Peter Bohnenkamp **Lawyer and notary**
Bocholter Straße 3
46325 Borken

Tel: 02861/907 907
Fax: 02861/907 90 90
Email: anwaltsbuero@bohnenkamp-borken.de

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Topic II

Rural and urban notarial practice

Country reports for Germany

Rapporteur: Lawyer and notary Peter Bohnenkamp

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* Lawyer since 1969, notary since 1972 with seat of office in Borken
Borken in Münsterland is a medium-sized town with ca. 40,000 inhabitants, a centre in a region with a rural profile

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A. Introduction

1. By establishing the notary's office or notariat on a nationwide basis the legislator has ensured that legal affairs it has entrusted to the notary in the noncontentious proceedings sector can be handled locally, fast, without bureaucracy and by qualified professionals with above-average qualifications at inexpensive rates for the benefit of the public asking for legal advice. Without the appointment of notaries these tasks would have to be performed by state courts, which would mean a significant increase of the budget for judicial affairs of each Federal State (*Bundesland*). Without the established structure of the notariat, it would not be possible to concentrate state jurisdictions by merging courts and reducing the presence of state services in rural areas. This trend towards restricting the nationwide presence of state services only just began with the introduction of electronic media and is developing rapidly. The citizen’s contact with state offices already largely occurs via the medium of the Internet. Data that can be consulted electronically is no longer registered, processed and provided locally; it is concentrated in a data centre. This means that the relevant units are working more and more on a specialist and anonymous basis and their staff are no longer available to citizens as contact partners. The notary is therefore gaining in importance as the mediator between state service in the noncontentious proceedings sector and the citizen seeking legal advice. He is increasingly acting as an external office for the noncontentious proceedings courts, and his range of tasks and importance for the operation of noncontentious proceedings will grow correspondingly as courts and registers become focused in a few locations.

   Experience from organising administrative services shows that outsourcing tasks from the civil service structure leads to a less expensive and faster completion of tasks. The extensive deregulations in all European countries in recent years offer persuasive proof of this. A further transfer of assignments to the notary is being considered in Germany, especially in the probate area. This is also being done with the aim of concentrating state tasks on the one hand, while simultaneously maintaining nationwide provision of services to the population on the other.

2. The 2007 UINL congress in Madrid first deals with the notary’s professional activity in rural areas compared with urban sites under the topic ‘The notary: a worldwide institution’ in Topic II. A notary’s professional activity in urban structures differs in many ways from the activity a notary with seat of office in a small country town is supposed to execute. The topic puts the spotlight on the notary’s special professional, commercial and personal situation in the country and investigates whether essential differences exist from the

professional activities of colleagues in bigger cities. On the basis of the differences impetuses for developing the professional image further and for allocation additional functions will appear.

3. Urban and rural communities have their own specific features and different problem areas in terms of residential density, spatial planning, the local economy and the sociological structure of the population. For example, urban land conveyance is much more characterised by large-scale construction projects and associated composition regarding housing ownership law (*Wohnungseigentumsrecht*) plus large-scale industrial parks and the related legal problems of infrastructure and emissions than rural settings. The rural notary has to deal with the special features of agriculture and take account of agricultural quota entitlements, state subsidies or declaration and duty obligations plus the specific features of farm regulations (*Höfeordnung*) applying in some parts of Germany when preparing real estate purchase agreements. These different requirements characterise the respective professional activity of local notaries and create an extremely varied professional profile, which fully becomes apparent only on closer examination.

4. The following survey compares the notary's different tasks and activities in relation to his local seat of office with special focus on the work of the notary in the area of real estate law, family law, inheritance law and company law.

   Notaries work on a sovereign basis, and do so in their other official duty as well as when recording deeds. The rights and obligations arising from the notary's public office are an essential basis for his ability to fulfil the duties assigned to him by law. His function as a non-circumventable independent state administrator of justice and his ensuing official duties can only be understood if the territorial and personal deployment of notarial services is summarised for the topic (following section B), before the chief features of official notarial duties in rural and urban notariats are outlined (following section C).

B. The notariat in Germany: the territorial and personal provision of notarial services

I. Organisation of the notariat

1. The notary's office

In the Federal Republic of Germany the notary is appointed as an independent holder of a public office for the authentication of legal transactions and other tasks in the area of precautionary administration of justice (*vorsorgende Rechtspflege*) (§ 1 [Federal Regulations for Notaries] Bundesnotarordnung, abbreviated to BNotO). He holds a personal office that is inseparably linked to his person and which is extinguished when he quits it.[1] As a result the label 'Notariat' ('notariat') is not permitted for use for the office of the notary or his Internet address.[2]

The notary is appointed by the respective administration of justice of the state (*Bundesland*) (§ 12 S. 1 BNotO)[3]. Notaries are therefore officials of the Federal State (*Bundesland*), where they are appointed. However, the validity of their deed activity is not restricted to the borders of the individual Federal State (*Bundesland*) where they hold office (§ 11 para. 3 BNotO).

The notary holds the deeds recorded by him as originals and draws up executed copies and certified copies of these for legal transactions. After he quits his office his deeds are stored as a rule by another notary, and to a lesser extent by the local district court. If they are not held at the probate court, the notary hands final will provisions to the probate court when he receives news of the testator's death and retains a certified copy in his collection of deeds. The holding of notarial deeds by the notary guarantees that the original deeds are always available for legal transactions and can be consulted for informative or proof reasons.

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1 § 47 BNotO; further details in Frenz in Eylmann/Vaasen, Kommentar zur Bundesnotarordnung 2nd edition 2004, § 1 RN 18 and Bracker in Schippel/Bracker, Kommentar zur Bundesnotarordnung 8th edition 2006, § 1 RN 9.

2 BGH (Federal Court of Justice) in Deutsche Notarzeitschrift (DNotZ) 1984, 246 and 2003, 376, most recently in NJW 2005, 2693 for a lawyer notary. The title 'lawyer's and notary's office' is permitted if clarification is given immediately concerning which professional is a notary and who is simply a lawyer in the letterhead. 'Notariat and law firm' is not permitted, BGH ruling of 20.11.2006, ZNotB 2006, 69.

3 According to Art. 84 German Constitution (*Grundgesetz*, GG) the States (*Bundesländer*) themselves arrange the establishment of notarial positions and the procedure for appointing notaries under their own responsibility.

2. The notary's liberal profession status

The notary's profession is not a trade (§ 1 Sentence 3 BNotO). He does not hold his office like an independent entrepreneur and on the basis of free entrepreneurial decisions in competition, but is subject to numerous restrictions in the exercise of his office that arise from its official nature.[4]

Although the notary is the holder of an office entrusted to him by the state and although he carries an official seal in accordance with the corresponding provisions of the state (*Bundesland*),[5] he is not a civil servant in the sense of the relevant civil service law of the German Federal States.[6] The BNotO does not describe the notary as the holder of a liberal profession but regulates the exercise of his profession through public-law procedural rules, which set out his position comparably to that of a judge. The notary is responsible in all areas where regulations specify the recording of public deeds as a prerequisite for the validity of the legal agreement (§ 20 BNotO). He performs a series of original judicial functions (partly in competition with the courts in terms of responsibility), which, according to the legal understanding of other legal regulations, are only reserved for the courts. For example, this includes comprehensive responsibility for creating enforceable deeds to create a state enforcement order (§ 794 para. 1 no. 5 German Civil Procedure Law (*Zivilprozessordnung*) - ZPO), the recording of affidavits and the registration of oaths in accordance with § 22 BNotO, as well as his involvement in the determination of the legal succession in the case of death (authentication of inheritances or certificate of inheritance applications, § 2356 BGB).[7]

While taking account of the official character of the notary's profession and the sovereign tasks transferred to the notary, his profession can therefore only be described as a 'liberal profession' on a restricted basis.[8] The personal and professional independence awarded to the notary and linked to the obligation to take responsibility for his own business relationships and circumstances justifies referring to his professional activity as an 'office with additional features of a liberal profession'.[9] The largely official nature of the notary's office is misjudged in the current debate, in which the notary is granted freedom to advertise for his professional activity in line with the yardsticks applied to other legal or

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4 Details in following section B.
5 § 2 Sentence 2 BNotO in association with § 2 Sentence 1 Service regulations for notaries (DONot).
6 BVerfGE 17, 371, 379 = DNotZ 1964, 424, 427. An extensive description of notary's public and social functions is given by Baumann in Mitteilungen der Rheinischen Notarkammer 1996 p. 1 ff.
7 Details on this by Starke in Beck´sches Notarhandbuch 4th edition, L I RN 7
8 Details on this in Bohrer, Berufsrecht der Notare 1991 p. 6 f).
9 According to Löwer, The notary in the tension field between a public office and liberal profession, in MittRhNotK 1998, 310 ff.; he emphasises the function of the office and puts the addition in brackets.

business consultancy professions based on the principle of professional freedom (Art. 12 GG). In contrast to other liberal professional activities, the notary cannot decide how many and which tasks he wishes to take on, because he cannot refuse notarise deeds without sufficient grounds (§ 15 para. 1 sentence 1 BNotO). As a result he is also forbidden to advertise for assignments outside his official district.[10]

The notary's function and position in our legal order system would therefore be misjudged if his professional position were largely equated with that of other legal advice professions as regards professional freedom. No sovereign functions whose fulfilment is primarily a state task are entrusted to a lawyer or tax consultant. This means greater freedom to advertise and act professionally (e.g. through professional links with other professionals) can be awarded to these professions by the legislator, without the independence of the profession being negatively affected. The legislator has safeguarded consideration for legal rules when the notary performs sovereign functions through strict regulations and controls, and ultimately thus through the arrangement of a professional law that necessarily collides with the typical freedoms of the so-called 'liberal professions'. This is also one of the justifying reasons for removing notarial activity from the European Union's regulation competence in Article 45 of the EC Treaty.[11]

3. The notariat's constitution

In the greater part of Germany, the profession of the notary is the principal profession (§ 3 para. 1 BNotO) while in the Federal States of Berlin, Bremen, Hessen, Lower Saxony, Schleswig-Holstein and in one part of North-Rhine Westphalia lawyers can be simultaneously appointed as notaries as long they are lawyers (lawyer-notaries, § 3 para. 2 BNotO). The state notariats in Baden-Württemberg are a special form of the notariat and the Federal notaries regulations do not apply to them (§ 114 para. 1 BNotO) so that this survey is confined to the principal notary profession and the lawyer-notary profession.

No professional distinctions[12] exist in principle between principal profession notaries and lawyer-notaries. The following explanations of their tasks and the special problems of their official duties apply to both types of notariats. The legislator has precisely defined the

[10] BGH NJW 2004, 2974; however, the publication of a notary's telephone number in a telephone directory that does not include his official district is not advertising incompatible with the office, BVerfG in ZNotP 2006, 36

[11] The EU Commission has continued the process for breach of the Treaty against Germany due to retention of citizenship and the failure to implement the recognition of qualifications directive for the notariat sector. The procedure is wavering. The Commission's legal attitude is unjustified in the view of the Federal Chamber of Notaries because German notaries work exclusively on a sovereign basis and Article 45 EC Treaty applies without restriction.

[12] Compare with Starke in Beck´sches Notarhandbuch L I RN 17 and 18.

special aspects of working as a lawyer, as well as holding the office of notary to guarantee the notariat's independence and impartiality (e.g. the ban on involvement in § 3 para. 1 p. 1 no. 7 BeurkG)and its advertising conduct (§ 29 para. 2 BNotO), the access to the notariat (§ 6 para. 2 BNotO) and the extinction of the notary's office (§ 47 no. 3, § 50 para. 1 no. 5 BNotO). The different notariat constitutions were not adversely affected by the new alignment in the distribution of tasks between the Federal government and States during the implementation of a structural reform in 2006 and it is generally understood that they have been established on a lasting basis. Both notarial constitutions have proved themselves to be excellent at fulfilling the tasks assigned to them in the parts of Germany where they have traditionally existed.

Independently of the notariat constitution, notaries are organised in chambers of notaries. The chambers in principle have the same district as the higher regional court and embrace all notaries with this district.[13]

4. Appointment to the office of notary

The notary's office is advertised by the State administration of justice (§ 6 b BNotO). The prerequisite is a three-year candidate post as a notary assessor for becoming notary as a main profession or for becoming a lawyer notary, a preparatory training which is expected to end with an examination. The most suitable candidate technically and personally is appointed based on the legal 'best selected' rule (§ 6 BNotO).

