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**The notarial function in making law**

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## **I. Introduction**

In the so-called Time Sharing Directive<sup>1</sup> the European body for creating and issuing directives has standardised not only the obligatory contents of a contract but also the obligatory right of a purchaser to withdraw from a contract. Contractual law has thus become definitively regulated, and autonomy in contractual matters definitively ruled out, while the will to enter upon a contractual obligation has been postponed.

Work done on shaping contracts makes use of this body of standards, and leads to the question being asked as to whether the function of the notary in shaping law can possibly survive under these conditions of increasing encroachment by the European legislators onto the territory of national contractual law.

Starting with a discussion of the concept of shaping of law (under II), and taking into account the idea of a notary as one related to function, which in turn takes up the idea of the European Court that legitimisation of traditional professions relates exclusively to the activity undertaken (under III), the lines visible thus far defining the function of the notary in shaping law will be sketched out and elucidated by way of examples (under IV).

With this in mind the changed conditions of law formation by notaries in the European law market need to be set out, and the suitability of the legal framework for independent shaping of law by notaries discussed (under V). The theses arrived at are summaries of the conclusions drawn.

## **II. Shaping of laws – Legal Transactions**

### **1. On creating terms**

The shaping of laws is the putting into practice of the idea of law.<sup>2</sup> Positive law presupposes the shaping of law; it is the result obtained. Indeed law takes on a form not only through the legislator's work but through its application under real conditions, which acts as a driving force causing the law to continue its path of development, at least to the extent the law can develop within the validity of positive law. Those who shape the law are the lawyers who give decisions in the context of further development of the law

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<sup>1</sup> EC Directive 94/97 EC, AbIEC No. L 280/83 of 29.10.1994

<sup>2</sup> Radbruch: *Rechtsphilosophie*, 8th Ed., Stuttgart 1973, pp. 180, 183 ff.

by judges, and also those lawyers who are active in the area of prevention – particularly the notaries – in their constant confrontation with questions formulated under real conditions governed by law, which take on fundamental importance, either because of their frequency or because they have some distinctive features.

The shaping of laws must be distinguished from the concept of application of laws, which is confined to the interpretation of positive law by the wording, the history of how it came into being, and by its purpose or aim.<sup>3</sup> While application of laws means implementing recognised legal methods<sup>4</sup>, the shaping of laws necessitates having room to solve problems as well, and it is these solutions that will change and amplify the positive law.

## 2. Theory of Legal Transaction and the Shaping of Law

The shaping of law by the notary primarily relates to legal transactions.<sup>5</sup> As the deliberate causing of legal consequences these transactions are an expression of the principle of human self-determination. For this reason the Bürgerliches Gesetzbuch [*German Civil Code: hereunder 'BGB'*] assumes that freedom of contract and the freedom to certify are the fundamental signs of private, autonomous action,<sup>6</sup> although indeed this is only guaranteed within the limits laid down by constitutional rules.

Constitutional rules demand that any social and economic imbalance be opposed, with the aim of ensuring that self-determination – autonomy – does not mean unrestricted heteronomy for the other party.<sup>7</sup>

The freedom to conclude a legal transaction and the freedom to shape the contents of this transaction are restricted in the BGB by a large number of obligatory norms, yet no general judicial control is imposed on the content of the transaction.<sup>8</sup> Only in § 242 BGB

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<sup>3</sup> Savigny: System des heutigen römischen Rechts I, 1840, p. 212 ff.

<sup>4</sup> Langenfeld: *Vertragsgestaltung*, 2<sup>nd</sup> Ed. 1997, pp. 7 ff.

<sup>5</sup> § 20 Para. 1 BNotO names the executing of public deeds as the first responsibility of a notary, centred on the certification of declarations of intent, §§ 6 ff. BeurkG. Besides these documents requiring witnesses there are other forms of documents executed by the notary, notarisation (i.e. certification) of deeds, and other legal notarial assistance within the realm of preventive legal measures, Seybold / Schippel / Reithmann: *Bundesnotarordnung*, 7<sup>th</sup> Ed. 2000, Before §§ 20 to 25 Edit. No. 2 ff.

<sup>6</sup> Palandt-Heinrichs: 60<sup>th</sup> Ed. 2000, Review of § 104 Edit. No. 1

<sup>7</sup> BVerfG, NJW 1990 pp. 1449 ff., 1470; NJW 1994 pp. 36 ff., 38

<sup>8</sup> Gegen eine Inhaltskontrolle privatrechtlicher Verträge. Lieb: Schutzbedürftigkeit oder Eigenverantwortlichkeit?, DNotZ 1989 pp. 274 ff., 284

is any idea of regulating the equitableness of content introduced, and even here the courts are given no authority to substitute the legal consequences arising in an individual case from a legal transaction by using words intended to be “more equitable” or “more reasonable” and imposed in the interests of judicial aftercare. The administration of justice only sets limits to the way the law is practised when this produces results that are not tolerable and clearly not compatible with the law and with notions of justice.<sup>9</sup>

The law regulating legislation on General Business Conditions that came into force in 1977<sup>10</sup> does not – despite expressly laying down control of content – mean a move away from the idea of the autonomy of the private person, since it did not intend to deal with the removal of the unequal relations that are unavoidable in contract law.<sup>11</sup> Instead it took up the way pre-formulated contractual conditions are used, which could lead to a misuse of his or her economic superiority on the part of the person using the contract<sup>12</sup> - something ruled out in the standardised contracts used in modern bulk business, which are worded to take account of the autonomy of private persons.

It is only in the adoption by the AGB [*Allgemeine Geschäftsbedingungen: General Terms of Business, hereunder “AGB”*] of the idea of protection of the consumer, § 24a ABGB, [*Law on General Terms of Business, hereunder “ABGB”*] contained in the EC Directive on misuse of clauses in consumer contracts,<sup>13</sup> that one sees a move away from this model, because here the formally inferior position of the consumer<sup>14</sup> is assumed when either waiving or amending regulations in law, irrespective of whether pre-formulated contractual conditions have in reality been imposed or whether the consumer is, in real terms, inferior in position. It is the first time that EU law has managed to call into question the fundamental assumptions upon which the understanding of legal transactions in the BGB is based.<sup>15</sup>

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<sup>9</sup> BGH NJW 1985 pp. 2579 ff., 2580; NJW 1987 pp. 1069 ff., 1070

<sup>10</sup> BGBI 1976 I p. 3317

<sup>11</sup> Lieb: Sonderprivatrecht für Ungleichgewichtslagen? Überlegungen zum Anwendungsbereich der sogenannten Inhaltskontrolle privatrechtlicher Verträge, AcP 178 pp. 196 ff., 204

<sup>12</sup> BGHZ 22 pp. 90 ff., 94

<sup>13</sup> ABIEG No. L 95 of 21.5.1993, p. 29

<sup>14</sup> Reich: *Europäisches Verbraucherrecht*, 3<sup>rd</sup> Ed. 1996, p. 326

<sup>15</sup> The directives issued previously on door-to-door selling (1985), consumer credit (1986) and package travel (1990), cf. FN (76), used the same approach but only dealt with specific areas.

### III. Functional conditions necessary for the shaping of laws by the notary

#### 1. Public Office – Area of Function

The shaping of laws by the notary takes place within the limits laid down by laws governing the exercise of his profession. Its crucial national characteristic is the concept of public office,<sup>16</sup> in other words the idea of an institutionalised series of state-authorised powers,<sup>17</sup> which can be categorised as the exercising of an official authority that ultimately belongs to the state administration.

The communication to the notary of the task of administering justice means he can exercise the powers of his function independently of the executive and also of the client. This brings him closer to the judge and distinguishes him from the state official, who remains dependent on orders given to him.<sup>18</sup>

The responsibilities of the notary given in § 1 BNotO names the general certification of legal records, then other duties in the area of preventive justice which, because they form part of this concept of public office, take on official quality. By giving a public function or office to the notary the fully official nature of his work, and therefore the official character of all the responsibilities assumed by him, is made clear; all possibility of private practice of the profession and any commercial orientation is thereby excluded.<sup>19</sup>

The national viewpoint, where the fact of public office leads us to deduce an idea of the profession characterised by its official function, does not correspond to the jurisprudential approach of the European Court, which – confronted with the most widely varying ideas of the profession of the notary in the member-states of the European Union – found itself forced to take account of the cases regarded as exceptions to an official authority, given in Article 45 EGV (Amsterdam), and thus to examine the matter from the standpoint of the work the notary does: Public authority is not held by someone because the national legislators qualify a specific person as having it, but because it can

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<sup>16</sup> § 1 BNotO

<sup>17</sup> Seybold / Schippel / Schippel loc. cit. FN (5) § 1 Edi. No. 7, Arndt / Lerch / Sandkühler: *Bundesnotarordnung*, 4<sup>th</sup> Ed. 2000, § 1 Edit. No. 6

<sup>18</sup> Seybold / Schippel / Schippel loc. cit. FN (5) § 1 Edit. No. 16 ff.; Pfeiffer: *Der Notar in unserem Rechtsstaat*, DNotZ 1981 pp. 5 ff., 7

<sup>19</sup> Arndt / Lerch / Sandkühler loc. cit. FN (17) § 2 Edit. No. 6

be recognised from the function this person fulfils; it relates to the concrete activities carried out by that person.<sup>20</sup>

The function of the notary in shaping the law will in future therefore only be observable by taking the approach found in European legislation on professions. What defines the functions of the profession from the work-related standpoint is not the concept of public office, anchored in national laws, but its specific characteristics – the things that characterise the notary's work in the concrete circumstances of production of a service. The understanding of the office of notary on its own cannot give the law-shaping function of the notary any particular character; this can only be observed and described as a visible performance on the legal marketplace. The criteria for this performance are that the performer of the legal function is oriented towards supplying a service, that the person participating in the legal transaction is oriented towards a result, and that the law-based community has an interest in regulating this legal market.

