for reflecting the reality. The only factor remote from reality is the assumption that a site like this is not encumbered with a mortgage. This occurs of course, but is rather the exception in Germany in companies of

this size. Thus it would be advisable to take a second example with typical charges, as these are also relevant for time and cost. However, the seller pays the costs of release from charges in Germany as a rule, not the purchaser. If a switch was made to an empirical capture of actual cases, cat-egories would have to be created in any case to deal with differences in cases. With regard to costs it is clear that these depend almost completely on the scale of the purchase price, and thus can be far below or above those taken in the example. But this should hardly be important for the valuation as the costs are expressed as a percentage of the purchase price in the rankings, and this rate is relatively constant in a purchase price of € 100,000.00 due to the linear land purchase tax.
The economic reality also includes the fact that the buyer in most cases also require financing, which he only obtains when he can secure it sufficiently. In this respect it would also be informative to see when the site itself becomes available as a security and at what cost. This would also be an impetus to expand the report by this point.

cc) The added value of ‘compulsory’ legal advice

In principle the statements on the report on formation apply correspondingly here,[109] although with a slight nuance:
in view of the scale of the transaction and the specialisation of legal questions in land transactions very few people (including entrepreneurs) would refrain from seeking the advice of specialists here. Similarly, the experienced businessman will be keen to ensure a secure exchange of services.

[109] See Fig. 1.c)ee).

II.
Overall economic consideration

As this contribution deals with the economic importance of the notary's function overall and not just the fields investigated by the World Bank, the perspective to the end of this contribution will be expanded.
Whether a legal system with Latin notaries is economically good will ultimately never be proven. A country's economic success alone, regardless of which yardstick is used, is not a convincing indicator. Otherwise it would be necessary to take states like China due to high growth rates, Switzerland, Luxembourg or Saudi Arabia due to particularly high per capita income or also the Federal Republic as the 'global export leader' for years would have to take the leading positions. Factors other than the legal order of the state are obviously important for such successes.
However, not everything that is useful to enterprise is good, even when consideration is restricted to economic matters. The current debate about the cons-equences of climate change shows this clearly.

An economic analysis of the contributions of Latin notaries in their individual legal order must include the following viewpoints if they are to be convincing:

1. The economic value of the contributions of notarial activity to the development of society
   Even though it is hardly possible in practice to determine and evaluate the economic efficiency of a legal order comprehensively, an attempt must nonetheless be made to assign an economic value to all the results of a legal order that appear positive for the development of society. It will have to be shown whether this is possible equally for every contribution of the notarial deed outlined in part B, but an attempt at economic valuation should at least be made.

   a) The economic dimension of the development of law
   The impact could hardly be deemed economically insignificant if the law were more clearly formulated and therefore more easily understood. Because it is generally recognised that information has an economic

value,[110] the effective supply of information, including about foreign law as provided by DNotI, is economically valuable.

b) The economic dimension of legal certainty and legal peace

It has been shown that the notarial deed in Germany makes a contribution to legal certainty and legal peace. Of course, the economic value of legal certainty and legal peace cannot be determined as exactly as the length of a reporting procedure in days or the fees and taxes in cash for a land purchase. But as a result it cannot be denied. Consensual solutions of disputes and fast inexpensive recourse to alternative dispute resolution procedures that are appreciated under the labels ADR, mediation, etc. are indisputably economically favourable for the participants. In this case, however, every legal measure that already avoids a run up to a dispute must be eco-nomically inexpensive for the participants. This also includes the associated saving of state resources.

c) The economic dimension of reliable registers

With the largely completed switch to an electronic commercial register and land registers it is possible in a matter of minutes in Germany to obtain reliable information about the existence of companies, their authorised representative organs and agents, property, ownership relationships to this and nearly all the relevant land taxes and the beneficiaries of these taxes. The correctness of the register is so high that rights are acquired securely based on trust in entries. This saves the participants in legal relationships from requiring other securities and this is expected in Germany. This is also an important factor in legal certainty and legal peace and therefore has a high economic value for the German legal order, which counterbalances the associated costs that are covered by taxes and fees.

d) The economic dimension of effective legal enforcement

The World Bank report itself ascribes a high economic value to fast effective enforcement of claims. In this respect as well, the executable notarial deed that is delivered immediately and can be executed already

[110] *Rehm*, Aufklärungspflichten im Vertragsrecht, Munich 2003, p. 23 ff.

fourteen days after delivery, offers the best value which no recognition procedure can approach. As this immediate access to execution is based on the voluntary subjection decision by the debtor, it is also excellently legitimised and is namely as good as the claim itself.

e) The economic dimension of a ‘partial privatisation’ of state tasks

In particular, regarding the liberal notarial profession which prevails in almost all of Germany, the fact should not be overlooked that it is a tried and trusted arrangement to continue to hold state tasks in the sovereign area but to transfer their completion to the economic initiative and skill of private persons. Although it is not exactly quantifiable, the privatisation of suitable state tasks is regularly assigned a positive economic effect. Current German policy is completely along this line, if people think of the many init-iatives that aim to transfer other tasks to German notaries.[111]

2. Ease and speed

These previously outlined positive factors also have their price of course, not just financially, but also relating to the ease and speed of transactions.