The number of notaries is limited; only as many notaries are appointed as are required by orderly administration of justice (§ 4 sentence 1 BNotO). The yardstick is the need to cater appropriately for parties seeking notarial services. The regulated age structure of the notarial profession can be safeguarded by additional age structure positions. This means that the principle of limiting the number of sovereign tasks entrusted to the notary is satisfied and only bundling tasks can ensure that they are completed on a qualified basis. The increasing demands on the office's technical and personnel resources, namely the expense caused by introducing electronic legal transactions with the commercial register while excluding the option of submitting deeds in paper form[14], as well as the increased complexity of the notary's official activity favour the trend towards restricting the number of

[13] In Bavaria the higher regional court districts of Munich, Nuremberg and Bamberg combine to form the Bavarian State Chamber of Notaries, while the higher regional court districts of Cologne and Dusseldorf in North Rhine Westphalia combine to form the Rhenish Chamber of Notaries. A special regulation also applies to Baden-Württemberg and Hessen (§ 65 BNotO).

[14] Binding since 01.01.2007.

notary positions in the lawyer-notary segment and thus promoting increased notarial activities by lawyernotaries compared with their business as lawyers.[15]

5. The notary's scope of office

Verifying needs and allocating seats of office ensures that notaries are available nationwide and locally in Germany to fulfil their official obligations[16]. The notary's local presence is additionally safeguarded by the fact that he can generally only notarise deeds in his official district, i.e. in the official court district where he has his seat of office (§ 10 a BNotO). His local presence is therefore an official obligation, which guarantees that notaries are specifically available for the public seeking legal services in sparsely populated rural areas.

Income from notarial activity is occasionally inadequate to ensure the notary's economic independence, especially in poorer areas. This is safeguarded in parts of the pure notariat by the notaries' fund[17] and the State notaries' fund[18]. The notary receives an income supplement contributed by the pool of all notaries as compulsory members of the fund on showing his business figures. Notaries in economically weak positions therefore also have a secure income. This means that the business risk borne by a notary applying for a newly created notary's position or a notary's position in a poorer region is reduced. Secure income of this type does not exist in the lawyernotary system. The legislator assumes that the additional income from the work as a lawyer secures a sufficient basis for economic existence, as the newly appointed notary was already working locally for many years as a rule and is applying for notary's position from a secure professional position.

This basic economic security for notaries is matched by the ban on setting up branches and the obligation to keep the business office open during normal business hours (§ 10 para. 3 BNotO) and only to undertake official work outside the business premises if practical reasons exist for this.[19]

The development of electronic communication makes it possible to administer and offer state services centrally. The elimination of bureaucracy is therefore proposed as an

[15] At present the guideline figure for calculating notarial positions in the lawyer notariat at approximately one quarter compared with the guideline figure in the pure notariat.
[16] Lerch in Arndt/Lerch/Sandkühler, Kommentar zur BNotO, § 10 Rnr. 24.
[17] The Notaries' Fund as a legally competent public law institution of the Free State of Bavaria, established in accordance with § 113 BNotO, responsible for the notaries in Bavaria and in the district of the Pfalz Zweibrücken higher regional court district in Rhineland-Pfalz.
[18] Established in accordance with § 113 a BNotO as a legally competent public law insitution, responsible for notaries in Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia.
[19] Guideline recommendation from the Federal Chamber of Notaries IX, 2.

essential goal of administrative reforms in the government programmes advanced by both the Federal government and the State governments. The judicial system is also affected by this. A reduction in the number of judicial facilities is only possible geographically because notaries provide sovereign judicial services locally in the non-contentious proceedings sector. While the essential judicial facilities are present locally in conurbations and cities and can be consulted more easily by the citizen, rural notaries replace journeys to courts for citizens and act almost as an external branch of the relevant register to which they are connected electronically and as non-contentious proceedings sites.

II. The notary's official work

1. Personal exercise of the office

The notary must hold and execute his office personally and under his own responsibility.[20] This principle applies without restriction for any notarial task of a sovereign nature, i.e. for generating deeds. A deed recorded by a representative of the notary who is not official, i.e. not being appointed by the supervisory authorities (§ 39 para. 1 BNotO) is invalid because it is not a public deed.[21] The notary can only use employees or representatives to assist his official work on a restricted basis. The obligation to exercise his office is confined to his person and arises from the transfer of the notarial office by the state only to him in person. It is a personal entitlement and obligation without the right to transfer office in full or in part to a third person.[22] The notary consequently bears always full personal responsibility for his official work.

In this regard the notary's professional work differs fundamentally from that of a lawyer or tax consultant, who is used to handling legal issues that go beyond everyday legal problems in a team working under the responsibility of the entire firm (law firm, tax consultancy firm) obvious for clients. The notary can only restrictedly accept information that he requires for the preparation of notarial deeds from employees. The notary can only correctly investigate the wishes of the parties and clarify the case (§ 17 para. 1 p. 1 BeurkG), if he speaks personally with the parties, listens to them, personally obtains an impression of the description of the case and then clarifies what appears to be the

[20] Federal Chamber of Notaries guideline recommendation IV Nr. 1, adopted by all chambers of notaries in their guidelines.
[21] BGH DNotZ 1972, 549; Schäfer in Schippel/Bracker, BNotO § 39 RN 1.
[22] See Starke in Eylmann/Vaasen, RL-E IV RN 1 - 4.

essential circumstances, while asking questions and looking for additional information or documents. Long experience has shown that parties seek notarial aid and wish to conclude agreements based on misunderstood information from their tax consultant or incomplete knowledge that is increasingly being obtained over the Internet, for example, or which can be traced back to other incorrect estimates or well-meant advice from third parties. In this case the notary's task is to outline the legal scope of the transaction, highlight alternatives and present in-depth solutions to the parties that can only be developed from the notary's comprehensive knowledge of the law and personal experience. However, decisive input from staff is not allowed.

On the other hand the notary's personal official work makes him a contact for his clients, who is unequalled by any comparable professional among a public seeking legal services. An exceptionally high level of publicly-enjoyed respect is therefore linked to the notary's office in the country in particular. Following long professional service the notary is better informed than any third party of the personal problems of his clients, legal or business difficulties in families or a firm's commercial and legal situation, because he holds his office personally. He is viewed and approached as a highly personal adviser and in this respect is unique and without competitors.

2. Independence and impartiality

On being appointed the notary is personally and practically independent with respect to the State whose sovereign authority he exercises. The supervision to which he is subject is a pure legal supervision and he is not subject to any instructions concerning exercise of his office.[23] The notary's official transactions are not checked for their advisability and are only verified for their legitimacy on a restricted basis to ascertain whether professional law provisions have been fulfilled. Thus the supervisory authority merely has to gauge the interpretation of legal terms in material law by the notary on the basis of whether the notary's decision was made carefully and justifiably and independently of whether it is ultimately approved by the supervisory authority.[24] Only a judge has a comparable independent professional position.

On the other hand the notary is also independent with respect to the parties (i.e. clients) who request his official activity. He is not the representative of one party, but the independent and impartial counsellor of the parties (§ 14 para. 1 sentence 2 BNotO).

[23] Lemke in Schippel/Bracker, BNotO, § 93 RN 10
[24] Baumann in Eylmann/Vaasen, BNotO, § 93 RN 9.

While he is obliged to notarise deeds if requested, he can also reject this task for practical reasons. These can involve both in his person and in the content of the official work demanded.

This impartiality demarcates the notary sharply from the lawyer, whose core task is to defend a party interest (§ 3 para. 1 BRAO). It also immediately differentiates him from all other legal and business consultancy professions. He cannot assert the interests of one party against those of another unilaterally. His neutrality is protected by a ban on involvement (§ 3 BeurkG). He is not only excluded from any participation in cases in which he or close relatives obtain legal or commercial advantages, but also if he or a third party involved with him in a joint professional activity were already active in the same case unilaterally on the instruction of a participating party. On the other hand the notary can also refuse to exercise the office due to bias (§ 16 para. 2 BNotO). This obligation to ensure impartiality not only exists with respect to the parties formally involved in the official work (i.e. the clients and those present at the authentication). It also exists with respect to those materially affected by the case whose rights are affected, although the case and its arrangement may not be known to them at all at the time of the notary's work.

This also leads to the strict rule for the notary to fulfil his neutrality obligation, if differences of opinion emerge later between the parties involved, including the purely materially involved parties. If the parties disagree concerning the content of a deed, the notary cannot adopt any position and only act on the instruction of all the parties. If the notary has formulated applications to the court, he can only represent the parties if they have unanimous wishes and a common interest. As soon as differences of opinion emerge, he is prevented from further involvement. If the notary is to make a statement and give witness about knowledge handed over to him, he can only do so with the approval of all of those involved in the official transaction. Otherwise he would breach his confidentiality obligation.

The obligation to ensure independence and impartiality takes precedence for every activity by the lawyer-notary as a lawyer. The ban on involvement (§ 3 BeurkG) excludes him and possible lawyer associates from any work as a lawyer if a notarial assignment has been awarded in the same case. Accepted mandates as a lawyer are invalid and do not generate any claims for fees as a lawyer (including for his lawyer associates).[25] This is particular is an essential restriction for the notary who works in big law firms.

[25] Relevant details: Eylmann in Hensler/Prütting, Kommentar zur Bundesrechtsanwaltsordnung, 2nd edition 2004, § 45, RN 13 ff.; Sandkühler in Arndt/Lerch/Sandkühler, Kommentar zur BNotO, 5th edition 2003, § 14 RN 58

The notary must state his obligation to ensure impartiality. Prior to any authentication he must ask the parties whether he or a third party with whom he is linked in joint professional practice or with whom he has shared business premises has had previous dealings in this case and have the answer confirmed in the negative in the presence of all the parties. If the notary or a person linked to him for professional cooperation has already provided legal advice to one party in the authentication process, the notary is excluded from any further official work. The fact of informing the parties and confirmation by the parties to the deed must be documented in the deed (§ 3 para. 1 p. 2 BeurkG).

Notarial impartiality demands behaviour from the notary that goes beyond passive neutrality and the avoidance of unilateral partisanship in the case of conflicting interests. According to § 17 para. 1 BeurkG he is obliged to investigate the wishes of the parties, to clarify the case,[26] to inform the parties about the legal scope of the transaction and to record their statements clearly and unambiguously in the record. He must also ensure that aberrations and doubt are avoided and ensure that inexperienced and unskilful parties are not disadvantaged.[27] This obligation can only be checked in the court and supervisory law procedure on a limited basis, i.e. with respect to the conscious exhaustion of his evaluation margin, and how far his impartiality obligation extends.[28]

3. Fairness in exercising the office

The notary must show himself worthy of the respect and trust placed in the notary's office inside and outside his office through his behaviour (§ 14 para. 3 sentence 1 BNotO). In this regard he has obligations that exist in the general interest and which could collide with the wishes of his client. He must refuse to act when he is asked to become involved in transactions where recognisably forbidden or unreasonable goals are pursued. His obligation to ensure true attestation[29] guarantees that he can only authenticate what he has recognised as accurate after conscious verification.[30]

A functioning legal system demands a conscious consideration of this fairness in office by all office holders. Insofar as the notary is bound by the same obligations as those binding the judge or the judicial civil servant responsible for keeping the land register or commercial register, notarial deeds can also be recognised for the documentation of

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[26] See above B, II, 1.
[27] § 17 Para. 1 p. 2 BeurkG.
[28] Relevant details: Hauk, Die Amtshaftung des Notars, 2nd edition, Verlag Beck, RN 419 ff.
[29] Criminal law due to § 348 StGB sanctioned official obligation (so-called false authentication in office, the attempt is also punishable under criminal law).
[30] BGH DNotZ 1992, 819.

cases and legal obligations on an equivalent basis to judicial deeds. In practice this not only includes the notarisation of shareholders' resolutions or the authentication of facts officially recorded by the notary (§ 20 para. 1 BNotO), but also certification of representation entitlements, legal amendments in companies (§ 21 para. 1 BNotO) or the clarification and determination regarding the allocation of assets within a marriage.

4. Forbidden activities and transactions for the notary

The prohibition to broke loans or land transactions or to participate in brokering of such transactions in any type (§ 14 para. 4 p. 1 BNotO) arises from the notary's official obligation shown above, especially from his independence and impartiality obligation as the holder of a public office. He also has to ensure that his staff does not engage in such activities either. The acceptance of sureties, warranties or guarantees by the notary in connection with the execution of his office conflicts with the obligation imposed on him to keep distance to the parties and to the official activity the parties apply for. Accordingly, the notary is not allowed to accept these.[31]

The German notary is subject to clearly stricter rules here than some notaries abroad. Parties are often advised by tax consultants, banks and brokers, and occasionally these transmit direct information to the notary on their customer's instruction to prepare and implement the official transaction. The strict distance of the notary from these advisers' businesses is an essential basis for his ability to do his official work neutrally and independently. The relationship of trust among the parties with the notary can therefore exist without reservations and restrictions.

