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TOPIC I

Collaboration of the Notary and the State in facing the new challenges of society: transparency of financial markets, money laundering, urbanisation, environment

Rapporteur:

Ms Karin Arnold
Sollicitor and Notary
Kurfürstendamm 59
D-10707 Berlin
Tel.: +49 (0)30 893 66 40
e-mail: karnold@broich.de

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Summary

Legally speaking, the sphere of activities of the German notary is clearly specified. Essentially the jurisdiction of the notary arises from sections § 20 - § 24 of BNotO [German Notarial Code]. The German system of administration of justice thereby presumes a two-pillar model. Precautionary judicial administration via the notary serves to protect inexperienced, inept participants from legal disadvantage and ensures legal security and protection of evidence for purposes of subsequent avoidance of dispute. The preventive legal control of the notary, as opposed to the judicial deciding of disputes, has a true complementary function. As the "preliminary judge", in a certain sense, the notary must exercise sovereign control and decision-making competence of his or her own.

The German notaryship makes a contribution towards combating the new social challenges faced, such as transparency on the financial markets, money-laundering, urban development and the environment. The notary also contributes to the development of the law applicable in these areas by initiatives, by participation in national and supranational legislation procedures, and the scholarly preparation of points of law, also as regards their practical applications.

The official activities engaged in by the notary in these areas, of course, are often varied. In connection with questions relating to urban development and the environment the notary is not particularly required to accept excessive responsibility. He or she can only make a contribution within the framework of the general notarial activities, such as in the preparation of real-estate contracts that require certification.

The contribution made by the notary in the context of combating money-laundering and terrorism, by contrast, is based on concrete legal requirements. The law on the combating of money-laundering,

after all, sees the notary as belonging to the circle of those obligated, and requires that he or she identifies clients, safeguarding documents in the process, and reports suspicious cases. The extent of the identification obligations goes beyond those requirements stipulated for the notary by the relevant vocational law (sections § 10 of BeurkG [Law on Official Recording], and § 26 of DNotO [German Notarial Code]).

The notary is required to check all business requiring his or her participation to determine whether they might have some connection with serious crime such as money-laundering and the financing of terrorism. If a suspicion of violation of the law on money-laundering arises, the notary must notify the Federal Bureau of Criminal Investigation - Central Office for Notification of Suspicious Circumstances. So far, as is clear from the annual report of the Financial Intelligence Unit (FIU) Deutschland for 2009, such notification by notaries has only occurred in a few cases. In the year covered by the 2009 report there were only 5 cases of notification by notaries. Despite this low figure, the fact remains that the notary makes an effective contribution to combating money-laundering in Germany by means of identification of clients and the related documentation, as required by the law on money-laundering. The notary must also pay particular attention to assuring that his or her position as notary is not abused for purposes of money-laundering.

A special contribution is also made by the German notaryship in its technical and legal development of electronic documents and registers. One aspect here deserving particular mention is the changeover from the commercial register to electronic legal trafficking as well as to the preparations for changeover of the land-registry procedure to electronic legal trafficking. The creation of central registers for precautionary power of attorney, care decrees and in future also last will and testaments helps to ensure both the legal security and fast tracing of these documents and makes it easier especially for the authorities, the courts and others affected bodies to do their work. The costs of

the above-named measures are low and therefore constitute no hindrance for those seeking legal assistance.

The current financial crisis has no immediate interaction with the activities of the notary. Since the financial crisis was not a consequence of intrinsically incomplete or legally faulty transactions, but had its origins especially in the disregard of economic matters-of-course, this is understandable.

The legislator has reacted to the financial crisis with, amongst other things, the "Risikobegrenzungsgesetz" [Risk Limitations Act]. On the basis of the new section § 1192, paragraph 1a of BGB [German Civil Code] the applicant for a land-charge security ordered or acquired as from 19th August 2008 can also uphold objections made against the previous land-charge creditor on the basis of a security contract or arising from the security contract, against each purchaser of the land charge. In addition to this the German Federal Supreme Court has ruled that subjection to enforcement in connection with the application for land charges only applies to entitlements arising from a fiduciary bound land-charge security. For this reason the notary must check, before transcription of the enforcement clause in keeping with section § 727 of ZPO [Code of Civil Procedure] to the new land-charge creditor, whether this creditor entered into the obligations arising from the original security contract. Because of section § 1192, paragraph 1a of BGB, this decision is only relevant for land charges applied for and assigned prior to 19th August 2008.

In effect, it can be seen that, apart from the transcription of the enforcement clause demanded by the German Federal Supreme Court in cases of assigned land-charge securities only in the event of the entry of the new creditor into the security agreement, no further checks need be made by the notary and that, from a politico-economical standpoint, such would also currently be regarded by the legislator as being undesirable.