In the era of the world wide web the claim of being able to get everything everywhere is growing. With a few clicks on the mouse a holiday is booked, a car bought by auction and the legal adviser found. This need for ease and speed runs in a direction that in principle is against one that demands personal presence, where a contract can first be concluded after it is read out and which must be pursued to obtain certain things. The notary has no place where this need takes precedence. However, this is not a new phenomenon, it is as old as the notarial profession itself. Approaching the notary was always only required for particularly important transactions, not for everyday deals. In the core areas of notarial activity, land transactions, family and inheritance law and also company law, long term matters are concerned where speed and ease are of little importance. No one would come up with the idea of stipulating that shares had to be traded through notaries.

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[111] See page 14 Fn. 22 and page 18 Fn. 28 and 29.

However, time is a factor that counts where notaries operate and which has economic importance. Obtaining a limited liability legal person to be able to undertake a risky business venture is often an urgent matter that would have been better closed yesterday rather than today. A person who decides to buy a plot of land, wishes to build on it quickly and if he has corresponding preplanning even straight away. As long as this is not prejudicial to the quality of notarial work, notaries will also have to search for and enforce possibilities to accelerate matters. The World Bank reports have shown that the length of the execution function is under close scrutiny. This con-tribution has shown that this is already partially underway insofar as possible. The notarial profession is challenged here, especially also from a technical perspective. However, it says a lot that German notaries manage to offer their service efficiently in terms of time. The fewer measurable delays that occur, the less the need will also be to find an economic justification for this.

3. Legal paternalism: an economic justification for form requirements?
   ‘An action is paternalistic when it is firstly undertaken for the benefit of the person or persons concerned and secondly if it would also be undertaken if the persons concerned would not agree with it.’[112] Form requirements can also be classified here as they are arranged to protect the affected parties[113] and are implemented against the wills of the affected parties who do not want form requirements due to the specified legal consequences. This is not surprising, as numerous civil law provisions such as those on capacity to do business, cancellation rights in certain contractual relationships or breaches of customs may also at least be based on paternalistic motives.[114]

   As it is not convincing to legitimise these interventions in individuals’ decision making freedom through their appropriate procedural creation in the democratic process, there are also approaches to justify legal paternalism

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[112] *Eidenmüller*, Effizienz als Rechtsprinzip, 3rd edition. 2005, p. 359.

[113] Concerning the form purposes see Part A Fig III.1. (p. 10).

[114] *Eidenmüller*, Effizienz als Rechtsprinzip, 3rd edition. 2005, p. 360.

economically.[115] *Eidenmüller* has proposed measuring paternalistic law against whether it leads to more independence and freedom (independence principle) overall for all legal subjects, although it restricts freedom individually.[116] Thus if it can be shown that a form requirement (especially the obligation of notarial authentication) creates a gain in independence for all legal subjects overall, a good economic foundation for this legal provision has been found.

An individual's loss of independence to undertake certain legal transactions in any form that he favours must be contrasted with a gain in independence and this is not difficult if the purposes of the authentication procedure are remembered. An overly hasty decision leads to a loss of freedom for the parties concerned in the same way as a decision made on the basis of inadequate knowledge and information. The authentication obligation for all in a few legal areas that are typically particularly important because they concern valuable objects (property, business shares, marriage claims), have long-term effects (declarations in marriage and inheritance law), or which legitimate the immediate use of state coercion for legal enforcement (subjection to compulsory execution) offers access to good, fairly designed legal transactions and thus to the economic ideal of the most complete contract to the greater part of all legal subjects who have little experience of these issues. The commitment of the few who could also act without notarial intervention for all applicable demands is also economically legitimate[117] and is justified by the fact that this circle of people cannot be limited practically.

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[115] On the various approaches to legitimisation see *Eidenmüller*, Effizienz als Rechtsprinzip, 3rd edition 2005, p. 365 ff.

[116] *Eidenmüller*, Effizienz als Rechtsprinzip, 3rd edition. 2005, p. 374 ff. The cases and examples discussed there (ban on alcohol and tobacco advertising, ban on slavery contracts) do concern serious interferences in individuals' independence but *Eidenmüller* does not see any conclusive categories here, just help to develop argument patterns in the debate on the legitimacy of paternalism through law.