5. Professional relationships

The restrictions on professional connections with other notaries or professionals also serve to maintain and guarantee the notary's independence and impartiality. The notariat is a personal task and office only which cannot be transferred by means of a private law agreement to third persons. The official duties granted by the state to the notary are not performed by these third persons who lack the qualification of a notary. The permissions for joint professional practice according to § 9 BNotO are therefore related solely to a shared organisation of the office, i.e. the use of personnel and material resources, and not the content of the official work.

[31] Sandkühler in Arndt/Lerch/Sandkühler § 14, RN 203 ff., 210, 212.

Notaries working on a main profession basis can only associate themselves with notaries appointed to the same seat of office for joint professional work or to set up a shared business premises with them. Moreover, professional links are subject to a reservation of approval by the supervisory authorities and are limited to two notaries per professional association. This does not breach the guarantee of a free professional work under Art. 12 of the German constitution (GG).[32]

Lawyer-notaries have a wider ability to do professional work with members of a law firm, patent lawyers, tax consultants, tax attorneys, auditors and sworn auditors (§ 9 para. 2 BNotO). These professional links must be notified to the supervisory authorities and the chamber of notaries. There is no obligation to approve such associations and partnerships. If the professional obligations imposed on the notary are endangered, especially regarding independence, impartiality and guaranteed confidentiality (§ 18 BNotO), the professional link can be forbidden.[33] The ban on involvement under § 3 BeurkG for the notary applies to all members of the professional association. On the other hand, partners in the joint practice can no longer do any personal professional work in the same case if the notary is already involved officially.

By restricting the professional cooperation with other liberal professions, including those with which the lawyer-notary can engage in joint professional practice,[34] the legislator ensures the independent and qualified fulfilment of state sovereign tasks entrusted to the notary. Shared offices between pure notaries are only usual in cities, because partners for joint practice are usually unavailable in the country and in smaller towns. Lawyer-notaries are predominantly associated in partnerships regarding their work as lawyers, and in the form of an office community regarding their work as notaries. No special problems arise if lawyer-notaries execute their professional work as lawyers in a limited liability company (GmbH) since their work as a notary occurs outside the company. Notaries holding a pure notariat without being lawyers at the same time are not allowed to use a GmbH as a vehicle for their work, because it is not the GmbH but the person itself who are awarded the notary's office.

6. The notary's liability

In contrast to a lawyer, who in accordance with § 51 a BRAO can limit his liability in the event of a loss due to negligence through agreement with the client to the minimum

[32] Federal Court of Justice, ruling of 24.10.1994, 1 BvR 1793/94.
[33] On this subject see Starke in Beck´sches Notarhandbuch L I Rnr. 38 ff.
[34] For example, with owners of business enterprises, even craft businesses, compare with draft of the legal services law § 59 a BRAO.

insurance amount[35], the notary cannot limit his liability by agreement. While this is not regulated explicitly by law, it is agreed by unanimous opinion.[36]

A private law limitation of liability conflicts with the notary's position as an office holder, his public law duties and the notary's official liability regulated in terms of grounds and scope by § 19 BNotO. The assignment awarded to the notary is a public law task by nature and not a private law service contract, with the result that its content cannot be changed to deviate from legal stipulations through private law agreements.

7. The notary's costs

The notary calculates his costs in accordance with the costs regulations (KostO), which also applies for the imposition of court costs as a court cost law for non-contentious proceedings. He is obliged to charge the legal fees incurred by his work and cannot make any fee agreement (§ 17 BNotO). This means that competition among notaries via different fee levels is excluded. Notarial services in cities and in the country generate the same fees. KostO does not take account of the different, structurally determined, income and expenses.

The scale of the fees is oriented by the type of official transaction, and incidentally according to the value of the business, whose calculation is also regulated in KostO. Due to his obligation to notarise a deed (§ 15 BNotO) the notary cannot refuse to take on a time-consuming official job that only offers a low fee because of the low business value. The legislator assumes that ultimately the cross-subsidisation underlying the cost law will lead to an adequate fee balance.[37]

The notary's cost claim is a public law matter by nature.[38] Consideration of the cost stipulations is also subject to checking and monitoring by the supervisory authority (§ 93 para. 2 p. 3, para. 3 p. 3, 4 DNotO).

In contrast to the notary, other legal advisory professions can agree their payment freely in deviation from the legal regulations.[39] The obligation to calculate legally determined fees only applies to lawyers in the case of representation in judicial procedures (§ 49 b

[35] At present €250,000.00.
[36] Schramm in Schippel/Bracker BNotO § 19 RN 100.
[37] Relevant details: BVerfG DNotZ 1978, 412.
[38] Federal Court of Justice DNotZ 1990, 313.
[39] E.g. § 4 lawyer's fees law (RVG).

BRAO). If lawyers are commissioned to draw up draft contracts by their clients, the practice of calculating the lawyer's fee on the basis of payment agreements has now largely imposed itself. This primarily applies to company purchase contracts or unusually extensive and complex land transactions. In relation to the expense for advice from lawyers the economic cost to the parties from the additional notarial costs is low. The payment to a lawyer for ordinary day-to-day transactions is a multiple of the corresponding notarial expenses, even when using the average value of the RVG fee table.[40] For this reason, advice from a lawyer in connection with the notary's official work is exceptional and in practice is restricted to extensive land transactions or company purchase contracts, whose authentication was linked to the prior verification of the economic basis of the contract or is only linked indirectly with the authenticated legal transaction. In practice the parties exclusively leave the preparation, drafting, authentication and settlement of the transaction to the notary while conscious of his sovereign official capacity, his neutrality and technical qualification.

8. Competition with other legal consultancy professions

Parties seeking legal services are offered legal advice in Germany by 142,830 lawyers[41] and if tax law advice is sought, by 68,781 tax consultants[42]. This means that a serious competitive situation is excluded, given the imbalance with the figure of 1,610 pure notaries and 7,265 lawyer notaries[43]. Lawyers and tax consultants are forbidden to engage in the sovereign function entrusted to the notary, with the result that overlapping is only possible in the area of assisting parties outside drawing up a deed, which a notary is allowed to do in accordance with § 24 para. 1 BNotO. This is imaginable if the commissioned official work is not performed, e.g. because the order is taken back or the notary advises against the intended official transaction, or if the notary is only entrusted with drawing up a draft and not the later authentication. But in these cases where authentication does not follow, the notary is subject to the strict rules of professional law, especially the obligation to be impartial, not only to the client but also to materially involved third parties, e.g. the possible contractual partner who did not entrust him with the task. This neutrality obligation borne by the notary would be misjudged in the debate, if the view was asserted that the notary is entitled to formulate a contractual deed favourable to his client while using his special knowledge in the area of contract design. The notary is excluded from an official job as soon as a unilateral contractual arrangement

[40] E.g. for a contract draft with a business value of €200,000.00 20/10 Geb. KostO €714.00 €/1.5 average fee Nr. 2300 RVG €2,608.50.
[41] On 31.12.2006 according to a press release from the Federal Chamber of Lawyers.
[42] On 31.12.2005 according to footnote 41, plus 2,775 tax attorneys and 12,578 auditors
[43] See footnote 41.

is wanted. This involves representation by a lawyer of a client's unilateral interests and the notary's professional law excludes professional competition.

The assumption in § 24 para. 2 BNotO is fulfilled whereby a notary who is simultaneously a lawyer acts as a lawyer in the event of doubt, if he does not obtain an assignment for an official transaction in the context of his sovereign work. The lawyer notary is obliged to clarify with the parties at the outset and on time whether an assignment is being given to him as a lawyer or as a notary.[44] In practice few problems arise in this context because it is clear from the outset which service the client wants due to the clear demarcation between the sovereign function entrusted to the notary and a lawyer's work. Competition in the legal consultancy market between the notary and other legal consultancy professions therefore does not exist in practice.

An essential factor for the assessment of the notary's position in the tension relationship with other legal consultancy professionals is his general responsibility and the lack of any specialisation. The notary has to work in all legal areas and not just in fields that he has selected as a specialisation and he cannot refuse authentication in principle. The mastery of the legal areas entrusted to the notary's scope of responsibility demands the highest possible qualification, which is ensured by the selection process, and continuous further training, which is a professional obligation. The focuses of notarial activity lie both in material law, especially the arrangement of contracts, but also in parallel to this in formal law, especially settlement by filing applications and completing deeds. Consultancy as a portion of notarial work therefore includes both the drafting and content design of contracts, as well as their execution while taking account of the legal information obligation imposed on the notary and the acquisition of the required permits.

In the case of complex company law arrangements or unusually extensive property transactions the contracts will frequently be negotiated and prepared with the involvement of lawyers. It is then the notary's experience that the notary's advice and involvement often has to offset shortcomings in the outcome of the negotiation and formulation in the final version of the contract text. Additions also prove to be necessary from a formal viewpoint as a prerequisite for the execution of the deed. In the case of contracts that were negotiated by lawyer advisers to the clients, the notary also has the task of checking whether the contract work is consistent and formally executable and must inform extensively on the legal consequences. This checking function performed by the notary is also an essential component in the case of legally important transactions and not merely a

[44] Section I fig. 3) of the guideline recommendations of the Federal Chamber of Notaries.

superfluous expense for the parties. The notarial deed firstly creates the required legal security for all of the parties concerned. The notary guarantees the correct settlement through his official position. The notary also has his own function, task and responsibility in these cases and is not in competition with the lawyer and tax consultant work of other professionals.

9. The notary's sovereign work

In the current proceedings by the European Commission on a breach of the Treaty against the Federal Republic of Germany on the use of Art. 45 of the EC Treaty the non-contentious proceedings is viewed overall as a service and not a sovereign activity. The European Court of Justice will ultimately have to decide on this assignment. In principle the Commission's argument does not concern the reservation of citizenship during the appointment of notaries or the alleged inadequate implementation of the directive on the recognition of qualifications, but the classification of non-contentious proceedings in the continental European Member States as a sovereign activity. The Commission is not only challenging the direct and specific exercise of public power in notarial work, but also in the case of all of the other organs of non-contentious proceedings, including judges acting here, judicial officers and other decision-makers. Non-contentious proceedings are a sovereign activity by virtue of law and the state organisation. The assignment of state services to sovereign or private law fulfilment comes within the remit of every state's organisational power beyond the EC Treaty.

It is theoretically imaginable for many tasks currently reserved for the sovereign system by the legislator to be performed in the future by bodies organised under private law.

Examples of current efforts to privatise public tasks attest to this. However, assignment as a sovereign task is a longstanding duty of the national legislator in accordance with its concept and implementation of sovereign circumstances and the exercise of state power. These valuations and decisions are not subject to a requirement for and inclusion in European treaties. As a result the European Commission's responsibility does not arise here.

The German legislator has not only regulated the production of enforcement orders in the form of judicial judgements or notaries' executable deeds as a sovereign task, but also the drawing up of public deeds with special evidential force (§ 415 ZPO), the execution of land conveyancy, the formation of capital companies initially with their entry in the commercial

register as well as many other legal deeds that can only be executed with a notarised deed. In accordance with the German legislator's appreciation the notary's work is globally sovereign in nature.

C. Focus of the notary's official work in rural and urban notariats

I. Introduction to the local particularities of notarial work

1. The structure of community focuses and rural regions

The notary does his sovereign work exclusively in his official district. This assignment, linked to strict regulations about how to administrate and conduct the office (service law) which bind him to his seat of office naturally mean that local factors have a direct effect on the content and scope of his professional business. As a result the notary's content and working method in rural regions is determined by local special circumstances, and thus differs from methods found in an urban notariat. In contrast to lawyers, who frequently work supra-locally or supra-regionally and thus go far beyond local boundaries, the notary's typical work is concentrated on his seat of business, is only possible outside this place of business in exceptional cases and only permitted in a restricted local district by virtue of the abovementioned service law. His client base almost completely comprises the local population, and his service is determined by its needs. Insofar as the population structure or economic structure and the public's ensuing legal problems in the individual regions differ, the focuses of notarial work differ correspondingly.