From this supply-oriented view of the notary, as the performer of a legal function – almost an extract from the concept of the office discussed above – the work of the notary would be characterised by:

- independence towards the public authorities and also towards clients
- impartiality in exercising the responsibilities of the office

Independence and impartiality are the things which distinguish all shaping of the law by notaries from any other offers of legal services made on the legal market, because only the notary is obliged by the strictest possible professional regulation<sup>21</sup> of his profession to uphold both things<sup>23</sup> each time he performs his services. When shaping the law the notary

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<sup>20</sup> Of fundamental importance here is EuGH RS 2/74 of 21.06.1974 (Reyners) = NJW 1975 pp. 513 ff.; Fischer: *Die Rechtsstellung des deutschen Notars im Recht der europäischen Wirtschaftsgemeinschaft*, DNotZ 1989 pp. 467 ff., 479 f.; on functional approaches: judge, EC law and German notaries - *Versuch einer Standortbestimmung vor der Verwirklichung des Binnenmarktes* -, MittBayNot 1990 pp. 1 ff., 4; Heinz: *Europa - Chance oder Bedrohung für unser Notariat*, AnwBl 2000 pp. 562 ff., 569.

<sup>21</sup> § 14 Para. 1 p. 2 BNotO, §§ 3, 6, 17 BeurkG

<sup>22</sup> It is however a fundamental obligation of the lawyer not to represent opposing interests, § 43 a Para. 4 BRAO, and a tax consultant is also under the obligation mentioned here when assisting his client in tax matters, § 3 Steuerberatungsgesetz; but only the auditor is obliged to maintain impartiality when drawing up audit reports and advisory opinions, as well as his role in giving partial tax advice to a client, § 17 Para. 1 WPO.

does not undertake to help one party to win; he undertakes to ensure that a fair contract is achieved.

From the result standpoint of the parties involved, it is the product of the notary's shaping of law which should be looked at: a public record that can only be created by a notary and not by any other legal service provider. Its usefulness stems from

- its immediate enforceability, § 749 Para. 1 No. 5 ZPO;
- the greater value it has as evidence, specially with regard to circumstances of time and place, §§ 415, 418 ZPO;<sup>23</sup>
- its legal validity in cases where it is compulsory to complete forms or certificates,<sup>24</sup> in particular property contracts, marriage contracts, testamentary contracts, memoranda of association of legal persons, transfers of shares, changes to status of legal persons and the records of proceedings of AGMs of limited companies.

There are two fundamental characteristics of the work of the notary that stand outside the independence and impartiality that underpin his function, and which, from a consumer standpoint, complement the special quality of the notary's work in the legal marketplace. But by standing outside the basic qualities of a notary's work they also stand in competition to services provided by other legal officers. They are:

- certifying documents connected with any form of registration;<sup>25</sup> and
- specialisation as a professional prerequisite for the shaping of laws

## 2. The Legal Market and Regulation

The functioning of the legal market is primarily determined by supply and demand; at the same time the market is highly regulated – it neither allows a 'free' offer to be made nor does it permit 'free' demand. The reason there is regulation is that for the purchaser of a

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<sup>23</sup> Only evidence of improper certification is admissible, § 415 Para. 2 ZPO

<sup>24</sup> When a form laid down in law is not adhered to, the BGB rules that, in principle, the legal transaction is null and void, § 125 BGB; a curing of the defect is only possible when this is expressly allowed in the special formal requirements.

<sup>25</sup> In fact § 53 BeurkG only provides for limited duties connected to certification of deeds, which in practice are combined with a general obligation to execute based on § 24 BNotO, Seybold / Schippel / Reithmann loc. cit. FN (5) § 15 Edit. No. 27 ff.

legal service the law is seen as a commodity, whereas the legal community regards the law as the ordering of social existence, summed up in the three words: justice, expediency, and certainty.<sup>26</sup>

The demand of the consumer for legal services is therefore closely tied to the rules of positive law that channel the legal service demanded and determine its contents. This can be summed in distinguishing between two areas: the consensual area of legal transactions and the contradictorial area of legal proceedings.

On the supply side, too, the strictest regulation is found, determining the conditions under which legal services may be provided. The supply provided by the various legal service providers is determined to a considerable degree by the rules of their profession, which give each provider a defined function on the legal market. Either they are there to represent the interests of parties (lawyer, tax consultant and auditor, outside of work doing audits), or they may only act impartially (notary, and auditor, when he is doing the audit).

The services offered as preparation for a court decision – the contradictorial sphere – necessarily demand compliance with the interests of a party, while the consensual sphere is in principle free to convey in what the law consists.

The relationship of tension between freedom and justice necessarily regulates the market in legal transactions. Since representing a party serves the contractual interests of the party represented, and hence this party's freedom, justice in contract can only be looked for when both contractual parity and representation of the other party to the contract are in evidence. Any time there is disparity justice in contract must be created through regulation. Apart from compulsory provisions in law, which place considerable restrictions on contractual freedom, limitations placed on the form taken by the legal transaction represent a less stringent method of regulation, in which the connection between the form used and the legal transaction are what matters. The form of the contract, as the prior regulation by law of the transaction, must ensure that the actual will of both contracting parties has been adequately rendered in the contract and that the legal consequences are recognised by the parties. In other words it must have an 'inner' form.

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<sup>26</sup> Radbruch loc. cit. FN 2, p. 164

To make use of this inner form as an alternative to compulsory prior regulation in law of the consensual sphere the only condition needed is that it provide an institutionalised guarantee of the impartiality of its supplier, and that the service product created by this process is given reasonable consideration on the market. From the legal community's point of view this provides a good reason for the service offered by the notary, since the impartial shaping of law for the market by the notary anticipates the judicial function of settling disputes by preventing such disputes on the primary level of free consensus, with the participation of an impartial notary. The effect is to relieve the burden on the courts.<sup>27</sup>

The call for deregulation of the legal market<sup>28</sup> is aimed at having a one-dimensional, uniform range of offers of all legal services from all legal service providers. The reason for the call is the wish to see this market expand in economic value, although the fact that deregulation of the market structures for making offers would require fresh regulation of market conditions<sup>29</sup> by the legislators, to the detriment of the free and individual shaping of relations in private law between individuals availing themselves of the product 'Law', is simply overlooked. Deregulation of the suppliers brings about increased regulation of market participants. If this – from the point of view of legal politics – questionable approach is not used, then the independent and impartial offer of the notary to shape law has a secure place on the legal market. His area of activity, because he is committed to enacting justice in contracts, is capable of being defended from a functional standpoint as well.

#### **IV. Current functional parameters of shaping of the law**

##### **1. Legal Transactions and Administration of Justice**

The German federal regulations on notaries do not attempt to define the area of responsibility of a notary. The area of legal transaction is only touched on in connection

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<sup>27</sup> On relief in general of the obligation to administer justice see Wagner: *Entlastung der Rechtspflege durch notarielle Tätigkeit - Bestandsaufnahme und Perspektiven*, DNotZ 1998, Special Ed. p. 34 ff., also the proposals of the Federal Chamber of Notaries on relief to justice administration by notaries in the report on the work of the Federal Chamber of Notaries in 1997, DNotZ 1998 p. 514 ff., 525 ff., 530 ff.

<sup>28</sup> EEC Commission: *Eine Binnenmarktstrategie für den Dienstleistungssektor*, Notice of the Commission to the Council and the European Parliament of 29.12.2000. Point 3 (2) proposes the removal layer by layer of the unnecessary and often contradictory regulations governing cross-border commerce.

<sup>29</sup> EEC Commission: *Die Strategie für den europäischen Binnenmarkt*. This Notice to the European Parliament and Council of 11.01.2001, p. 6 proposes the issue of a Green Book for consumers on access to the law and legal appeals.

with the exclusive responsibility of the notary for certifying deeds, which is not confined solely to declarations of intent. The concept of certification also includes actual transactions and other types of declaration.<sup>30</sup>

Legal assistance by a notary is limited by the German federal regulations on notaries to the area of preventive legal care, defined as a package of responsibilities that do not necessarily have to be taken on by the public authorities, but are still classed as part of the role played by justice<sup>31</sup>. The intended aim here is to clarify and secure private legal relationships.