[117] Concerning justification through the thought of collective self paternalism (i.e. a majority decision on self commitment to protect everyone, cf. *Eidenmüller*, Effizienz als Rechtsprinzip, 3rd edition 2005, p. 375 ff.

In German Law the notarial deed is also recognised as a means of protecting against irreversible losses of freedom. Binding Legal transactions rel-ating to inheritance law (e.g. inheritance contracts, waivers of inheritance and obligation shares) are not banned in principle in German Law but legal commitment assumes a notarial authentication of the corresponding de-claration without exception. The resulting freedom of commitment created is assessed positively economically as a gain in independence for the in-dividual. The protection offered by the authentication requirement makes it justifiable for the binding decision to also mean a (unilateral) irreversible loss of freedom for the party concerned in a very important area of his inheritance law.

This is supplemented by the economic contribution of the notarial deed to the development of society referred to above in figure 1. In places where deeds deal with more than just the immediate legal relationship between two participants, they provide third parties with a clear, reliable and lasting source of information and thus also a sound basis for further decisions. This is a gain in independence for everyone.

4. The notary as part of the state authority: the protection function and the macroeconomic perspective

It has previously been demonstrated that there are many good economic reasons for having the obligation for a notarial deed in important individual areas of German legal order. However, this cannot in any way blur the fact that efficiency and economic utility are not the only criteria for orienting a legal order. Fundamental legal considerations such as equality, a ban on discrimination, protection of the weak and minorities may also bear up to economic criteria and create gains in efficiency, but do not primarily serve this goal. The notarial deed can be justified purely economically just as little. To conclude some general considerations will be dealt with that are not restricted to the economic issue.

a) Protection of the weak: good legal advice for all

Individual utility through a form requirement is most likely to be plausible where the slowing down of the contract conclusion and the clarification concerning legal importance and consequences lead to a significant gain in

information or levels out or at least reduces undesired inequalities between the parties to the contract. The story of the German builder's contract is a shining example of this and brought German notaries the extended authentication competence on which their core competency is still based. The notary as the competent assistant to the weaker party in contract, called the consumer in EU nomenclature, is a meaningful feature when it is understood as reducing the unfathomable quantity that is available to necessary information that is important for decision-making. It allows this party to make a better decision about the contract and thus creates economic utility for him.

However, this only works if the weaker party to the contract receives this support at a reasonable cost. We thus come directly to justification of the value dependent fee. It is one of the few possibilities of guaranteeing high level legal advice quite independently of the payment in the individual case. With regard to the registration of property the World Bank itself writes that is not very difficult for the rich to protect and secure their rights.[118] This undoubtedly applies for the legal advice of a good lawyer, whose quality in almost all states including Germany depends on what the client is ready and willing to pay. Notaries in Germany are currently jurists as a rule who can demonstrate a particularly high level of qualification. If this high quality is available during particularly important transactions for parties that are buying a small property that they will repay over thirty working years in the same way it is available to its contracting partner who builds five hundred of such buildings in a year, this is an achievement. Of course this does not lead to two equally strong parties, but in view of the different starting points it at least creates fair conditions.

If payment was only made for what the client considers appropriate for the service, the fees at the top would certainly sink. The result is that the commercially thinking will try exclusively to find assignments that are worthwhile, with the result that the quality of legal advice for the financially weak will sink in this area too.

In parallel good lawyers would abandon areas of property law as they are not lucrative. Small businesses like boundary straightening, road land

[118] Doing Business 2005, p. 34.

purchases etc. would be either accompanied less well or have to be more expensive as the associated time expenditure is often high. It is a legitimate state wish to entrust legal relationships concerning land and soil, which are ultimately an essential non expandable life factor to particularly qualified people.

b) Fulfilment of state tasks

As a weak party cannot help itself, its protection is a state task. It is also a state task to create order for business so that it can develop on the best and most secure basis. Property law in which the notary has traditionally played a major role should be taken here as an example.

The regulation of legal relationships for land and soil is tied to costs. The form in which these costs are covered, namely via notary costs, regulation costs, taxes and duties related to land purchase, taxes and levies linked to soil use or general taxes, is neutral from an economic perspective. In contrast, the quality of the system is economically important, i.e. its possibilities (types of material laws, the possibility of abstract security rights), its correctness, security and speed and the overall costs that are incurred and paid for these. This also includes all the costs for disputes revolving around rights to land and soil, as the better the system the more these costs will be avoided. There are no investigations available of what German real estate law in this sense costs overall. Even if were to prove inexpensive due to the notary’s services, no final economic judgement could be made, as it could also be envisaged that the services of these persons could offer a better yield in a different system, and thus were wasted in the sense of oppor-tunity costs. Moreover the economic values off the notary’s other functions (e.g. in the context of the tax system or also as a factor in social peace) are not recorded.