Particularities cannot be determined by the number of official transactions, because no weighting applies in this respect during the appointment of notaries. Statistical documents show a greater number of sales of land without buildings in rural areas and a focus on the sale of condominiums in urban settlement structures, but this does not have any mentionable validity concerning the different position and task of the notary in these areas. More is revealed about the notary's work by his ability to influence the content of the parties' declarations being authenticated. The clarification of the case and advice from the notary often influences the parties to the deed extensively. His involvement in the content arrangement of official transactions is naturally small, if the parties concerned have each already been advised unilaterally by lawyers and tax advisers. In these cases the contracts are largely prepared, and ready contractual drafts that only require minor

supplements are presented to the notary. If such an additional unilateral advice is missing, the parties to the deed trust a great deal more in the clarification of the case, the indication of the legal and tax problems and proposals for contractual design by the notary, and in practice also in the case of tax law issues, although the notary has no advisory obligation in this respect but can refer the parties to their tax adviser.

The residential structure in Germany has many high-density settlements (conurbations, large municipal centres). The Ruhrgebiet in the Federal State of North-Rhine Westphalia is the biggest urban settlement in Europe when viewed as a unit, while other residential concentrations are distributed almost evenly across the country. Many cities with over 100,000 inhabitants and evenly distributed medium-sized towns lie between the dense areas. As the biggest economy in the European Union, Germany is largely characterised by medium-sized industries, which also requires qualified notarial activity in company law in medium-sized and small towns, alongside large companies that have their headquarters in the large municipal centres. The economic foundations for professional work as a notary are therefore assured on a nationwide basis, although the revenue situation in cities is favoured by the fact that the important transaction values are naturally higher than in the country for the calculation of notarial fees.

2. The focuses of work on the basis of legal stipulations

While the notary has to do his official work in all legal areas, local terms of reference determine focuses of activity and thus specialisations, although these cannot be emphasised externally as an advertisement. The notary working in an urban setting is only exceptionally involved in the particularities of legal transactions concerning agricultural land or special issues concerning succession in agricultural enterprises. The regulation of generational succession is also essentially different in rural regions and determined there by the frequently encountered families where several generations live together and support each other reciprocally in illness and old age. This makes special features in consultancy and contract design necessary which differentiate activity in the country clearly from activity in urban notarial work. The focuses of the differences are presented below.

II. The transfer and taxation of land

1. The land survey register (*Liegenschaftskataster*)

a) All of the real estate in a State region is registered, shown and described by the State surveying and register authorities in the land survey register (*Liegenschaftskataster*). This register serves as an official directory of plots of land for proof of ownership in the land register and indicates the results of the land valuation for the purposes of land and soil taxation.[45] The land survey register is not a part of the non-contentious proceedings and thus is not subject to the responsibility of the courts and notary. The entry unit of the land survey register is the field unit (*Flurstück*) . It covers a coherent, geometrically clearly limited portion of the earth's surface, which is proved in the land survey register with the field unit number or folio number. Field units serve the identification of plots of land in the land register. The land surface of a plot in the locality can comprise several field units and have the same owner, but cannot comprise parts of a field unit. As a rule, plots of land comprise a single field unit.

The field (*Flur*) designates the area to which the field units are issued. It comprises multiple, locally coherent field units. Several locally coherent fields in a community form a local subdistrict (Gemarkung). The local subdistricts regularly align with land register districts in which the land registers are identified by consecutive numbers.

The technical land register identification of a surface area then includes the name of the local subdistrict, the number of the field and the field unit number. The field units are kept in the automated real estate book (*ALB*).

Field units can be broken up or merged following an application from the owner or via official action.

b) The land survey register comprises a descriptive text section, the real estate book, a representative graphical section, the real estate map and a technical measurement section being the documents for the measurement. The land survey register authorities are assigned to the local communal district bodies (county boroughs and rural districts) in many Federal States, and occasionally they are multiple-level State authorities.

[45] There are still a few plots of land, which are not entered in the land register that are in public ownership and owned by churches that serve public purposes. Please note that the German terms describing the land register are technical and are not translated identically in foreign languages.

The publicly appointed surveyors work on measurement activities alongside the land survey register offices.

c) The land survey register is at the start and end of land conveyancy, insofar as it identifies parcels of land in terms of geographical location, size and shape. Information about the type of use is important for notarial activity. The sale of partial land units requires approval for the division of the parcel by the local land authorities as a rule, to which the notary is to refer during the authentication (§ 18 BeurkG).[46] The sale of agricultural and forestry property requires approval in accordance with the land conveyancy law,[47] which the notary obtains in the context of settling the contract.

The notary can easily determine the registration of a parcel of land with the land register office via the land survey authorities if, for example, the parties cannot give any exact indications on the matter. The notary has a right of inspection, but third parties only on the basis of a justified interest.

2. The land register

a) Land register offices are part of the non-contentious proceedings and are organised as departments of the local district courts, the entry-level stages of jurisdiction.[48] All of the field units in the court district are registered here. A separate land register is kept for each owner; several field units can be entered, also from various fields and local subdistricts, in the inventory.

The land register supplies information about the private law relationships of the land parcels. Insofar as public law questions are important within the context of a land transaction, the notary cannot take these out of the land register, but must have them determined by the responsible authorities or have them to be determined.

b) In the past, land registers were kept in fixed volumes in hard-copy, subdivided into land register pages, and have been converted and kept for the past approximately 35 years on individual sheets with removable inserts (loose sheet land registers). In keeping with technical progress the land register is kept in machine format as an

[46] For example, according to § 8 of the Construction regulations of the State of North-Rhine Westphalia for plots of land containing buildings.
[47] § 2 Land transaction law (GrdstVG).
[48] § 1 para. 1 p. 1 land register regulations (GBO).

automated file at present in the Federal States (§ 126 GBO). The directory of owners and plots, as well as other directories required to keep the land register are also kept electronically. In most Federal States only the electronic land register still exists. The notary can inspect them simply over the Internet following application for an access entitlement. The notary is therefore locally available to the public seeking legal services as the provider of an insight into the land register.

c) Entries in the land register are largely subject to being protected by public faith. This can only be justified on the basis of the sovereign function of the land register office in the context of non-contentious proceedings. Incorrect entries trigger the state's official liability, not civil law, claims for compensation. If a right is entered for someone in the land register, it is assumed by law that the right exists for him and if an entered right is extinguished it is assumed that the right does not exist (§ 891 BGB). If someone obtains a right to a parcel of land or a right to a right of this type through a legal transaction, the content of the land register counts as correct in his favour. Restrictions on availability must be entered in the land register so that they can be effective with respect to third parties (§ 892 BGB).

In this respect the notary can therefore rely on the entries in the land register and use them as a basis for his authentication work. As a result he is obliged to determine the content of the land register in the case of land transactions (§ 21 para. 1 p. 1 BeurkG) and can only authenticate without prior examination of the land register in exceptional cases following special instruction and a reference in the deed. However, the legal assumption of § 891 BGB and public faith in the land register in accordance with § 892 BGB do not extend to the actual details of the inventory directory, i.e. not concerning the details about type of economy, position and size. Deviations in the parcel size from the entered sizes in older measurements arising from divisions of parcels and new measurements are common for the notary working in the country in particular. As a result his instruction obligation has to cover this circumstance specifically to avoid disputes among the parties. New measurements are precise as a rule due to the current electronic available data.

d) In parallel to the land register, the land register office keeps land deeds to safeguard deeds and copies, which can also be stored in image or other data format for reproduction instead of in paper format. Entries into the land register are made according to the sequence of entries, and the date and time applications are entered are registered in each case for this purpose. The deeds kept in the land deeds

supplement the content of the land register. Easements in particular are only registered with a reference to the entry authorisation of the party whose entry right is concerned, and not including their content. To determine the content of easements the notary therefore must therefore also access the land deeds, if the parties cannot present the entry authorisations and the easements are not extinguished during the transfer of parcels of land. The entry authorisation authenticated by the notary is thus integrated into the public faith in the land register.

e) To create conciseness, the land register is divided into three sections by the inventory directory in which the field unit is registered. The owner is identified in section I of the land register, while section II of the land register contains all of the charges and restrictions on the property, with the exception of liens on property which are listed in section III.

The rights entered in section II and in section III of the land register are listed below each other in a ranking relationship. Earlier sought entries hold the better rank, while the sequence of entry is decisive within the same section of the land register (§ 879 BGB). Ranks can subsequently be changed. The ranking relationship governs the sequence in which several existing rights relating to a plot of land are executed and which are taken into account and satisfied during a compulsory auction and compulsory management. The legal security that an entry in the land register communicates can therefore only be evaluated from the determination of the ranking relationships. In particular this has an effect on the notary's instruction obligation during the arrangement of liens on property or the transfer of entered liens on property, because a subordinate entered lien on property can be economically worthless due to the precedence of other entries.

3. The notary's tasks in land register work

An entry is only made in the land register if the entry authorisation of the parties whose right is thereby affected or the other statements required are proved by public or publicly certified deeds. The obligation on a party to a contract to transfer or acquire ownership of a plot of land requires notarial authentication (§ 311 b BGB), which means that notaries have sole responsibility in land register transactions. In addition to the notary, seal-bearing authorities (state administration), public law bodies (e.g. boroughs, rural districts) or public law institutions (e.g. savings banks) make entry applications for the land register

or authorise the extinction of rights, insofar as they are authorised themselves. Corrections of the land register do not require public certification as a rule.

The extensive restriction of access to the land register for citizens, if legal modifications have to be entered in the land register, and the bundling of applications via the notary mean the elimination of the tests, instructions and formulation of deeds prior to the entry process for the judicial authorities. The notary must check the identity of the parties, and the land register office takes over all of the details in accordance with the notary's application. This means that the otherwise required direct contact with the public is eliminated.

With the formulation of the deed and the applications contained in it by the notary the land register office's task is reduced to their execution, i.e. the takeover and verification of the actual statements (about the land register, land, owner) and a checking of legal issues to see whether the applications can be executed. The land register office is not subject to an evaluation of the legal effects of the entries on the parties' legal position, as this is part of the notary's instruction obligation. The tax issues do not have to be clarified by the land register office either; instead it is up to the notary to notifiy these to the responsible tax office[49] within the context of concluding a land transaction and to submit a certificate issued by the tax office that tax obligations do not prevent a change of ownership to the land register office.

Finally, the entire correspondence, with the exception of the issue of a cost account, between the land register office and the parties involved in the entry takes place via the notary, with the result that the notary appears equivalent to an advance section of the land register office for citizens seeking legal services. The notary in his sovereign function is not only the responsible office holder for the pursued authentication, but simultaneously equipped with a function in the context of the land register system.

4. Liens and rights to movable assets

a) The civil law code (*Bürgerliches Gesetzbuch, BGB*) regulates three forms of liens, without using this collective term itself. They do not justify any personal payment claims that are only enforceable in the parcel of land. Instead, the owner of the plot of land is obliged to tolerate compulsory enforcement due to sums payable from the parcel of land (§ 1147 BGB).

[49] § 18 Land purchase tax law.

The mortgage (*Hypothek*, § 1113 BGB) is a restricted tangible land unit right in German law, whereby a financial amount is payable to satisfy a claim by the mortgage creditor against the land owner or a third party arising from the plot of land. The owner as such is not obliged to make payment, but must only tolerate compulsory execution in the plot of land to satisfy the claim. The debt law claim is the main right, the mortgage is accessory to the claim, with the result that it cannot arise as a foreign right without a claim. Exceptions against the claim can be asserted against the mortgage and are only restricted by the public faith of the land register (§ 1138 BGB). The legislator regulates German mortgage law in detail and refers extensively to these legal provisions in other land charges.

However, legal effectiveness has developed differently. It prefers the land charge (*Grundschuld*) as a means of security (§ 1191 BGB). This is a restricted tangible right to a land unit, whereby a financial sum is payable from the land unit simply, i.e. without dependency on a claim. The payment can serve to satisfy a claim, but this is not a stipulation for the existence and validity of the land charge. The land charge is not accessory to a debt of the land owner or a third party even if the land charge is arranged in connection with the debt. The land charge is therefore suitable in particular to secure loans whose payment conditions are not finally determined at the arrangement of the land charge or can change continuously, e.g. due to the adjustment of interest to the market development. Overdrafts with fluctuating debt amounts can be secured in an uncomplicated way without further entries in the land register via the land charge. They can be used as security for new loans, including if they have not secured any claim by the creditor over a longer period and can be transferred easily from one creditor to another creditor.