The exclusive responsibility of the notary for the certification of deeds in property law, company law, inheritance law and family law, all standardised in substantive law, has led to certain main foci for the legal transactions he concludes, and in these the law-shaping function of the notary can be seen in operation to a remarkable extent. His other notarial responsibilities in the area of legal assistance therefore tend to be left out of account.

The following instance will serve to illustrate the examples given farther down of this law-shaping function:

*K, a businessman, produces heating control systems and wishes to offer to install these for end-consumers. After the death of his wife he has decided to marry again.*

*His unmarried son has been working for some years with him since leaving school in the family firm, and the intention is for him to take an appropriate share of the former single-man company and, in the future, to run the firm.*

*His married daughter, with a good education, is not going to receive anything out of the firm's capital wealth, but by the transfer of property she will, in the eyes of inheritance law, be placed on an equal footing with her brother.*

*K is looking for advice:*

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<sup>30</sup> Seybold / Schippel / Reithmann loc. cit. FN (5) § 20 Edit. No. 4 ff.

<sup>31</sup> Seybold / Schippel / Reithmann loc. cit. FN (5) § 24 Edit. No. 9

- on the transfer of private assets to T. during his lifetime
- on the founding of a company with S.
- on the way to protect his children in his will
- on the way to arrange the marriage contract for his second marriage, and
- on how to draw up the supply and instalment contracts for the control systems.

## **2. Shaping the law in Private Law**

### **a) Law of Obligations – Anticipated Succession**

The German law of obligations regulates transactions for a valuable consideration in the law on sales, while transactions without charge or payment are regulated in the law on gifts. In the case above the only type of non-standard transaction is the transfer of K's real property to T, because in this transfer the agreement regarding the gift, in other words the subjective agreement between the parties regarding the gratis nature of the transfer, is missing, although objectively the daughter does not bring any consideration. The businessman K's motivation is not primarily generosity towards his daughter, but an intervention with a view to arranging affairs between persons living such that the capital assets can be passed on to the son, as the next generation, without any claims being raised by the daughter.

Besides this priority concern there are a whole range of other conceivable motives, such as further securing the businessman's situation during his lifetime by arranging for the daughter to have liability for maintenance in case of the failure of his second marriage or the predecease of his wife.<sup>32</sup>

The legal arranging of the transaction is of the greatest importance for the parties concerned, because if a gift is accepted there is a right in law for return to be demanded in case of need on the part of the giver, and also the right of revocation if the person receiving the gift is guilty of gross ingratitude.<sup>33</sup> The defining of the gift as a "provision" out of the parents' assets, in accordance with § 1624 BGB, where the legal grounds given in the provisions of the law expressly state that this is not a gift but a *causa sui generis*,

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<sup>32</sup> Examples of the purposes of anticipated succession are to be found in Langenfeld loc. cit. FN (4) p. 129

<sup>33</sup> In the case of a partially payable and partially gratis transaction (mixed giving) both parts of the agreement are in principle treated separately; right of return and right of revocation can in principle only apply to the gratis part, unless the character of giving is uppermost in the transaction, Palandt-Putzo loc. cit. FN (6) § 516 Edit. No. 15 ff.

can create considerable consequences in the eyes of the law, since it leads to a legal obligation to compensate for differences when questions of succession between descendants arise, § 2050 Para. 1 BGB,<sup>34</sup> and when a claim asserted for completion of the portion to devolve compulsorily is made by the one entitled to such legal portion, and yet not included in the succession, this claim will not be considered.<sup>35</sup>

Our case here, concerning the participation of the son in the former single-member company, seems to imply the existence of a provision, because of his high level of involvement in the work of the firm, and therefore implies he is being placed on an equal footing with his sister who has a higher education. The transfer of the real property would probably then have to be seen – not taking account of the motives described – as a gift in favour of the daughter. Indeed two gifts could exist, if the value of the son's share ruled out its being regarded as a provision.

Finally, in the majority of cases probably a mixture of gift, provision, and division of an estate during the lifetime of the giver would be in evidence, with the aim of avoiding disputes of a type or types with legal consequences that are not in accord with, or only partially accord with, the types of contract given in the BGB.

The shaping of the law by notaries has developed a wide variety of forms to deal with the type of contract not regulated in law called “anticipated succession”<sup>36</sup>, with the aim of providing a person seeking a legal solution with the right provisos to suit his requirements. The main focal points of these are:

- guarantee of maintenance during the lifetime of the owner, usually through reservation of rights of use or maintenance agreements;
- provision for faults during the lifetime of the owner by reserved rights of retransfer or revocation, either limited in a general way or with regard to economic purpose or operative events;

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<sup>34</sup> Counting this as part of the portion of the estate to devolve compulsorily on a successor only happens, on the other hand, when this inclusion is expressly ordered, Palandt-Edenhofer loc. cit. (6) § 2315 Edit. No. 1

<sup>35</sup> Münchner Kommentar / Frank, Vol. , 3<sup>rd</sup> Ed. 1997, § 2325 Edit. No. 13

<sup>36</sup> Mayer: Die Rückforderung der vorweggenommenen Erbfolge, DNotZ 1996 pp. 604 ff., 609 ff.

- the avoidance of disputes between heirs in the event of death, and protection of the dispositions of inheritance law, particularly with regard to the law on compulsory devolution of estate portions to heirs.

The incomplete nature of the provisions in law, which does not suggest any further type of contract in between a transaction for a valuable consideration and a gratis one,<sup>37</sup> was what triggered the shaping of the law by notaries. What has come into being is an open type of contract,<sup>38</sup> determined by a series of motivations and therefore depending on subjective criteria, not a unified contractual model.

### **b) Company Law – Succession to proprietorship equity**

The firm of K, formerly run as a sole trader firm, becomes a company through the participation of the son. The available legal company forms are those of a company with share capital or a partnership, also including a GmbH & Co. KG,<sup>39</sup> in which all the shareholders have only limited liability and yet are regarded as a partnership for tax purposes.<sup>40</sup> The choice of legal form is strongly influenced by tax considerations, but also by questions of civil law arising over the longer term, such as the procurement of capital and the continuation of the firm, or the possibilities the majority shareholder K might have to influence the management.

Particularly in the law on partnerships, jurisprudence regarding provisos has managed to establish a number of developments or amendments to the law reflecting changing legal

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<sup>37</sup> Because it is treated separately in law with regard to its two parts, the part implying a valuable consideration and the gratis part, a mixed gift is not to be regarded as a type of contract in its own right, cf. FN (33) above.

<sup>38</sup> Spiegelberger: *Vermögensnachfolge*, 1994 Edit. No. 12 ff. Other important examples of notaries shaping the law in the law of obligations are the contributions dependent on marriage. On this, see Morhard: "unnamed contributions" [Unbenannte Zuwendungen] between spouses, in: *Rechtsfolgen und Grenzen der Vertragsgestaltung*, NJW 1987 pp. 1734 ff.; Grziwotz: *Die zweite Spur - ein (neuer) Weg zur Gerechtigkeit zwischen Ehegatten*, DNotZ 2000 pp. 486 ff., 491 ff., and also the securing of claims under the law of obligations by making of a prior notice in the Land Register. On this, see for example Amann: *Keine Vormerkung eigenständiger Übereignungspflichten des Erben oder des jeweiligen Eigentümers*, DNotZ 1995 pp. 252 ff.

<sup>39</sup> Von Hartmann: *Einflüsse und Aufgaben der Kautelarjurisprudenz im Recht der Personengesellschaft*, DNotZ 1989, Special Issue p. 63 ff., 72, which has been called a perfect example of the inventive capacity found in jurisprudence on precautionary measures.

<sup>40</sup> Reithmann: *Der Beitrag des Notars zur Rechtsentwicklung*, DNotZ 1977, Special Issue pp. 5 ff., 20

realities. These concern the transfer of company shares, the working out of the majority principle or the concession of usage rights to the basic right to profits.<sup>41</sup>

The most remarkable example in company law that can be given of shaping of the law by the notary is the solving of problems of succession when a shareholder in a partnership dies, although the recently repealed § 131 No. 4 HGB provided for this circumstance by ordering the dissolution of the company, which had devastating consequences in both civil and taxation law. The less harsh law now in use, § 131 Para. 3 No. 1 HGB, takes the deceased shareholders departure from office and the continued existence of the company as its starting point, but still does not regulate the inheritability of the partnership share of the deceased.

Legal succession to the partnership share can be determined using either company law or the law of inheritance. If an inconsistent position arises then company law takes precedence;<sup>42</sup> if there is an existing inheritance commitment this can be circumvented.

The version now in use of § 131 HGB makes the company continuation clause developed from jurisprudence on provisos, in other words the continued existence of the company without the inheritors of the deceased, only necessary in the case of a two-person company.<sup>43</sup> However any active regulation of succession also requires, under current law, arrangements to be made in the company articles of association such that immediate succession – a succession clause – or the admission into the company of the successor by means of a legal act – entry clause – are agreed upon. Owing to the complexity of such cases both these clauses have developed differing forms: the succession clause has ranged from a simple solution, making the share inheritable, up to a detailed regulation of the number and the identity or qualification of the successor.<sup>44</sup>

The need for shaping of the law with regard to company articles of association, illustrated by this example, is characterised by the need for a regulation that takes into account individual cases, in other words regulation by subjective elements, since any compulsory and detailed arrangements are absent from the law. The impetus for shaping law also

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<sup>41</sup> Hartmann loc. cit. FN (39) p. 72 ff.