Economic research is thus still in the early stages. However, what is clear and undisputed is that German property law fulfils its task in business life perfectly, as the individual’s rights are clear, certain and lasting and a legal purchase occurs simply, securely and on a lasting basis. In the German legal system the notarial deed plays a significant if not decisive part here. From the viewpoint of smooth functioning it is certainly not necessary to make any incisive modifications. What applies to computer systems is also

meaningful for legal systems here: ‘never change a running system.’ At least not as long as it offers potential to develop accordingly to meet needs.

c) Legal uniformity and legal quality

The EU’s organs in particular see different legal orders as a complication for international legal relations and thus a market impediment. However, the recognisable preference of World Bank reports for certain legal systems also indicates a plea for legal harmonisation in this direction. But the added value of legal harmonisation across borders must be weighed up against the disadvantage that the same solution for everyone may not be equally good and suitable for everyone, as needs, expectations and framework conditions differ. If it can be recognised in principle at (micro)economic level that everyone knows best what is useful for him, it is possible to take over this assumption (macro)economically for the arrangement of legal systems at least for such states that are organised democratically and whose economy is successful. A look at the world of technology is also very instructive here. The leadership of an individual IT system has the advantage of compatibility, but is always linked to doubts about whether the best solution is being developed.[119] Alternative solutions continue to be sought as long as they are adequately compatible and thus offer operating interfaces. Legal implementation should also distinguish more sharply then during plans for legal harmonisation where the decisive improvement in the harmonisation of law lies and therefore the first step is to develop suitable interfaces so that the different legal orders harmonise with each other. The decision of a legal order for or against form requirements would then be more a problem of suitable interfaces. From a legal perspective this means taking account of the principle of subsidiarity and a reinforcement of efforts to create the most uniform and transparent international private law possible.

[119] Cf. *Schäfer/Ott*, Lehrbuch, p. 651 on the importance of so-called ‘network advantages’. For the selection of a product its dissemination is more important where applicable than the quality.

D.
Conclusion

The notarial deed in Germany makes a very positive contribution to the development of society. It is only specified in areas that are typically particularly important because they affect valuable objects (property, business shares, claims from marriage), have long-term effects (declarations in marriage and inheritance law), or legitimate the immediate use of state compulsion to enforce the law (enforceable deed). The ease and speed of the close is only of secondary imp-ortance for legal transactions in this area. Securing considered action by part-icipants on the basis of relevant and transparent information on the basis of their rights and obligations are in the foreground. The German authentication procedure meets this requirement very well. A modification of the authentication law, as well as recent jurisprudence have shown that the authentication pro-cedure can be expected to protect the weak in particular against wrong decisions. The notarial profession will also have to prove itself in the future here, insofar as the correct balance between protecting the weak on the one hand and the equally compelling impartiality and neutrality on the other hand need to be found. It will cope with this task.

Notarial deeds are the nation’s legal conscience. Processes from far in the past are lucidly and clearly documented and relatively easy to find. This quality is now also offered for electronic documents. The German notarial profession has accompanied and supported technical and legal development proactively. The seamless changeover of the commercial register to electronic legal relations occurred recently on 01.01.2007.
The creation of central registers for important documents (providential proxies, assistance dispositions, in future maybe last will dispositions) ensures secure and very fast finding and thus alleviates the courts’ work in this area significantly. The costs are covered by very inexpensive registration fees, and therefore neither burden the state budget or the taxpayer.

Notarial documentation and its transmission relieves the state in partial areas significantly from otherwise necessary information gathering, e.g. during tax collection or money laundering and the necessary identification of persons.

The notarial deed is anything but an economic impediment. In fact it is economically legitimised in its area of application. Statements to the contrary in the World Bank reports ‘Doing Business 2004’ and following are based in Germany’s case partially on incorrectly sourced facts and partially on the use of benchmarks that are unsuitable for evaluating the progress of a transaction in Germany. Insofar as the World Bank report’s criticism is factually accurate, especially concerning the formation period for a private limited company, the cause is not due to the requirement for notarial authentication or the use of a notary. An improvement has already been made here through the changeover to the electronic commercial register. Of course, the German notarial profession is ready to become involved in any possible improvement.

The German legislator trusts the competency of German notaries. At present legislative initiatives do not aim to restrict the notary’s responsibility, but occasionally foresee significant extensions in the areas of family and inheritance laws, as well as the private limited company. This partial privatisation of state tasks promotes quality and is economically useful.

The notaries’ central task is and remains ‘administration of justice’ in the best sense of the word. This occurs through precise use of law, the formulation of individual contracts and declarations tailored to the specific cases, through the scientific penetration of law, through its preparation for practical use and through involvement in national and supranational legislation. And last but not least, this also includes international cooperation among Latin notaries.