The arrangement of a land charge usually occurs in the relationship between the banks and borrowers through the use of forms that indicate debt interest, that go far beyond the interest agreed with the bank for the borrowing.[50] The land charge interest describes the framework for the security guaranteed for the creditor through the land charge, where higher interest than agreed in the loan contract is also secured for a case of default or legal proceedings by the creditor.

An interest charge (§ 1199 BGB) can be set as a sub-form of a land charge as a third form of lien. A special feature of this is that a specific sum from the land is payable at

[50] Between 15 and 20% is agreed as annual land debt interest as a rule.

regularly recurring intervals; the owner has a redemption right, but the creditor regularly does not have a termination right. The interest charge, like the land charge, is not accessory to the claim. A life annuity or an instalment-paid land purchase price can be guaranteed using it. It is not used much in practice.

b) In order to give the lending institution the possibility to execute from the land charge without difficulty, the owner and debtor (if this party is not identical with the owner) become subject to tangible and personal compulsory execution in the notarial deed. Due to the tangible compulsory execution the creditor can arrange a compulsory auction of the property if payment is not made. As a rule compulsory execution against the debtor is linked to a personal acknowledgement of debt, whereby the debtor acknowledges he owes the land charge amount plus interest and costs and in this respect becomes subject to personal compulsory execution to the extent of his full assets. This means that a title is created that operates like a court judgement and lengthy and expensive court case is avoided. Notarial deeds, like judicial rulings, can be enforced abroad.

c) As the land charge is not accessory to a claim, an agreement on the assigned purpose of the land charge must be reached in the context of the loan between the creditor and owner. This so-called declaration of purpose governs the extent of the claims to be secured with the land charge. The specific claims (e.g. held by the bank against the land owner) that are secured with the land charge are only determined through regulation in the assigned purpose declaration. While the land charge must be arranged in a notarial deed, the declaration of purpose is not bound by compulsory notarisiation. The notary's instruction obligation therefore extends initially just to the content of the land charge arrangement deed and not to the declaration of purpose, from which the executability of the creditor's claim for payment against the owner initially arises under the law of obligation. The protective effect of the notary's obligation to instruct the parties to the deed under § 17 para. 1 p. 2 BeurkG is therefore extended by jurisprudence, in which the notary's obligation to protect inexperienced and unskilful participants from disadvantages is interpreted widely. In this respect, the notary has an additional assistance obligation to instruct also on the effect of the declaration of purpose, if he recognises or should have recognised following a careful clarification of the matter, that the arranger of the land charge is unfamiliar with the function of the declaration of purpose. This applies in particular in cases where the land owner secures a third party's obligation to the land charge creditor. In practice this frequently involves arranging securities binding a spouse's

property for the other spouse's commitments for a business. This type of assignment is more typical for a notary in rural areas than for the notary in the city. The economy in the country is predominantly characterised by small and very small enterprises, which only obtain bank loans if the owner makes his personal assets and frequently those of his wife available as security, independently of the enterprise's legal form.

Jurisprudence continually expands the notary's instruction obligation with the result that the notary may be obliged to become involved in the parties' practical needs, wishes and economic considerations in order to give corresponding tips that go far beyond the legal effects of the transaction.[51] However, in such instructions he must maintain neutrality towards both the creditor and the material parties to the authentication, cannot dissuade parties sweepingly from use of the security in view of the associated danger and must consider the justified security interest of the lender in his instruction on the content of the land charge arrangement deed. However, insofar as the authentication law imposes special instruction obligations on the notary, these take precedence over his general impartiality obligation. As a result he must inform a wife who is inexperienced in business and unskilful about the possible consequences of an intended land charge arrangement in the event of the husband or his company becoming insolvent.[52]

d) A lien can be arranged for movable objects to secure a claim without the involvement of a notary, with the result that the creditor is entitled to realise it on the basis of maturity in order to satisfy his claim from the case (§ 1204 para. 1 BGB). The arrangement includes a real estate deed, namely the transfer of the item to the creditor or a transfer substitute, so that the debtor is aware of the loss of control and thus his legal position. This justifies the reduced protection of the parties involved through a waiver of notarial authentication and the instruction obligation.

5. Rights to use and utilisation in the land register

a) An item can be encumbered insofar that the party who benefits from this encumbrance is entitled to draw a utility from the item (usufruct).[53] Usufruct is non-transferable and non-inheritable, and can be arranged for a limited period or for the lifetime of the entitled beneficiary. During the establishment of usufruct, notarial activity is seldom restricted to the authentication of the entry application, as usufruct

[51] Limmer in Würzburger Notarhandbuch part 1 RN 97.
[52] Compare Frenz in Eylmann/Vaasen, § 17 BeurkG, RN 17.
[53] § 1030 BGB.

is arranged in a legal context together with other legal transactions. When transferring property to children, parents frequently retain income to care for their old age by arranging usufruct, so that arrangement of a usufruct is part of the authentication of the land transfer. In these cases tax arrangements are often the reason for concluding the contract. The notary does not have any instruction obligation concerning the tax consequences of the legal transaction,[54] as he is only bound by highlighting obligations relating to tax law due to special tax law provisions.[55] If the notary recognises that tax objectives are intended through a legal transaction, he has the task of recommending the involvement of a tax consultant due to his obligation to divert the parties from disadvantages (§ 17 para. 1 BeurkG).

b) A plot of land can be encumbered to the benefit of the specific owner of a different piece of land with a land easement or to the benefit of another legal or natural person with a limited personal easement. The content is an entitlement to use the land in individual respects or a restriction on the landowner from undertaking certain actions on the land or exercising rights that would be entitled to exercise as the owner. There is a multiplicity of arrangement possibilities in the neighbour law relationship among landowners.

The technical infrastructure (e.g. especially the right to redeploy and maintain supply conduits) is safeguarded via easements. The arrangement of these easements is a typical task performed by the notary in rural areas, as in urban areas conduits are laid in publicly owned traffic zones as a rule.

Entitlements with a significant economic value can also be secured as easements, which demands extensive knowledge of the drafting, options and possible tax consequences of transfer of use for notaries in rural areas. This applies both to the right to extract components of the soil and to exercise commercial activities or to set up building units. The retention of protected nature reserves in the public interest can be ensured by the entry of an easement if acquisition of the land by state authorities or nature protection authorities. Even if the easements can simply be entered in the land register through certification of the owner’s signature by the notary under the entry application in the land register, the agreement is often made through a deed drafted by a notary. In addition to good legal knowledge such arrangements demand an understanding of the related impacts on the use of the plots of land and consideration of the frequent aversion in principle to encumber property with tangible

[54] Constant jurisprudence.
[55] § 19, § 13 para. 1 and 5 EStDV.

rights to the benefit of third parties. A notary working in a town rarely encounters these legal issues and mentalities.

High demands are placed on the notary by voluntary allocation and urban planning contracts, the content of which is a land regulation to produce a recommended new arrangement of ownership relations for economic reasons to develop plots of land for construction purposes. Mediation is expected by the parties in these cases from a rural notary with arrangement proposals that are legally feasible, not disadvantageous from a tax law viewpoint and linked with the lowest possible costs in terms of execution. Larger cities that have high-capacity legal departments largely regulate the preparation of property for the construction of homes or industrial use with the public law resources of the construction code, i.e. under state compulsion. Smaller districts in the country prefer to negotiate with the owners and in the absence of their own legal department depend on legal support from the notary, which places special demands on the notary's neutrality and fairness.

c) The notary must be particularly careful about the assessment of public law charges that, unlike easements or other tangible rights, are not deductible from the land register. In addition to rights that cannot be entered in the land register from rental agreements or lease agreements or also preferential sale rights arranged under the law of obligation that are not entered in the land register or the currently rare old law easements from the time before the establishment of land registers these are primarily public law burdens, e.g. development costs and especially public law restrictions on the use and construction obligations. These can lead to additional payment obligations not calculated by the parties or substantially restrict the utilisation possibility of a property and then become the subject of disputes among the parties concerned about the consequently caused disadvantages experienced by a party if such charges are overlooked.

The notary is not obliged to inspect the construction charge directory (*Baulastenverzeichnis*), because his obligation to examine the registers in the case of land conveyancy is restricted to the land register (§ 21 para. 1 p. 1 BeurkG). According to the legal definition, the construction obligation is an obligation on the landowner to perform, tolerate and refrain from items affecting his land to secure construction law obligations that do not already arise from public law provisions. These are entered in a construction charge directory.[56] In this respect the function of

[56] A construction obligation directory does not exist in all Federal States.

the construction obligation as a public law obligation overlaps with the obligation in the private law toleration obligations and restrictions on use to be entered in the land register. This can lead to confusion, especially as the parties concerned have no recollection of or information about the construction obligations. In this regard the clarification of the case and the prompting of additional findings, as well as instruction on the importance of the actual findings is an essential task performed by the notary. In practice it repeatedly happens that such information is known to one party to the contract but was consciously not made known by it during the preliminary negotiations. In such situations the notary's independent position and as the bearer of a public office is a guarantee for a fair contract design that avoids later disputes.

6. Extinction of rights in the land register

In most cases land transactions can only be completed if charges entered in the land register are extinguished at the latest at the transfer of ownership on the basis of authorisation by the entitled party because the purchaser is not prepared to take these over. These can be entitlements in Section II of the Land register, e.g. usufruct rights or accommodation rights, whose extinction is often regulated in the vendor's family and is therefore not problematic.

The extinction of liens on property in Section III of the land register is often difficult because the lien creditor will only authorise the extinction on repayment of the secured loan. In this regard many foreign legal regulations stipulate the need for the purchase price payable by the purchaser to be settled via a special account set up by the notary, so that step by step settlement is possible without endangering a party's economic interests. This payment through a notary's custody account (*Notaranderkonto*) is the exception in Germany also because of the high costs it triggers. The purchaser's claim to a plot of land can be safeguarded by a reservation (§ 883 BGB) so that the claim is also secured if the vendor becomes insolvent. The authentication law (§§ 54 a ff. BeurkG) makes the establishment of a notary's custody account dependent on a security interest of all the involved persons.[57]

As a rule, the settlement and closing of the transaction is possible and offered without a notary's custody account using a contract arrangement via direct payment. To enable the bank financing the purchase price to arrange a lien on property as security in the ranking after entries, which will be extinguished after the transfer of ownership, the vendor issues

[57] § 54 a para. 2 no. 1 BeurkG.

the purchaser with an authorisation to arrange a lien for the lending institution financing the purchase price already before payment of the purchase price and prior to the transfer of ownership. If the notary confirms to the lien creditor that the prerequisites for extinguishing the preferential rights are met following the payment of the purchase price instructed by him, payment follows immediately without settlement via a notary's custody account. The notary can give this confirmation, if the extinction authorisations required for extinction are issued to him on trust providing that he can dispose freely of the extinction authorisations after payment of the loan amount notified to him. This direct settlement accelerates the payment processes and avoids additional costs of establishing the notary's custody account. Within the context of settlement of the land transaction, the notary is required to determine exactly whether the trust functions of the extinguishing creditor can be fulfilled and a careful forwarding of all the stipulations communicated to him as well as supervision of fulfilment. This contract settlement is impossible without the notary's position as the holder of a public office linked to his independence, neutrality obligation and unlimited liability.

In this respect the notary's activity does not differ regionally. Nonetheless, the completion of contracts in the country is often less complex, if the vendor has further real estate and the release of sold parcels of land by lien holders is not bound by requirements or these are easy to fulfil.

7. Demands on official notarial work during property contracts

a) In the case of land transactions the notary has different focuses in his professional work depending on whether his office is located in a town or in the country and the corresponding local factors and sociological structure of the population.

   In the country the focus of the notarial work naturally centres on involvement in the sale of agricultural parcels of land, with the result that he has to include the special features of land conveyancy law in the contract design. The sale of agricultural and forestry land and the arrangement of a usufruct to it requires approval under the land conveyancy law[58] and the associated land law stipulations. Moreover, public law availability and transferability restrictions during a field purification process can come in for consideration. Further restrictions on availability and transferability also exist occasionally under Federal State law.[59] The goal of reserving permission or restriction

[58] Law on measures to improve the agrarian structure and to secure agricultural and forestry firms (land conveyancy law GrdstVG) of 28.07.1961.
[59] E.g. approval for the division of forestry lands.

is to regulate the distribution of the land and soil used for agricultural purposes in such a way that it remains for agricultural enterprises and is not split so that sufficiently large useful areas are maintained. It also aims to steer the expansion of built-on surfaces in towns and villages and ordered industrial settlements in accordance with public law spatial planning.