<sup>42</sup> Klein in: *Münchener Handbuch des Gesellschaftsrechtes*, Vol. 2 1991, § 44 Edit. No. 2

<sup>43</sup> Baumbach / Hopt, *Handelsgesetzbuch*, 30<sup>th</sup> Ed., § 131 Edit No. 19

<sup>44</sup> Klein: loc. cit. FN (42) § 44 Edit. No. 26

comes from the currently valid dissolution of a company without a contractual agreement if a shareholder dies; something which has rightly not been accepted by legal practice.

**c) Inheritance law – Classification of wills**

The legal succession on K's decease, in other words the takeover of the estate as a common inheritance by both children, in equal portions,<sup>45</sup> does not do justice to the wishes of the deceased for the apportioning of his estate. The freedom to make wills, guaranteed under constitutional law, entitles K to make any arrangements he wishes regarding his estate. The determining factors for a will are the existence of business assets and private assets, and also some usable arrangement for succession in the company memorandum, plus the legal right to the estate portion on the part of the descendants. The business assets are part of the future basis for S's acquisition; they are taxable at the time of giving up business operations, whereas the private assets are in principle not subject to tax<sup>46</sup> and retain their value independently of short-term market changes.

K's marrying a second time means the way the will takes up and deals with the different forms the estate takes would then have to be supplemented by changes in the way various persons approach the estate; beside the two types of estate, the consistent divergence of interests between the children of the first marriage and the second wife will have to be reconciled, which leads one to expect a shaping in law which is both complex and fully cognizant of all possible individual instances. The aim of the testator to regulate his estate is what must always serve as the starting-point for such shaping, and the means with which to realise this aim must be sought within the legal armoury possessed by inheritance law. If the testator has several aims, then it is a question of harmonising them or taking an order of priority into account, with, if need be, the contractual participation of the heirs, § 1941 BGB.

Jurisprudence on provisos has made a review of the typical aims looked for in various arrangements made and has suggested model solutions that also include some of special ideas the testator may have for his estate, e.g. the desire of the testator to exert an

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<sup>45</sup> After marriage without a marriage contract the portion goes down to one-quarter each, with the wife inheriting one-half, §§ 1931 Sect. 1, 1371 Sect. 1 BGB.

<sup>46</sup> Apart from cases of speculative additions to private assets in the sense intended by § 23 EStG.

influence after his death, or the separate application of the use and the substance of the inheritance.

We may name as examples of typical last wills and testaments: the will of the divorced spouse, the provision parents with disabled children make, and the provision made by partners in a relationship other than marriage. Types of arrangements in the field of business include granting rights of use to shareholdings in companies, or the appointment of the successor to an undertaking by a third party.<sup>47</sup>

These examples demonstrate the considerable openness of inheritance law to the possibilities for shaping the law. Starting from the forming of case-types, the aims intended by the testator's provision are defined and then secured in law by means of the provisos found in inheritance law.

#### **d) Family Law – Marriage Contract**

The marriage K intends will give rise to his wife's having a legal right of inheritance; if there is a subsequent divorce the wife will have a claim on any gains acquired during the marriage. Both these claims, as well as any other financially-based consequences of a divorce, thus have a direct connection with the anticipated succession intended by K in favour of T., the company share to be held by S, and the provisions he has made in case of death. Any contractual form given to these circumstances now has to take account of both the right to inherit a legal portion of the estate in case of death and a claim on a share of gains acquired during K's lifetime, in the case of divorce.

Besides the choice of matrimonial property rights, namely community of property or separate estates,<sup>48</sup> marriage law is extremely open to any desired modification of the legal status of matrimonial property<sup>49</sup>, within the bounds of the general validity of the rules of contract law, § 134 BGB (infringing a prohibition in law) and § 138 BGB (offence against morality). The freedom of contract found in marriage law is not subject to supervision of content by the courts on the basis of suitability<sup>50</sup>, but may in the case of

<sup>47</sup> Nieder: *Handbuch der Testamentsgestaltung*, 2<sup>nd</sup> Ed. 2000, Edit. No. 1276 ff.

<sup>48</sup> §§ 1414 ff. BGB

<sup>49</sup> Langenfeld: *Möglichkeiten und Grenzen notarieller Vertragsgestaltung bei Eheverträgen und Scheidungsvereinbarungen*, DNotZ 1985 Special Ed. pp. 167 ff., 170. Reference to no longer operative laws or foreign laws is ruled out in accordance with § 1409 BGB.

<sup>50</sup> Gerber: *Diskussionsbeitrag*, DNotZ 1998, Special Ed. p. 298

specific periods or on certain merits<sup>51</sup> be subject to controls based in the rule of fairness found in § 242 BGB covering certification and enforceability, for example if an unforeseen development takes place subsequent to the contract, or if there was inadequate account taken at the outset of the interests of the contracting parties.

Changes or alterations to the legal matrimonial property, when this is based on the spouses holding separate estates, are covered by the 'principle of 50-50 division'<sup>52</sup> applied in case of death or the failure of the marriage. The division in half of gains during marriage may have consequences for one spouse, who worked to realise these gains, which are scarcely bearable, and for the other spouse such a division may lead to an unjustly favoured position. If K's second marriage fails and if he realises high profits during the time of the marriage, after the time he had previously spent, before the marriage, on building up his concern, then this 50-50 principle cannot be justified in favour of the wife, who has instigated the divorce.

Typical circumstances that lead to a modification are the failure of a marriage and the exclusion of parts of the estate from the 50-50 principle, which means that several sets of assets are created, thus limiting to certain parts the apportioning of gains made during the marriage.<sup>53</sup> A number of gradations are possible and are contractually linkable with the joint contractual provisions known to German law, made by the couple in the event of death (marriage and inheritance contract)<sup>54</sup>

The sharing out required by law of all entitlements or prospects for payment to the couple of old age benefits, professional pensions or invalidity allowances can also become a part of marriage agreements, and the arrangement made can range from a complete exclusion of one spouse through a variety of forms of partial exclusion to other available forms of sharing out.

Overall the basic content of marriage contracts is taken from the law of inheritance. Against this background of defining specific types of circumstance to be covered, this freedom of contract guaranteed by law has led to a pronounced distinction between

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<sup>51</sup> Grziwotz: *Vertragsobjekt Ehe und Partnerschaft*, DNotZ 1998, Special Ed. p. 228 ff. / 260

<sup>52</sup> Münchner Kommentar / Kanzleiter, Vol. 4. Ed. 2000, before § 1408 Ed. No. 17

<sup>53</sup> Münchner Kommentar / Kanzleiter loc. cit. FN (52) § 1408 Edit. No. 14

<sup>54</sup> Nieder: loc. cit. FN (47) Edit No. 1098

different sorts of proviso, and this has enabled contracts to be shaped in the most personal way possible. This personal tailoring is possible in all the four areas of law for which we have given examples, within the more or less narrow limits laid down by the law, and this in turn creates a demand for the shaping of the law by the notary. Shaping in this case does not merely mean further developing and concretising the contents of laws in each of these four areas; it also means the effect of looking simultaneously at all the agreements K hopes to achieve: the renunciation by the wife of a claim to the legal portion of the estate, declared in the marriage contract, would lead to a freedom in the will which might render an anticipated succession unnecessary.

### **3. Shaping the Law in Consumer Protection Law**

The supply and installation contract for the heating control systems produced by K is a consumer contract in the sense of § 24a, AGBG. When shaping a contract, commercial law regarding supply, and service contract law regarding the installation must be considered as the legal basis. Where there is an overlap between both these legally regulated contract types, for example guarantees for material defects, these are resolved by giving priority to the law on service contracts.<sup>55</sup>

Any contractual arrangement in a consumer contract that departs from the law is subject to supervision of content, § 8 AGBG. The way the contract is drawn up means applying the three legal bases – commercial law, service contract law, and the act regulating the Law on General Terms of Business – to the concrete circumstances. What is required is not shaping of law but application of law, unlike the previous examples given.

A consumer contract certified by a notary is also subject to monitoring of its content, even when the contents have been drawn up by the notary, rather than the businessman, irrespective of whether the individual terms of the contract will only be applied once. Only when a private agreement is in existence where the consumer can have an influence on the contents, which is typically not a pre-formulated type of agreement, will the application of the Law on General Terms of Business be ruled out.<sup>56</sup>

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<sup>55</sup> Palandt-Sprau loc. cit. (6) § 651 Edit. No. 4

<sup>56</sup> § 24a No. 2, AGBG

Outside the consumer contract, § 1 AGBG as always takes up the question as to who is dictating the General Terms of Business. The use of the provisos suggested by the notary and used repeatedly by him, granted that he is not a party to the contract, does not pave the way for a control of contractual content, unless these provisos have been inserted on the instructions of one of the contracting parties, or a contracting party makes use of the term “as if indirectly”.<sup>57</sup>

Consumer contracts have a bearing on the areas of activity of the notary first and foremost in the different versions seen of speculative turn-key property developments. The loss of possibilities available for fashioning the content of the consumer contract has to be seen against the increased need there is to create formulae in the run-up period to the contract when the project is being developed, determined by the growing juridification of property transfers<sup>58</sup> and the application of the Law on Home Ownership to housing estates that are increasingly ambitious in conception.<sup>59</sup>

#### **4. The currently existing conditions for the shaping of law by the notary**

##### **a) Freedom of contract – Contractual justice**

The part played by the notary in shaping legal conditions, evidenced in the examples given, presupposes a doctrine on legal transactions guaranteeing the legal person freedom to conclude contracts and freedom to determine content within the scope of contract law. Contract law, in principle discretionary, and the freedom of type-possibilities existing in the law of obligations, which makes it possible to create atypical relations and mixed legal relations, have opened the way for formulations that can absorb repeated developments in legal practice and provide suitable solutions to them, whilst remaining in accordance with the interests of the contracting parties. The room for manoeuvre accorded the notary is decided by the limits laid down to private autonomy.

The liberal approach of the BGB to contracts, starting from the assumption that the method or mechanism employed by the contract legitimises it, and not its ‘correctness’, which is difficult to define, has not been able to provide an answer to the question of the

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<sup>57</sup> Palandt-Heinrichs, loc. cit. FN (6) § 1 AGBG Edit. No. 8

<sup>58</sup> A typical example is the expansion of compulsory certification laid down in § 22 BauGB, relating to the establishment of home ownership and the compulsory hazard controls dealt with § 4, Bundes-Bodenschutzgesetz.

<sup>59</sup> Compare Röhl: Das Eingangsflurproblem bei der Unterteilung von Eigentumswohnungen, DNotZ 1998 pp. 345 ff.

justice of the contract adequate for today's purposes.<sup>60</sup> A reconciliation of interests can only be expected if there is fundamental parity between the contractual partners.<sup>61</sup> Therefore a basis is needed from which use can be made of the principle of freedom of contract.

The ill-defined limits laid down by §§ 138, 242 BGB have undergone a process of concretisation through legislation passed by the Federal Constitutional Court. This demands that notice be taken of the basic rights afforded by the Constitution when employing general terms in a contract. If *“one of the contracting parties has a preponderant position strong enough to allow him to set contractual conditions that are in effect one-sided, this has the effect for the other contracting party of determination by another [heteronomy]”*.<sup>62</sup> Where instances classifiable by type are being formulated and where this formulation recognises the inherent inferiority<sup>63</sup> of one of the parties and excessively encumbers the other party, the Constitutional Court uses this legislation to compel the civil legal system to recognise an inherent limit to private autonomy, which then allows legislation to intervene in a corrective way, whilst taking into account *“the circumstances in which the contract came into being”*.<sup>64</sup>

Contractual justice as the inherent limit set to private autonomy is thus the requirement against which, above all, the law-shaping activity of notaries and therefore the notarial procedure must measure themselves. But before going this far it would be good to see what the reasons for contractual disparity are.

The preponderance of one contractual party, thus leading to limits being placed on the other, can derive from:

- actual superiority, which the other contractual partner cannot avoid, in spite of perceiving the unequal situation the parties are in; or

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<sup>60</sup> Münchener Kommentar / Kramer Vol. 1, 3<sup>rd</sup> Ed. Munich 1993, before § 145 Edit. No. 2 ff.

<sup>61</sup> Limmer: Vertragsgerechtigkeit notarieller Urkunden und europäischer Verbraucherschutz, in the 'Notar und Rechtsgestaltung Jubiläums-Festschrift' of the Rhineland Body of Notaries Public 1998, pp. 15 ff., 27.

<sup>62</sup> BVerfG loc. cit. FN (7) pp. 1470,

<sup>63</sup> BVerfG loc. cit. FN (7) p. 38

<sup>64</sup> BVerfG loc. cit. FN (7) p. 39

- the situational inferiority of a contracting party, when he does not recognise the assertion of the interests of his contractual partner and the limits this will place on him.

The first of these concerns objective circumstances that will not cause a contract to be shaped in such a way as to remove the disparity, even when the disadvantaged party recognises the situation. The second case has to do with a subjective disparity which might arise from lack of information, intellectual inferiority, or an inferior position in the concrete circumstances of negotiation.<sup>65</sup>

#### **b) Contractual justice by notarial authorisation**

The product of the notary's shaping of contracts is usually<sup>66</sup> a public deed drawn up following a strictly adhered-to procedure. Both the guaranteeing of the notary's impartiality, § 3 BeurkG, and the obligation to verify and to instruct that are part of the procedure itself, §§ 17 ff. BeurkG, afford protection to the persons concerned in the deed. The main regulation governing procedure is § 17 Para. 1 BeurkG, which charges the notary with ensuring that by instruction the contract, put into documentary form

- reflects the true will of the persons involved;
- is factually correct;
- reflects the law and is clearly worded; and
- does not disadvantage persons involved who are inexperienced or inexpert.<sup>67</sup>

The element of precaution prior to entering into a contractual link through conclusion of a contract is common to all these requirements. The facts of the matter and the will to contract must be unambiguously and from the law's point of view established, so that the potential for later conflict is avoided. The consultation that takes place after establishing the will of the parties is to prepare adequate precautions against untoward incident, and also to deal with the procedures required for certification of the contract in the relevant registers.

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<sup>65</sup> Limmer, loc. cit. FN (61) p. 28, with a further subdivision into four areas of inferiority.

<sup>66</sup> The drafting of a private document by the notary is also a duty of his office to which the principles of independence and impartiality apply, Seybold / Schippel / Reithmann loc. cit (5) § 24 Edit. No. 2

<sup>67</sup> Jerschke: Die Wirklichkeit als Muster - der richtige Weg zum gerechten Vertrag, DNotZ Special Issue 1989 p. 21 ff., 23

A decisive factor for seeing to it that contractual justice is maintained is the duty of the notary to avoid an inexperienced or inexpert party being placed at a disadvantage, § 17 Para. 2, p. 2 BeurkG. If one puts the prevention model given by notaries in place over both the grounds of disparity discussed, which impair the justice of the contract, both the strengths and the limitations of this procedure become clear: A factually superior situation cannot be countered, but a situational disadvantage can be avoided.

If the inexperienced or inexpert party recognises the factual superiority of the other party to the contract through instruction by the notary, for instance the one-sidedness of the contract terms put in by the other party, the instruments available to the notary are then exhausted and further control of the contract's content by the notary ruled out, except for a case of breach of the rules generally limiting freedom of contract in §§ 134, 138 BGB.

If a party involved is disadvantaged by virtue of his situation, and recognises the consequences of a term of the contract demanded by the other party through the notarial instruction, an open contract position arises that excludes disparity.

The notarial certification procedure also acts as a filter for the contents of the contract in the interests of contractual justice in cases where the parties have little influence on the shaping of the contents, and both of them trust the proposals for wording put forward by the notary. The obligation the notary has to maintain impartiality prohibits him from suggesting terms that would favour one party, or which were not balanced, and inserting these in the contract.<sup>68</sup>

The heteronomous preponderance of a party based on an actual superiority is manifested in an economic strength, which in a number of standardised contracts asserts the contractual freedom of the stronger party. The compulsory provisions in the Law for Protection of General Terms of Business do not have the effect of weakening the function of the notary in shaping the law. Because the notarial procedure does not remove an actual disparity, the General Terms of Business have the effect of providing a sort of protective shield in substantive law that complements the notarial procedure and provides a basis that can be used to guarantee justice of contract in individual cases, even when one party is in an actually superior position. Control of the contract's contents by

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<sup>68</sup> Seybold / Schippel / Schippel loc. cit. FN (5) § 14 Edit. No. 35 ff.

the courts in these cases is given priority over a similar control by the notary,<sup>69</sup> which would be preferable because of its preventive nature.

The notarial model of prevention, which is protected by a raft of AGB's outside the private contract type, meets the requirements which, according to legislation enacted by the Federal Constitutional Court, must be imposed on a just contract. The preventive approach to a just contract seen in its being created by a notary is at the same time less restrictive of private law than the aftercare provided by AGB law. It does not narrow down the scope of the contract in the same way, since it does not have to take account of obligatory, but in individual cases maybe unsuitable legal regulation. It is also more legally certain, since the "right" notarial contract is surely preferable to a later court action for breach of the AGB regulations at the time the contract is concluded, which can only guarantee the upholding of the law in the general context of the risks involved in any court case.