Obtaining the permit is the notary's task when closing the contract, while the permit authorities direct their response questions on use of the lands by the purchaser to the notary. Notarial instruction on the permit eligibility of contracts is essentially important for the executability of the contracts and thus the parties' willingness to conclude a contract, in order to avoid the costs for contracts that are not eligible for permits and thus failed contracts. This requires that the notary knows the principles of the approval procedure and is informed of the prerequisites for eligibility for a permit. In particular, this involves the notary valuing the intended purpose of use in the purchaser's agricultural enterprise and including the approval of the authorities' foreseeable considerations in his advice.

The various premium and declaration rights, which make continuous adjustments to contract arrangements in the relevant legal situation due to EC agricultural policy and its implementation in national law, create special problems in rural land transactions. Although professional groups working in the agricultural sector are well informed about the details of subsidy and declaration regulations through their professional organisation, it then requires very cautious and advisory action by the notary. He has to clarify whether premium rights under the law of 21.07.2004 implementing reform of the Common Agricultural Policy (CAP) are being sought for the contract property and whether payment claims are being asserted, as well as concerning the disposal right to the payment claims.[60] As a rule an assignment of the entitlements is linked to this in the contract, whereby the details again depend on the intended use of the land or entitlements from lease contracts. In this respect the advice is part of the notary's instruction obligation and does not lead to any separate costs for the parties, in contrast to what would happen if lawyers were called in. For the notary in the country, a personal insight into the legal and economic specificities of agricultural firms is therefore useful and often even necessary in these cases.

[60] Based on regulation (EC) 1782/2003, regulation (EC) 795/2004, regulation (EC) 796/2004, the Federal premium implementation law, the enterprise premium implementation regulation and the InVeKos regulation (enterprise premium regulation).

b) The predominant construction of single family houses on sites in small towns and villages in Germany determines a further focus of the notary's function in rural regions. While the development of construction land in an urban setting is predominantly organised by the boroughs or developers commissioned by them, plots of land are often sold by private owners or transmitted via inherited construction rights in rural regions. Due to the sharp increase in land prices, built-on plots are frequently divided, which makes clarification of the development of the sections by recording the rights of way and conduit rights while including the obligations to embed and maintain the roads, as well as the costs for laying and renewing pipes in the land register. As the parties are frequently not advised otherwise, the notary is often compelled to become familiar with the construction law situation and to propose settlements to the parties that they had not previously considered. Contracts of this type must be prepared and formulated individually, which is often linked to significantly more time consumed for the notary, than is the case for construction contracts in a construction site developed by a developer where the contracts are concluded on a standard basis as a rule.

c) In contrast, a notary working in an urban environment often carefully has to clarify and settle problems linked to soil contamination caused by pollutants when concluding land contracts. Pollutants in or on the ground that lead to endangerment of the ground water or health-damaging emissions and whose elimination requires high financial expenditure are being viewed as an increasingly sensitive issue in public political debate and must be carefully considered during contract design.[61] This essential area for notarial contract design is regulated under public law through the law on protecting the soil (*Bundesbodenschutzgesetz*)[62] and must be specified by contractual regulations. Responsibility for eliminating harmful soil changes is then equally borne by the individual land owner, the holder of the actual material control (e.g. tenant, the purchaser to whom the possession, use and burdens have already been transferred, the beneficiary of inherited construction rights), the party responsible for the pollution and every prior owner of the land if he transferred the land after 01.03.1999 and was aware of the change in the soil or inherited waste or must have been aware of these (so-called negligence). The law does contain a regulation about compensation in the internal relationship between the parties liable for the overall debt[63], based on the responsibility of the former owner and possessor.

[61] Substantial literature is available on the subject, e.g. Care in MittBayNot 1999, 232, Schürmann in MittRhNotK 1994, 1.
[62] Law of 13.03.1998 BGBl I 502, BBodSchG.
[63] § 24 BBodSchG.

The responsibility and involvement in costs must then be settled precisely among the parties to the contract to prevent later disputes if the costs for the elimination of the inherited waste prove to be higher than estimated.

Instruction from the notary is urgently required in such cases.[64] The notary's contract design must take account of whether inherited waste is known of or unknown, whether suspect surfaces are present and the scale of the pollutant load. As a rule, the notary will recommend calling in an expert. The notary then has to consider the different interest positions of the parties and the suitability of the exclusion or the restriction of material defect rights and where applicable recommend the takeover of inherited waste risks by the vendor and a corresponding release from compensation obligations. In these cases the purchaser often takes on the possible costs of eliminating inherited waste up to a certain sum, while the vendor participates in costs exceeding this costs and both parties reserve the right to withdraw from the contract, if the financial burden exceeds the estimated costs. Due to the uncertainties in the matter and with the estimate of costs such contract arrangements demand sensitivity and care from the notary, as well as technical understanding.

d) A legally difficult notarial activity relating to property involves arranging and settling so-called building contractor contracts (*Bauträgerverträge*). These are contracts by a contractor[65], who sells plots of land with buildings or homes being built on them to consumers as his business activity[66]. Such contract arrangements are made up of purchasing law, manufacturing contract and service law components with the result that comprehensive and complex contracts must be formulated whose equilibrium depends essentially on the notary's care and neutrality. Drafts of the intended purchase contract must be made available to the consumer as a rule two weeks before the authentication date, so that he has sufficient time to read the intended contract, to check it and to acquire clarifications about the importance of the formulations from the notary or a third party. In addition to regulating the typical legal relationships between the parties, building contractor contracts include multiple technical sections, i.e. the description of the building being constructed. In this respect, the notary often has to insist on a clarification of the manufacturing contract obligations in order protect what are, as a rule, still inexperienced consumers from disadvantages.[67]

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[64] Care in MittBayNot 1999, 232.
[65] § 14 BGB.
[66] § 13 BGB.
[67] For further details on the notariat's contribution to the development of law see Bandel in his contribution to topic I of the UINL Congress in Madrid 2007 B I, 1.

In this respect a typical assignment for a notary working in the country is where several purchasers agree with the contractor that they will undertake a portion of the services to be provided by the contractor themselves in the context of the progress of construction. The reason for this is often their own craft knowledge and the possibility of acquiring help from family and friends and so to save a substantial portion of the purchase price. When designing the contract, the notary faces the task here of taking account of previously hardly assessable overlapping in the case of deadlines not being met or the appearance of shortcomings in the contract design. Contract designs of this type are rare in the urban environment, because flat-apartment construction is predominant there and personal services by the client during the construction of apartments are only possible on a minor scale for technical reasons.

The extremely low number of disputes during the construction of homes by building contractors, especially the safeguarding of the purchaser in the case of the contractor's insolvency due to cautious design of the contract by the notary, underlines the quality of contracts drafted by notaries in this area.

III. Work in family and probate law affairs

1. Marriage and family law contracts

In family law the rural notary's work does not differ essentially from a notary's official duties in towns. The design problems for marriage contracts, adoptions, divorce settlements or precautionary proxies are essentially the same. From the notary's viewpoint, different tasks arise from the fact that family ties are closer in rural areas. This means that there are fewer tasks during the design of marriage contracts or agreements on implementing divorces; the legal position that is viewed as appropriate on an unchanging basis by the population for current social relationships is accepted.

The clarification and determination of the marital assets for the parties to the deed are becoming increasing important for day-to-day legal transactions. Due to the migration in recent decades there are many marriages in Germany between partners with different nationalities, with the result that it is not always clear which national asset law provisions are applicable. Marriage contracts require notarisation and are effective without any further judicial permits. While the asset scheme the law establishes as a rule, which is the separation of assets, as well as the asset schemes of strict separation of assets, which

marriage contracts can establish, cannot be registered with the land register, deviating asset schemes, especially a community of assets or foreign asset schemes, are to be entered in the land register. As entries are seldom made in the so-called assets register (*Güterrechtsregister*) in practice, the notary must determine the assets scheme by questioning the parties, list this in the deed and where applicable look after a model of the marriage contract. However, because spouses with different nationalities rarely conclude marriage contracts, it is the notary's duty to identify the facts underlying the marriage asset scheme and to document these during the notarisation, as they govern the marriage asset scheme according to the rules of International Private law. The international aspects of notarial work have increased substantially in recent years and creates difficulties not only due to the parties' lack of knowledge of the ensuing problems and the lack of understanding of the legal consequences. Notaries in towns with an above average share of foreign residents have to resolve these problems more frequently than notaries in the country.

Spouses involved in business also regulate their asset law relationships through a marriage contract only, because the separation of assets in principle by virtue of law apparently does not create any impetus to cater contractually for the dangers to the family's existence arising from personal liability for the company's obligations. As a result of his official activity, it is often up to the notary to give his clients tips on effective arrangements, which becomes easier for him and is also quite expected of him by his clients the longer he has already worked as a notarial adviser. The binding of official work to the same location allows the rural notary to acquire a comprehensive knowledge of the personal, family and economic relationships of his clients, whereas tax advisers or lawyers only often know of partial aspects of these in their advisory function. As a result the rural notary is the only adviser on internal family legal arrangements as a rule.

2. Probate law arrangements

In the rural environment the share of houses and apartments owned by occupiers is significantly higher than in towns, where rented apartments predominate. Due to acquiring property the citizen in the country therefore comes into earlier and more frequent contact with the local notary than it is the case in city relationships. Due to the acquisition of a home the notary is often already asked for information about the need to make the resulting precautionary probate arrangements. The provisions of the legal probate law, the calculation of compulsory share claims and the options for arrangements through

testamentary provisions are largely unknown. In these cases it is the notary's task to point out the need for settlement, without becoming intrusive as the vendor of his official work.

Insofar as business clients allow their legal affairs to be looked after by the same lawyer, they seldom discuss their probate arrangements with him. Although the German legal order allows a very extensive alleviation of form for testamentary provisions by allowing a will to be handwritten, far fewer than one third of the dying leave effective declarations on settling their last will. The longer the notary is familiar with his clients' personal and economic relationships, the more the client expects advice and assistance without prompting in this area. The close personal tie by the notary in rural regions to his clients characterises the expectation attitude of the client base in this respect in contrast to the situation in an urban environment.

3. Transfer contracts for anticipated succession

a) In contrast to in urban households, several generations frequently live under one roof in the country. A typical task for a notary working in rural regions is to settle the family and probate law problems if a child remains in the parents' house, develops this with his own savings and while taking out additional loans, expands it by an additional home and then the generational succession while indemnifying the children that do not remain in the house has to be settled. Unilateral advice from a lawyer is not requested in this case: a neutral and independent evaluation of the case plus advice and a contract design are sought.

   Depending on the family and tax law terms of reference the notary often recommends a transfer of the property in such cases through anticipated succession in full or the transfer of the flat to be built after the establishment of two independent residential units in accordance with the provisions of the home ownership law. Tax effective arrangements do not always match the parties' family ideas, with the result that the notary often has to take on the role of mediator in addition to instructing on the legal position and the legal arrangement options.

b) Even when children can transfer their assets to one child without involving other children in the transfer contract or wishing to take account of their legal claims, the notary is bound to highlight the possible future compulsory share additional claims of the children not included in the contract due to his advisory obligation. Insofar as a testator makes a donation, the entitled beneficiaries of the compulsory share can

demand the amount by which the compulsory share increases as an addition to the compulsory share if the donated object is added to inheritance (§ 2325 BGB). The compulsory share is a payment claim against the heirs amounting to half the value of the legal inheritance share. This amount frequently cannot be financed because it is the yardstick for calculating the trading value of the assets concerned. As a compulsory share entitled beneficiary can waive his compulsory share claim through a contract with the future testator immediately with an effect on his descendants under German law, the notary always recommends including all children entitled to a compulsory share in such transfer contracts in practice, thus regulating their indemnification from the parental assets and the declaration of a waiver of further compulsory share claims.

In average asset and income relations, which in rural regions comprise a home and savings of various levels, the transfer of the personally used home or a part of it is regularly tied to personal care in the person's old age and ill health. The design of this so-called old age share requires sensitivity to family and personal relations, harmony and possible catering for conflict in the family, as well as an assessment by the notary of the presumable and actual payments by the younger generation with respect to possible further claims by their parents transferring property to them during the consultancy and legal design. The notary is often asked which payments he considers appropriate, which puts him in the role of umpire; he cannot fulfil this role due to his official obligations.