### c) **Compulsory form**

The preventive model of shaping the law through notarial certification only takes effect when it is put to use in actual legal transactions. As a procedure it is impeded by the freedom of the parties to conclude<sup>70</sup> contracts, but not by their freedom to form the contract's contents. From the point of view of the individual it is primarily the limiting of the freedom to conclude a contract and the cost of this which is being viewed; contractual justice is not a concept belonging to the contracting parties, but to the legal community. Only the legal community understands the form of the contract as an inner limit placed on private autonomy<sup>71</sup> and recognises how to use the objective parameters set to the functions of a form.<sup>72</sup>

Certification by the notary [notarisation] is the strongest legal form of a transaction in law, and, because of its preventive character, is the only form committed to the aim of justice in contract.<sup>73</sup> For this reason German civil law recognises notarisation not just as

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<sup>69</sup> Heinrichs: Umsetzung der EG-Richtlinien über mißbräuchliche Klauseln in Verbraucherverträgen durch Auslegung, NJW 1995 pp. 153 ff., 158

<sup>70</sup> Häsemeyer: Die gesetzliche Form der Rechtsgeschäfte, Frankfurt 1971 p. 231

<sup>71</sup> Häsemeyer loc. cit. FN 70 p. 168

<sup>72</sup> These can be either in the public interest (e.g. legal transactions under family creating a status, such as adoption) and / or in the private interest, Häsemeyer loc. cit. FN 70 p. 168 ff.

<sup>73</sup> Richter loc. cit. FN (20) p. 3

a general offer of a legal form but as a prescribed form whose functions indicate the way they are to be used. The examples given above regarding a succession being effected by transfer of property are subject to compulsory form in the law on inheritance, in cases where binding contractual provisions are desired (inheritance contract), but are not with wills or in partnership law, or in consumer contracts, at least where they relate to property.

## **V. Shaping of law by the notary in the European law procurement market**

### **1. Consumer law as the cutting edge of lawmaking in Europe**

The picture we have given of the lines that have been followed until now by notaries when shaping the law has tried to highlight national developments, using examples that are not (yet) influenced, in private contracts, by European legal developments. We confined ourselves to pointing out the rupture to the system occasioned by the introduction into the German AGBG of the consumer contract form laid down by the European directive.<sup>74</sup> In concrete terms this means that K, for example, cannot install his heating control systems in the house of his daughter T and her husband at cost price and without normal guarantees. It is possible a claim for a guarantee might be successfully asserted against K, although the guarantee exclusion, only formulated to deal with specific cases, may have been requested by K for a good reason.<sup>75</sup>

The directives<sup>76</sup> that have been issued dealing with consumer law have already brought an independent European consumer law into existence that is leading to considerable

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<sup>74</sup> (above Sect. II. 2)

<sup>75</sup> According to § 11 No. 10 AGBG a guarantee exclusion is invalid in the case of newly manufactured objects unless it has been agreed by private agreement. Since this is a consumer contract in the sense of EC Directive 93/13 and therefore of § 24a, AGBG, pre-formulated contract terms and conditions must be used even when they are only intended for use on one occasion.

<sup>76</sup> A survey of the directives on consumer law is given by Reich, loc. cit. FN (14) pp. 541 ff; the most important directives on contract law are:

- Directive 85/577/EEC of 20.12.1985 on protection of the consumer in contracts concluded away from business premises;
- Directive 87/102 EEC of 22.12.1986 on alignment of legal and administrative regulations of the member states on consumer credit;
- Directive 90/314 EEC of 13.06.1990 on package travel;
- Directive 93/13 EC of 05.04.1993 on alignment of legal and administrative regulations of member states on misuse of terms in consumer contracts.
- Directive 94/97 EC of 26.10.1994 for protection of the purchaser in connection with certain aspects of contracts for the acquisition of partial user rights to property;

changes in the evolved laws of obligations of the member states. The new and radical elements found are:

- the personal attaching of consequences in law to the consumer concept;
- the standardisation in law of a detailed and obligatory contract content;
- an overblown written form, meant to give consumer insulating; and
- restriction of the will to be bound by a contract through revocation and withdrawal rights.

If one takes these connecting factors, which have been foreign to German law to date, as the model for a new European law of obligations<sup>77</sup> in the future there will be little room left for the shaping of law by the notary. The regulations governing the conclusion of contracts are so rigorous that a contract formulated to relate to an individual case is ruled out. In more detail:

The concept of the consumer in European community law dispenses with the differentiations<sup>78</sup> based on the merits or content, as known hitherto in the German law of obligations, in favour of a general personal linkage with which the 'other side' of the trade in goods, services and capital, meaning the larger but also more risky possibilities that have arisen for the individual in the common market, is supposed to be cushioned.<sup>79</sup> Beside the particular 'positive' linkage to commercial acts found in the German law of obligations, this 'negative' linkage to consumer transactions allows the meaning of a 'normal' legal transaction to disappear. Consumer law becomes split because of the

- Directive 97/7 EC of 20.05.1997 on consumer protection in cases of contracts negotiated at a distance;
- Directive 1999/44 EC of 07.07.1999 on certain aspects of consumer goods purchase and guarantees for consumer wares;

Directive 2000/35 EC of 29.06.2000 on combating late payment in business.

<sup>77</sup> Hondius: Consumer Guarantees: Towards a European Sale of Goods Act, 1996, saw as early as 1996 the first nucleus of a European commercial law in the Consumer Directives; *ibid.*: Consumer Law and Private Law: the Case for Integration, in *Schriftenreihe der Europäischen Rechtsakademie Trier*, Vol. 25 1999, pp. 19 ff., 22 ff.; Remien, in: *Denationalisierung des Privatrechts in der Europäischen Union? - Legislative und gerichtliche Wege*, in *ZfRV* 1995 pp. 116 ff., 122 discusses models for a European law of obligations or commercial book of laws. Hoffmann, too, in *Analyse der europäischen Rechtsetzungstechniken im Bereich des Vertragsrechts aus Sicht der Europäischen Kommission*, in *Schriftenreihe der Europäischen Rechtsakademie Trier*, Vol. 25 1999, pp. 39 ff., 48. sees a systematic European approach.

<sup>78</sup> For example the ordering of particular legal consequences if a commercial act (sale) is present, §§ 343 ff. HGB. These consequences presuppose the quality of merchant in the sense intended by the Commercial Code.

<sup>79</sup> Cf. Reich *loc. cit.* FN (14) p. 64 ff; Hoffmann *loc. cit.* FN (77) p. 42 ff.

widely differing legal consequences that result from the presence or absence of a personal connecting factor or involvement, particularly with regard to the free ability to revoke<sup>80</sup> a contract which otherwise takes effect when it is concluded.

Even more questionable than this personal linkage – the concept of the consumer is much disputed and also contradictory<sup>81</sup> – is the compulsory nature of the shaping of consumer contracts. The prior assumption is that complex factual circumstances such as in time-sharing are comprehensible in content and are capable of regulation and will have some claim to validity. Just how unsuccessful this attempt is can be seen in such phrases as the requested “*estimate of the amount the purchaser must pay for use of a common facility or service*”<sup>82</sup>, when this assessment does not even have to be a reasonable one, as the “*reasonable assessment*” of the period for completion of the property expressly laid down in Annexe D2 to Article 4 of the Directive shows.

The wording preferred in consumer protection law is better adapted to ensuring there is proof of the contents of the contract than admitting contracts lacking in form. Nevertheless there are considerable doubts as to whether the aim of providing the consumer with information is met through wording.<sup>83</sup> The information paradigm in consumer protection law<sup>84</sup> may protect against false or misleading information and insist on clear and comprehensible contract terms; but awareness of the information content of the text of the contract gives as little guarantee of the written information as does

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<sup>80</sup> A right of revocation or withdrawal is recognised by the Directives in cases of door-to-door selling, package holidays, time-sharing and distance selling. When these directives were incorporated into German law a right of revocation for consumers was included into the BGB, § 361a BGB. This has meant that private consumer law has gained a fixed structure for the first time in the BGB, and the concept of consumer and that of economic operator were also defined in §§ 13 and 14 BGB. On this see Bülow / Artz: *Fernabsatzverträge und Strukturen eines Verbraucherprivatrechtes im BGB*, NJW 2000, pp. 2049 ff.

<sup>81</sup> Reich, loc. cit. FN (14) pp. 64 f.; Hoffmann loc. cit. FN (77) pp. 42 ff.; Hommelhoff: *Zivilrecht unter dem Einfluß europäischer Rechtsangleichung*, AcP 192 pp. 71 ff., 86 f., 93 f.

<sup>82</sup> Annexe to Article 4 of the Directive, loc. cit. FN (76); Martinek is right, then, to express the view that the new part-time residence rights law fails to grant protection to the consumer in time-sharing contracts, NJW 1997 pp. 1393 ff., 1396, and that considerable doubts are raised as to the form and content of the regulations in law on time-sharing; Hofmeister: *Rechtssicherheit im Verbraucherschutz - Form im nationalen und europäischen Recht -*, DNotZ Special Ed. 1993, pp. 32 ff., 43, is right to maintain the thesis that in complicated legal circumstances “repressive” consumer protection is inferior to “preventive” consumer protection in form and in the availability of professional advice.

<sup>83</sup> Wolfsteiner: *Rechtssicherheit im Verbraucherschutz - Form im nationalen und europäischen Recht -* DNotZ Special Ed. 1993, pp. 21 ff., 24

<sup>84</sup> Reich: loc. cit. FN (14) pp. 304 ff.

recognising this information and its possible legal consequences, for example if there is a fault in the contract.

Finally, most of the directives contain rights of revocation or withdrawal. The original legally politic aim of these was to rule out an element of surprise at time of concluding the contract.<sup>85</sup> Taking up this idea, the granting of a general period for reflection<sup>86</sup> was regarded as desirable, independent of the way in which the contract came into being. The price paid is a high degree of uncertainty in law<sup>87</sup>, for example when there are interim advance payments made by the consumer, which would then have to asserted as claims in law after this right of withdrawal was exercised, or linked transactions such as credit contracts and property development contracts.

An additional staggering<sup>88</sup> of rights of withdrawal, linked to the non-fulfilment of certain minimum requirements in the contract, further complicates the legal position. If, for instance, the assessment of the amount the purchaser has to pay for common facilities or services is not mentioned in the time-sharing contract, the period of the right of withdrawal is extended from ten days to three months, but it remains completely open as to whether the consumer knows this at the outset or whether he realises this with some degree of probability before the end of the period. And why the period for withdrawal is in any case extended, when the assessment is not even defined as “reasonable”, is devoid of all legal argument.

The use made of the right of withdrawal in the real legal world has not until now been examined. It is remarkable that the European issuers of directives have settled for an instrument whose effectiveness has not been tested, although a study of actual instances from a legal point of view would have been possible owing to the number of years the right of withdrawal has been in existence, for example covering door-to-door sales.

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<sup>85</sup> A typical example is the right of withdrawal in Art. 5 of the Directive of 20.12.1985 on protection of the consumer in contracts concluded away from business premises, cf. FN (76).

<sup>86</sup> Reich, loc. cit. FN (14), p. 357; Limmer, loc. cit. FN (61) p. 31

<sup>87</sup> Drobnič: Neue rechtliche Konzepte für den europäischen Verbraucherschutz, in Neues europäisches Vertragsrecht und Verbraucherschutz 1999, pp. 201 ff., p. 205 writes of the withdrawal rights as a ‘factor introducing uncertainty and disturbance’.

<sup>88</sup> See FN (80); a staggering over time is contained in Art. 5 of the Time-Sharing-Directive, for example, where differing withdrawal periods are coupled to non-fulfilment of individual minimum specifications given in the annexe to the Directive. For more detail on this see Martinek in Grabitz / Hilf, Vol. 2A (13) Ed. No. 172 ff.

The limiting by consumer protection law of the notary's role in shaping legal contracts may lead to a renewed need for such shaping in application of this law:

This would firstly be the case when the new types of contract begin to 'age'. In consumer protection law narrowly defined contractual circumstances have been made standard that have developed from the sort of problems which existed at the time the directive was issued.<sup>89</sup> If the economic circumstances change then the contracts in practice either have to reject the applicability of the directives or propose the adaptation of individual terms. What possibilities there will be in future, in view of the obligatory nature of the contents of the directives, will depend primarily on what legislation is enacted by the European Court.

Shaping is further needed for the combination of a consumer protection contract and another type of contract, provided there are no provisions in law governing the legal consequences when the right of revocation is used in an instance of a linked legal transaction.<sup>90</sup> If the vendor of a timeshare has taken on the performance of further services in connection with the consumer contract, such as for example the purchase of property of the consumer, the consequences of exercising the right of withdrawal must be set out in the additional contract.

## 2. Increasing complexity of conflict resolution

Diametrically opposed to the standardisation sought by the consumer protection law is the increasing body of complex regulations covering conflict resolution.<sup>91</sup> This can be understood as the avoidance of disputes, out-of-court settlement of disputes, and the special form of dispute settlement: mediation.

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<sup>89</sup> See Hoffmann loc. cit. FN (77) p. 48

<sup>90</sup> § 9 Verbraucherkreditgesetz solves the joining of a purchase contract and a consumer credit contract by stating that the revocation of a credit contract removes the link it has with the purchase contract. See Kaufhold: *Verbraucherschutz durch europäisches Vertragsrecht - materielle und institutionelle Bezüge zur notariellen Praxis*, DNotZ 1998 pp. 254 ff. on the problems arising for certification of deeds.

<sup>91</sup> Wagner, loc. cit. FN (25) p. 89 ff; Richter, Bericht vom Belgischen Notariatskongreß 1999, ZNOTP 2000, p. 156 ff.

Contract law as the instrument for avoidance of disputes necessarily involves tax law, which has in part become the driving force behind some economic arrangements,<sup>92</sup> but which also restricts the form of a contract desired under civil law or even makes it impossible. K, for example, will make the size of the transfer to T, done as part of an anticipated succession, dependent on the amount of inheritance tax payable, and, before choosing the legal form of the company he will form with S, will do a tax comparison. Increasingly the shaping of contracts done by notaries will have to integrate consequences under tax law, or will have to expose any irreconcilable contradictions arising between valuations contained in contracts under either civil law or under taxation law.

Increasing complexity in contract law is not limited to the procedure up until the contract is concluded. It continues on in the implementation of the contract, particularly in the case of legal transactions concerning property and companies, which are linked to registration.<sup>93</sup> Handling the implementation of the document therefore requires certification management which would integrate all the relevant declarations that have to be made by third parties and relieves the person seeking this legal help from having to handle his own implementation of the document. Shaping of law here implies the inclusion of the implementation and any possible hindrances to this implementation<sup>94</sup> into the document as indicators, so as to make the implementation of the contract more secure.

Owing to the pressure there is to relieve the justice system,<sup>95</sup> dispute settlement leads to new ways of shaping the law by notaries in areas that are close to the area covered by the contract. Mediation in particular takes the classic notarial functions and invests them with new possibilities. The role of an institutionally guaranteed, impartial mediator or middleman, absent in the English-speaking legal world, is invented and christened 'mediator', along with his procedure, which basically corresponds to the deed

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<sup>92</sup> For example the building developer models, where pre-formulated contract packages were meant to give the purchaser the tax advantages of a building developer without giving him any of the risks the latter has, cf. Schmidt / Dreseck, EStG 19<sup>th</sup> Ed. 2000, § 21 Ed. No. 110 ff.

<sup>93</sup> Current examples could include the conversion to euros being carried out by capital companies, and the new company law after the reform of the Commercial Code.

<sup>94</sup> Example: the way a not yet measured part-premises is identified in a purchase contract document can also be decisive for whether the document can be implemented, cf. BGH, DNotZ 2000 p. 121 ff.

<sup>95</sup> Wagner, loc. cit. FN (25), p. 36

certification procedure,<sup>96</sup> and leads towards the same goal of an agreement by means of a contract.

A further aspect of conflict resolution has been brought into the open by § 15a EGZPO, which gives the federal *Länder* the option of instituting obligatory out-of-court conflict resolution for specific civil matters, and requires the enactment of conciliation procedures as a prerequisite for a court case. On 25.04.2000 in the Bavarian Arbitration Law legislators in Bavaria designated, apart from interested lawyers, all the notaries in their respective district court jurisdictions to carry out conciliation proceedings.<sup>97</sup>

The out-of-court settlement of disputes which is expressly open<sup>98</sup> to notaries could contribute to new shaping of the law by notaries, since it comes from the idea of arbitration,<sup>99</sup> which was given a leading place in the Statute of the Arbitration Tribunal of German Notaries.

The new medium<sup>100</sup> in which contracts are concluded electronically must be learnt and used by notaries in such a way that the notarial procedure and the document which is its conclusion are not altered in quality in any way, otherwise the special characteristics of notarial creation of deeds will be lost. The risks here are less in the area of the technical aspects of certification and the way the event is documented and more in ensuring the contractual will of the parties involved<sup>101</sup> and in the notary's establishing whether indications or instructions from the parties have in fact been understood.

### **3. The benefit to the legal marketplace of the shaping of laws by the notary**

Standardisation and complexity: these opposites stand out as the determining factors in the European legal marketplace. There is standardisation where the European lawmakers

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<sup>96</sup> Wagner loc. cit. FN (25), p. 101 and elsewhere.

<sup>97</sup> Art. 5 Para. 1 Bayerisches Schlichtungsgesetz; other *Bundesländer* have not devolved compulsory conflict resolution onto notaries. On this, see Schwarzmann "*Mediation und Streitschlichtung*" as subject of the 51<sup>st</sup> German Lawyer's Congress in Berlin, MittBayNot 2000 p. 64 ff., 65.

<sup>98</sup> § 8 Para. 4 BNotO

<sup>99</sup> Wolfsteiner: Der Schlichtungs- und Schiedsgerichtshof deutscher Notare (SGH), Notar 1999 pp. 115 ff., 116; Wegmann, Der Schlichtungsgedanke im Statut des SGH, Notar 1999 pp. 122 ff., passim

<sup>100</sup> Erber-Faller: Perspektiven des elektronischen Rechtsverkehrs, MittBayNot 1995, pp. 182 ff, 187 f; Kindl: Elektronischer Rechtsverkehr und digitale Signatur, MittBayNot 1999 pp. 29 ff.