The content of the regulations is the provision of a residential right to the living space required by the older generation on transfer of the home, depending on the local factors in a family community with the acquirer or in a separate apartment. This provision in daily life is regulated through an obligation to supply food and personal assistance and care. An additional annuity is only agreed if commercial units are transferred, e.g. a trading firm or agricultural enterprise. These regulations guarantee the older generation a free right of residence and extensive home care in the transferred house and prevent the undesired changeover to a senior citizens' and nursing home. These services can be safeguarded in the land register. Depending on the arrangement of the individual case the notary recommends the conclusion of binding probate regulations in the form of an inheritance contract or also indirect availability restrictions for the non-transferred home by the formation of stipulated transfer claims as a reciprocal return for the obligations undertaken to assist and care for the older generation in cases of this type.

c) While the compulsory share legal claims can be resolved through a waiver on the compulsory share or the passage of ten years, possibly in the future through a reform of the compulsory share law[68] by reducing the scale of the claim during the years or a moratorium option, the involvement of the transferring party's social law claims in the contract design is often difficult to arrange for the notary. As public law claims from social law cannot be modified to the disadvantage of the social services beneficiary in private law contracts being authenticated by the notary, a comprehensive knowledge of social law and clarification of present and possible claims by the notary is required. Social law claims should not be endangered by a transfer contract because in many cases the older generation is bound to rely on these for care in old age and ill health. The provision services in the family being formed must therefore be subsidiary in contact, i.e. regulated to rank lower than the social law claims existing by virtue of law.

The parties to the contract often imagine that they can avoid a later use of transferred assets to cater for living expenses in old age if these are provided by the social security system with a recourse entitlement by transferring assets during their lifetime. If income from personal old age care is no longer sufficient personal assets must be used to defray the costs of daily life. Cost-free donated assets can be reclaimed ten years after the donation to finance suitable maintenance of the donor if this party becomes impoverished (§ 528 BGB), which can endanger the legal position of the acquirer after the transfer contract is concluded.

This legal situation generally expands the notary's need to advise on children's maintenance obligations to their parents. Knowledge and regulation of their possible obligations due to the legally imposed maintenance obligation often lead the acquirer's siblings to stipulate that they waive their compulsory share with respect to their parents. Insofar as the transferring parties' income and assets are inadequate to cater for their own appropriate living expenses, the children's maintenance obligations exist, which the state as a provider of social assistance takes on if it has to advance maintenance. This possible claim is a risk principally in cases where accommodation in a senior citizens' or nursing home with the corresponding substantial expense can no longer be financed from the older generation's own resources. In rural regions children frequently press for the transfer of the assets to avoid this claim. The differences of opinion in families arising from this are frequently brought to the notary, who has to mediate between the various interests of the older generation, the acquirer and the children. In these cases the notary is also responsible as the holder of a public office, which

[68] On this topic, compare Röthel, Interview in NJW Audio-CD 1/07 and, in connection with the reform of probate law, see Hüttemann/Rawert in Frankfurter Allgemeine Zeitung (FAZ), 16.02.2007, p. 34.

requires him to be reserved during the contract design if state recourse options are to be dealt with in the settlements. The fairness of his official work applies to all parties, not just the authenticating parties but also to state interests in recourse to assets that are intended to cater for living expenses in old age. In these cases in addition to a comprehensive knowledge of the law, the notary needs sensitivity for the parties' advisory requirement and emotions, patience and a lot of time, but especially the authority of the public office and the parties' trust in his neutrality based on this. Due to the different interests of the parties in principle, this task could not be taken over by a lawyer obliged to consider clients' interests, whereas on the other hand, the parties wish to settle the arrangement within the family and without external advice, especially without the associated high additional expense.

d) Contractual arrangements of this type are eliminated if the living arrangements exclude the cohabitation of several generations under the same roof. In these cases, a notary working in an urban area has to propose arrangements for use of the available assets including the personally used apartment to finance the additional living expenses in old age, e.g. by the conclusion of a purchase contract linked to a residency right for the vendor and the payment of the purchase price in instalments. The demands on the notary to propose tailored contracts suited to the personal relationships of the parties concerned will grow in the future, as the number of households without children is increasing and households with several children and several generations under one roof remain rather typical for rural regions.

4. Transfer contracts for agricultural firms

a) The special provisions for the sale of agricultural land are supplemented by special agricultural inheritance law regulations. The design of contracts to hand over agricultural firms to the next generation is a speciality and a frequently difficult professional task for notaries working in rural areas.

The agricultural probate law applied in Germany is not uniform for historical reasons and comprises a mixture of Federal and Federal State law provisions. The provisions on the land assets apply federally on a uniform basis (§§ 2049, 2312 BGB and §§ 13 ff. GrdstVG concerning the assignment of agricultural firms to joint heirs). These provisions shall guarantee the public interest that commercially viable farms are kept in families with farming tradition, both in the interest of securing the supply of food and in particular to keep the landscape and environment for relaxation, to guarantee clean air

and to supply clean water. This justifies a reduction of the valuation during the measurement of probate law and compulsory share rights to the capitalised earning value to the disadvantage of the yielding heirs, to limit the financial burden on the farm successor. This public law interest is valid under constitutional law despite the unequal treatment compared with the valuation of other assets during the calculation of probate law claims.[69]

b) In addition Federal law applies in parts of Germany in the form of the farm regulations (*Höfeordnung, HöfeO*)[70]. These comprise a regional special probate law for agricultural firms that are designated as farms in the farm comment in the land register or in the absence of such an entry are a farm in the sense of § 1 of the farm regulations. For agriculturals firms that do not meet this prerequisite (e.g. due to the extinction of the farm reference following an application by the owner) the above provisions under (a) apply. To secure orderly exploitation of the farm, determining the commercial viability of the farm heirs (§ 6 HöfeO) is therefore a necessary prerequisite for the transfer of the farm among living persons or following death, and is certified by a farm succession certificate[71] from the agricultural court. The farm regulations initially provide for legal succession by a child with a time-delimited right of management and a usufruct held by the surviving spouse in the farm (§ 14 HöfeO). This is replaced by an elderly person's share after this entitlement lapses. The compensation of the heirs excluded from the farm succession occurs at very low levels, which are far below the trading value and as a rule also below the capitalised revenue value. To offset this, the legislator has arranged an additional indemnity regulation, restricted to 20 years, for a case of a partial or full sale or a halting of the agricultural business by the farm heir (§ 13 HöfeO).

There are also separate agricultural principal heir laws in some Federal States that have a lower practical importance than the farm regulations in North-West Germany.

c) This special arrangement of farm inheritance law means specialisation in very complex special law for the notary in rural regions. The determination of whether a farm fulfils the prerequisites of the farm regulations can be very difficult in critical cases and especially demands knowledge of agricultural economic processes in addition to

[69] BVerfG in NJW 1985, 71 for the case of gain offsetting during a divorce and BVerfGE 91, 346 concerning the assignment of the agricultural firm to a joint heir at the earning rate. Reform is required for the taxation of the transfer of agricultural firms through donations and in an inheritance case, after the Federal Court of Justice suspended the current assessment arrangement through a decision of 07.11.2006 -1BvL 10/02- and instructed the legislator to arrange a constitutionally appropriate valuation and taxation procedure by 31.12.2008.

[70] The North-West German Farm regulations apply in Hamburg, Lower Saxony, North-Rhine Westphalia and Schleswig-Holstein.

[71] Inheritance certificate relating to the entered farm.

knowledge of the legal provisions and the associated extensive jurisprudence . Due to the numerical change in animal stocks, the assignment to farm regulations without an entry in the land register and in the farms roll (*Höferolle*) can be changed: when the economic value is increased the farm expands its farm characteristic by virtue of law, and it can lose it if the farm unit is sold or exploitation is abandoned. The parties to the contract are often unaware of this, so that the notary must inquire about the actual relationships. The appointment as heirs or the transfer of the farm to a legal successor are then only effective if the successor is commercially viable, i.e. he is able to exploit the farm being taken over in an orderly way with his physical and intellectual capacity, knowledge and personality (§ 6 para. 7 HöfeO). The notary must inform the parties about this through a questionnaire, otherwise the contract cannot be approved by the agricultural court[72]. The testamentary appointment of a farm heir is particularly characterised by uncertainty. The farm characteristic or commercial viability of the farm heir may be incorrectly assumed or subsequently lapse, thus leading to the invalidity of the arrangements made.

d) Agricultural firms are predominantly transferred to the farm heir during the farmer's lifetime. In these contracts care for the older generation has to be settled by a residency right, a regulation of care and providence in old age and ill health and as a rule also by a cash contribution due to the low agricultural old age pension. This demands an evaluation of the farm's viability by the notary. The older generation's presumptions frequently cannot be afforded by the farm acquirer with the result that the permit required by the agricultural court under farm regulations will be refused. The notary must inquire about the viability of the farm for this purpose and arrange a fair solution for all parties involved.

With the transfer of the farm to a descendant with entitlement to inherit the farm the transfer contract counts as an inheritance case for the benefit of the other descendants (§ 17 para. 2 HöfeO). This means that involvement by the so-called yielding heirs is required in the transfer contract. This is always offered if a residential right or other property-based right should be created for third parties especially siblings of the farm acquirer, as this cannot be arranged effectively without their involvement as a rule. The notary has to inform about this.[73]

The calculation of the yielding heirs' legal settlement has occurred so far while valuing the farm at one and a half times the tax unit value (§ 12 Para. 1 p. 2 HöfeO). As the unit

[72] Also part of the voluntary jurisdiction and largely concentrated in district courts.
[73] FCJ [Federal Court of Justice] in NJW 1993, 2617.

values were determined on the basis of 1964 and the legislator no longer makes the planned adjustment, the Federal Court of Justice (*Bundesgerichtshof, BGH*) has developed the law and decided on a correction through the valuation of the farm value on the date the payment is due date [74]. This adjustment demanded by jurisprudence cannot be implemented in practice, with the result that the notary is regularly asked to propose an appropriate compensation amount. This practice emphasises the extensive trust placed by the parties in the notary's objectiveness, who must broker an agreement between the parties in such cases while taking account of his neutrality obligation. This often makes long preliminary discussions in farm transfer contracts necessary prior to notarisation, but in practice leads decisively to a fair regulation, social balancing and the avoidance of judicial disputes. The notary can also only perform such a task by emphasising and obtaining respect for his function as the holder of a public office.

e) Farm transfer contracts usually also contain regulations of future compensation claims by yielding heirs in the event of the sale of the entire farm or part of it. In this respect agreements depend on the relevant local situation and the economic prospects. This concerns both regulations for the case where sections of the farm are valued more highly due to planning permission (e.g. as construction land), as well as cases of the elimination of underground resources or the partial redeployment of the firm's assets in the context of modifying its exploitation. These questions that are partly addressed in the farm regulations are all to be clarified by the notary with the parties to the contract and to be regulated during the notarisation, especially if only provisions on the land asset (§§ 2049, 2312 BGB) are to be considered if farm regulations cannot be applied.

The legislator has only taken inadequate account of the high demands on the notary's qualifications and the time expenditure required as a rule, insofar it has fixed the notariat's fees at a largely inappropriate amount for social reasons. Only a small fraction of the actual farm value is used as a yardstick for calculating fees.[75]

[74] FCJ, decision of 17.11.2000 in AgrarR 2001, 52.
[75] § 19 Para. 4 KostO limits the value to four times the last unit value.

IV. Company law arrangements

1. The formation of companies

a) The focus for notarial involvement in company law is the notary's function in the framework of forming a company. The preferred form of company in Germany today is the private limited company (GmbH).[76] The articles of incorporation and association require notarial notarisation (§ 2 GmbHG), and they are created initially with an entry in the commercial register. The same applies to the public limited liability company (plc., *Aktiengesellschaft, AG*), which is much less widespread numerically[77], and whose foundation is rather focused on economically more strongly developed areas, with the result that the notary working in the rural environment is only rarely concerned with legal issues involving an AG.

The conclusion of partnership agreements by business partnerships does not require notarial authentication, although the founding partners frequently prefer advice from a notary and the formulation of the contract by him due to his independence and neutrality, instead of handing over the drafting to a tax consultant or lawyer. From the viewpoint of the parties concerned, the notary counts as the guarantor for a balanced contract design due to his position as the holder of a public office, and the expenses he charges are clearly below the fees charged by lawyers or tax advisers in comparable cases.

b) The notary working in rural regions is predominantly involved in founding and assisting cooperatives. These are companies with an unlimited number of members that aim to promote their members' purchasing or business via a shared commercial firm.[78] They therefore exist predominantly as lending or merchandise cooperatives and are entered in the register of cooperatives that is kept in parallel to the commercial register as a rule. Their foundation does not require notarial authentication.

Agricultural enterprises have primarily been operated as trading companies in the East German Federal States since reunification, whereas cooperation among agricultural firms in the Western Federal States is increasingly being organised in the form of partnerships with unlimited liability. Designing their contract is one of the special tasks

[76] At the end of 2003 there were approximately 935,000 GmbHs in Germany with a nominal original capital of over €175 billion lt. Hansen GmbHR 2004, 39.
[77] Over 15,000 public limited companies were entered in the commercial register for the first time in April 2003.
[78] Law on cooperative and industrial and provident societies (Cooperative law – GenG).

borne primarily by notaries working in the country, and demands special knowledge of agricultural law like land conveyancy and succession arrangements.

A special task performed by notaries working in rural regions that has now largely been completed was the conversion of agricultural production cooperatives in the legal format prior to reunification into limited liability partnerships (*Kommanditgesellschaft, KG*). The successful completion of the restructuring of agriculture in the East German Federal States was possible through the immediate establishment of region-wide notary positions after reunification and their occupation by qualified notaries.

c) The legal stipulations about raising capital for a company contrary to a partnership from the viewpoint of protection of creditors impose a substantial advisory and instruction obligation on the notary concerning the related obligations and the personal liability borne by the founding shareholders and managing directors. Under the impression of the foundation of branches of an English Private Limited Liability Company (Ltd.) that is founded without significant equity, the German legislator is not considering drastically reducing the minimum equity required to form a GmbH.[79] In this case the positive experience from the past with the upgrading of minimum equity capital in the interest of creditor protection, as well as the business reasons in order to create an apparently attractive company format. From the viewpoint of notarial advice the reduction of the minimum capital would have to be linked with a tightening of personal liability among shareholders and managing directors if they operate a company without the injection of sufficient equity capital against trading rules. The consistent implementation of this personal liability would bring many founders of a company back towards the legal form of a partnership again.

2. The disposal of shares in private limited liability companies

While the transfer of interests or parts of these in partnerships is effective without notarial notarisiation of the transfer contract and only the notification of the change in the shareholder position to the commercial register requires notarial certification, the effectiveness of an agreement on the disposal of a share in a GmbH and the execution of the transfer requires that it is concluded in a notarial deed (§ 15 para. 3 and para. 4 German Act on Private Companies with Limited Liability, *Gesetz über Gesellschaften mit beschränkter Haftung, GmbHG*). This formal requirement is typical for the German legal position and is not stipulated by the majority of foreign legal regulations. It is based on the

[79] According to MoMiG at €10,000.00, in the Netherlands a minimum capital of a few eurocents applies in a Ministry of Justice draft law for a private limited company (b.v.) instead of €18,000.00.

fact that shares in a GmbH retain their independence (§ 15 para. 2 GmbHG) and do not merge through unification in the hand of a shareholder. In contrast to a limited liability partnership (*Kommanditgesellschaft, KG*) where the limited partner is only entered in the commercial register with the amount of liability, the shareholder of a GmbH, who acquires several shares, retains these as independent rights. These do not arise from the commercial register, because the shareholders in a GmbH are not identified there. The current list of shareholders can only be inspected in an ancillary file (*Beiakte*) at the register court. As a result, the share must be adequately identified and the nominal amount stated in the sale contract. This often requires careful research by the notary on the development of the share since the company was formed, especially the interim splits, increases and merging of shares. The transfer of an imprecisely specified or unavailable share is invalid.[80] As a bona fide acquisition of unavailable shares today is excluded, even if the acquisition is shown as effective in the list of shareholders deposited with the commercial register, in this respect a lengthy subsequent liability exists for the notary for careless identification of company rights.[81]

3. Declarations to the commercial register

a) The formulation of partnership agreements and articles of association is technically and temporally related with the notary's work for the notarisation of declarations and applications to the register. The entries in the commercial register, partnership register, cooperative register and association register require certification of signatures by the notary; as a rule the notary also drafts the text of the declaration and application, because the correct formulation is often time consuming and error laden due to the forms that must be observed. If the notary does not formulate partnership agreements that do not require authentication in these cases, he is then commissioned in his capacity as holder of a public office with the result that he is not entitled to charge for the services provided so far other than in accordance with the notarial cost regulations (*Kostenordnung, KostO*). The technical context also assigns the subsequent signed deed to the notarial official activity.

b) As the formation of a partnership is possible without the need to observe a special form, the notary is first commissioned when the entry of the firm in the commercial register is applied for. The object of the firm and the shareholders' representative capacity has to be declared, and in the case of a limited liability partnership the

[80] Winter in Scholz/Winter, Kommentar zum GmbHG § 15 Rnr. 40.
[81] In the draft of a law on modernising private limited company law (MoMiG) a proposal is made to allow bone fide acquisition after the passage of a period or, as advocated by the notariat, on the basis of notarial certification of the existing company shares.

partners' limited liability amounts (they are personally liable up to this amount). When the notary requests the deeds to be declared the need frequently initially emerges to instruct the shareholders on the personal liability taken on by forming the partnership and the prerequisites for limiting the liability. In particular in the case of still inexperienced shareholders in a newly formed company this often leads in practice to an in-depth advisory discussion on the design of the partnership, to which the founding shareholders had not yet paid the required attention in the scope of the founding concept. The requirement for a joint declaration by all of the founding partners often leads them to an initial in-depth discussion of the articles of association of their firm together with the notary as the neutral adviser. Instruction by the notary concerning the importance of the entry of the partnership in the commercial register therefore also has the function in practice of clarifying legal issues and avoiding future contentious conflicts. This is an additional task performed by the notary in the context of partnership formation and business promotion alongside the state and private organisations called on for this purpose.

c) A further sovereign task performed by the notary arises from § 6 GmbHG; a newly-appointed managing director of a GmbH must ensure that his appointment is not opposed by any condemnations due to a criminal offence or ban on trading. The notary is responsible for instruction in accordance with § 8 para. 3 sentence 2 and § 39 para. 3 GmbHG and is thus involved in the sovereign verification of the personal prerequisites for the person exercising the office of business manager.

D. Conclusion, summary

I.

1. In the Federal Republic of Germany the notary is appointed as an independent holder of a public office for the authentication (notarisation) of legal transactions and to fulfil other tasks in the area of the precautionary administration of justice by the judicial administration of the Federal States. Sovereign tasks are entrusted to him, and he is subject to numerous restrictions in his official work that arise from the nature of the office. He operates under public law, not on the basis of private law relationships with his principals and his office is comparable in design with that of a judge. However, he is not a

state civil servant, but personally and professionally independent, with an obligation to take responsibility for his own commercial relations.

2. Notaries' positions are established in accordance with the needs of regulated legal transactions on the basis of state organisational power. An official seat is assigned to the notary who can only notarise deeds in his official district. His local presence ensures that notaries are available for the public seeking legal services specifically in sparsely populated rural areas. A sufficient income as a prerequisite for personal independence in parts of Germany where notaries are employed on a full-time basis is guaranteed by support from the notaries' fund paid for by notaries, while additional income from work as a lawyer ensures an adequate standard of living in parts of Germany, where lawyers are appointed as notaries on an ancillary professional basis.

   The concentration of state services through the reduction in the numbers of courts and administrative civil servants in rural areas is only possible, because citizens have local access there to registers and non-contentious proceedings facilities via the notary. Information and the settlement of business transactions are increasingly being arranged through electronic communication between notaries and the courts operating the registers.

3. The notary holds his office personally and under his own responsibility and he cannot restrict his liability for errors contractually. He must perform his official duty independently and impartially and is obliged to exercise his function reasonably and neutrally. He is bound by multiple obligations to clarify circumstances, investigate the wishes of the parties to the deed and to inform about the legal consequences of the intended legal transactions. The notary's independence and impartiality are protected by many restrictions, including cases where he is excluded from an official function and the fact that he is forbidden to broker or be involved in loans or land transactions.

4. Notaries do not specialise in particular legal areas, but are obliged to undertake their official functions unless a legally regulated reason for refusal exists. Notaries have to be fully-qualified jurists and are appointed according to the 'best selected' principle. Due to the restriction of their official functions to sovereign functions alone the number of office-holders is low at approximately 9,000 persons. Due to their remit and number they are not in competitive relationship with other legal consultancy professions, e.g. lawyers or tax consultants.

II.

1. Local features of a notary's office characterise his official work with the result that the professional demands in rural regions differ from those in urban areas. Local features and different social structures determine focuses in legal areas that the notary has to process and have an effect on his personal prestige and the scale of recourse by the public seeking legal services. A notary working in the country is often involved very extensively in the content design of processes requiring authentication whereby the participants obtain his opinion as to whether their agreements are balanced and fair. They often expect him to provide suggestions about questions that they had not considered or have not negotiated conclusively in areas in areas where the advice of a lawyer or tax consultant would be obtained in urban structures. This is related to the special trust in the notary's neutrality and reasonableness that characterises his social position in rural regions.

2. The notary is comprehensively responsible for the authentication of land transactions and the forwarding of applications to the land register. His official obligation extends to obtaining permits, with the result that a notary working in rural areas must know and take account of the specificities of agricultural land transactions. The consideration of premium rights and legal issues from lease agreements relating to agricultural parcels of land, as well as the features of permit requirements under the land transactions law, require special knowledge of law. A notary working in urban areas frequently faces legal problems due to soil contamination with pollutants subject to disposal and the associated public law provisions of the Federal soil protection law. On the other hand, the notary operating in rural areas has to settle multiple easements and rights of use to safeguard the infrastructure. Building-contractor contracts are legally difficult contract designs (i.e. contracts by a contractor who sells plots of land with buildings or housing to be built on them to consumers as his commercial activity). Such contracts are made up of purchasing law, labour law and services law components and demand a balanced and careful contract design. These contracts are typical of urban areas.

3. In family law it is increasingly difficult to determine the marriage and asset law relations of the parties, because many marriages are contracted between partners of different nationalities, particularly in urban regions. The determination of the state of assets by the notary is a basis for its entry in the land register. As marriage contracts are seldom concluded in Germany although these can be agreed before and after the wedding

without a permit requirement in a notarial deed, notaries have a substantial advisory function and clarification obligation.

A special feature of the notarial official activity predominantly in rural regions is the authentication of transfer contracts as anticipated succession while safeguarding the elder generation through a comprehensive life interest. The arrangement of these contracts demands comprehensive advice on the legal maintenance obligations borne by children with respect to their parents and social law provisions that must be taken into account during contractual arrangements. In this respect a special law area is the transfer of agricultural companies and the consideration of special legal provisions of the farm regulations and the agricultural inheritance law. The contractual arrangements for this purpose demand understanding from the notary for the social and economic terms of reference of the agricultural firm and sensitivity for the family questions to be regulated.

4. In commercial law the focuses of business also characterise the notary's official activity. The notary working in the country predominantly authenticates the formation of companies with low capital funding in opposition to partnerships, while a notary working in urban areas deals with public limited liability company law, company transformations and typical legal issues affecting bigger companies. The transfer of shares in private limited liability companies requires notarial authentication because a careful determination and description of legal relationships is not possible without notarial authentication and the associated clarification and instruction obligation due to the independence of company shares. In legal transactions with the commercial registers, entries are exclusively permitted on the basis of notarial deeds, which are no longer possible in written form, but exclusively electronically.

III.

The frequently long period of office of a notary in a locality creates a comprehensive knowledge of his clients' personal, family and economic relationships. Due to the closer social ties in rural regions this leads to the notary also enjoying high social regard. He is therefore approached by several parties as a sole legal adviser and asked to evaluate and mediate the relevant agreements beyond his official function more extensively than in an urban setting. This places high demands on the notary's neutrality and fairness.

Consumers, in particular, who have only limited legal knowledge or who do not or cannot obtain a lawyer's advice due to their modest financial means, require protection from an independent and impartial official function of the notary. The acquisition of a house or

apartment is linked to a financial burden for this segment of the population that consumes their entire savings and burdens their future income substantially. In these cases the notary's official work means legal security and protection against imbalanced contractual arrangements due to the notary's neutrality and impartiality. But in rare cases where the parties are represented by lawyers or tax advisers in the contractual negotiations, the notarial work imposed by the legislator through form requirements also ensures the authentication of fair, clear and legally correct contracts and their closing and settlement. The basis for this is the qualification of the notary's official function as a sovereign task and the strict consideration of the demonstrated official obligations arising from this.