<sup>101</sup> Wolfsteiner, loc. cit. FN (99) p. 32

have swept away the evolved structures of civil law with orders and directives, complexity in the niches left to private contracts, above all in inheritance and family law and – with perhaps some reservations – in company and property law, as well as in the areas close to contractual matters, of dispute settlement and out-of-court conflict resolution. Its usefulness for the market will be what decides in the future whether law shaping by notaries will be demanded by individuals and by the legal community who create the legal framework in which notaries operate.

Shaping of law by notaries means preventive action before the conclusion of a contract, involving the giving of advice and instructions. Its core is the ability to take account of the subjective possibilities. Notarial law shaping is linked to cost, and can only be demonstrated as superior to a contract whose form is weaker on occasions when the lack of preventive attention in the latter case has led to a dispute over the contractual relationship.

It is not a question of whether the parties decide to use the offer by the notary to form the contract, provided the regulation forms that are required mean they have to have recourse to the notary for purposes of certification.

Where the regulations forms do not require it, contract shaping by a notary depends on the parties concerned recognising the advantages of the public deed from the point of view of a result. However the independent and impartial shaping of law by the notary, in other words his market offer, is not in itself an argument for the consumer in favour of using notarial services; he should rather look for the adviser in contract matters who is able to serve his interests exclusively in having the matter carried out. Only the lower cost of using a legal service provider could influence a decision in favour of engaging one notary rather than two lawyers. Despite having different aims and a different form of work<sup>102</sup> the parallel with the profession of an auditor can be pointed out. The auditing functions carried out by the latter in the public interest are required compulsorily by law, excepting small capital companies and partnerships, § 316 HGB, and in voluntary circumstances the auditor is only asked to perform a service if considerations of usefulness determine this, in specific cases.

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<sup>102</sup> See FN (22)

From the point of view of the legal community, in other words on the premise that relative regulation of the market is necessary, the particular product of a notary's shaping of law – the public deed – with its legal effects of immediate enforceability and increased quality as evidence, needs a justification that follows on from the nature of the market offer being made.<sup>103</sup> Only because of the independence and impartiality of the notary and the procedure he enacts based on those two things, one which redresses a situational inferiority on the part of one of the parties to a contract through advice and instruction, can the special character of a public deed and its recognition throughout Europe as the basis of any implementation, according to Art. 50 EuGVÜ,<sup>104</sup> be justified. Thus the task of the legal community is to decide as part of the process of regulation of the European legal market what value should be ascribed to the offer of a legal service by notaries, whereas the selling point for market participants to encourage them to use this service would be the existence of compulsory legal form or of sequences of form.

In the context of Europe a demand for compulsory legal form based in certification by a notary can only be raised with difficulty, since not every EU state possesses a notarial system along the lines found in Latin countries. It is, however, possible to take up the question of sequence of form and link certification by a notary to that, because it breaks up the ossified former system of guidelines (directives) that banish every individual form of contractual freedom. This all presupposes that the European body issuing directives dispenses with compulsory content to contracts in favour of pre-contract prevention through certification by a notary, in contract law, but also in consumer protection law, in which case the actual superiority of a contractual partner can be avoided by application of the protective rules laid down in AGB law.

A consumer law that does not avail itself of these possibilities and is exclusively oriented toward compulsory regulation, written information and rights of withdrawal leads us to fear that the future will see an impoverishment of our legal culture<sup>105</sup> Because its procedure is geared to prevention, and if the necessary leeway is given it to carry on shaping of law, the act of certification by a notary could in future, as the offer of a legal form, replace particularly the stereotyped rights of withdrawal, with the ability they have

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<sup>103</sup> See above III. 1

<sup>104</sup> Hellge: *Europäische Perspektiven für nationale Notariate*, Österreichische Notariatszeitung 2000, p. 1 ff., 3

<sup>105</sup> The superiority of notarial certification over the mechanisms used to steer contracts: inshaping and right of withdrawal, is emphasised by Drobnig, loc. cit. FN (87), p. 205

to create uncertainty in law.<sup>106</sup> In these cases a distinction should be made according to the nature of the facts involved in the consumer protection; no-one is going to seriously require notarial certification of door-to-door sales. Suitable objects for notarial certification would be principally matters which are regulated by difficult legal circumstances requiring intensive implementation (e.g. timesharing) or which lead one to expect long-term commitments (e.g. consumer credit). And, in general, notarised contracts, even to the extent that they only touch on directive law, for example the existence of a case of distance selling among the facts being notarised, should be taken out of the sphere of directive law, which would otherwise prevail when laying down conditions for contracts.

The demand to open up European consumer law to the possibility of shaping of the law by notaries becomes more pressing when one views the increasingly recognised necessity to reform and to re-codify<sup>107</sup> into a unified consumer code the currently disunited directive law, with its widely varying time-limits and conditions placed on the exercise of rights of revocation or withdrawal. Owing to the doubts, which have recently become even more vocal, about having an independent European contract law,<sup>108</sup> it is a now a general question, outside the confines of the approaches to consumer law being discussed, about the possibility of making the offer of a contractual form through notarisation the model for a European contract law. So it will depend on whether the European directive-issuing body can be convinced that instead of having obligatory regulation of contracts one should have notarisation of contracts, with the advantage of prevention, guaranteeing a sound understanding of the contents of a contract and – supported by General Terms of Business – leading to a situation where contractual justice would prevail.

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<sup>106</sup> Drobniġ: loc. cit. (87) p. 205

<sup>107</sup> Limmer, loc. cit. FN (61) p. 32; Drobniġ, loc. cit. FN (87) p. 207

<sup>108</sup> Hearing in the Law Committee of the European Parliament on 21.11.2000, *Harmonisation of civil and commercial law of the EU member states*, report read by Klaus-Heiner Lehne; academic discussion of a “private market law” has long been under way, Hommelhoff, loc. cit. FN (81) p. 105; Zimmermann, *Konturen eines europäischen Vertragsrechtes*, JZ 1995 p. 477 ff. passim; Micklitz, *Ein einheitliches Kaufrecht für Verbraucher in der EG?* EuZw 1997 p. 229 f. passim; Drobniġ, in *Festschrift für Ernst Steindorf 1990, Ein Vertragsrecht für Europa* p. 1140 ff. passim.

#### **4. On the necessity of a European law on deeds procedure**

Notarial prevention is only useful to the legal market if notarisation actually guarantees contractual justice Europe-wide. For that to be the case it would have to be guaranteed that the notary is acting independently and impartially, in other words that any link-up of interests with other participators in the legal market is either ruled out or so restricted in scope that it could not impair the managing of concrete cases. The notarial procedure would also have to be committed to the achieving of contractual justice through preventive advice and instruction throughout Europe.<sup>109</sup> Without a unified guarantee of elementary principles of procedure that would manifest themselves to the European issuers of directives as a certain instrument for the creation of contractual justice, there will be no European recognition for the notarisation procedure; and so with the Europeanisation of more and more areas of civil law the law-shaping function of the notary would disappear.

The notarial product on the market, the national public deed, will have to become a European document to the extent that its re-creation would be secured by a European law on notarisation procedure. Apart from the institutional components, the maintenance of the independence and impartiality of the notary, the elements of the notarisation procedure that would have to be regulated are those that serve to bring about contractual justice: preventive advice and instruction.

With regard to the structures and the variety of duties attached to the different bodies of notaries public in Europe, one cannot demand the full harmonisation of the notarial bodies by proposing a European law on notarisation procedure. The aim can only be to install a unified procedure for notarisation of all contracts within the European Union as a minimum standard, in other words in the legal form of a directive, with the expected effects this offer of form would have on future legislation as contract law became more European in nature – and with a Europe-friendly offer to legal transactions of this product as a ‘new’ European notarisation procedure.

The European Union would not have the jurisdiction needed to bring about complete harmonisation of the notarisation procedure for all instances, not just for instances related

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<sup>109</sup> In the national language of the person seeking legal help, which can be ensured by translating the text of the contract.

to contract law essential for the single market.<sup>110</sup> However in the meantime Art. 95 EG On Future Legislation V (Amsterdam) has been proposed, with reasons being given that seem to bode well, for an answer to the question of opening up jurisdiction for a new European contract law.<sup>111</sup> The increasingly close nature of European integration is necessitating an ever greater measure of assimilation of legal and administrative regulations between the member states,<sup>112</sup> since the isolated instances of legislation on contract law can no longer guarantee the function of the internal market.

All questions of form belong to contract law<sup>113</sup> and therefore so do the professional structure in law (independence and impartiality), as these are inseparably connected to the aims<sup>114</sup> being served by the forms laid down

The principle of subsidiarity found in Art. 5 EGV (Amsterdam) does not conflict with the idea of a European contract law, since a unified system of contract law as an aim of the internal market comes under the exceptions that '*on member state level cannot be satisfactorily dealt with*', Art. 5 EGV (Amsterdam).<sup>115</sup> The European bodies of notaries public have attempted to make a start with the *Code Européen de Déontologie Notariale*,<sup>116</sup> which has been ratified in the meantime by almost all organisations of notaries public.<sup>117</sup> The rules in this could, if they were expanded to include precise minimum standards for the notarisation procedure, be made into the content of a directive, which

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<sup>110</sup> With regard to Art. 45 EGV (Amsterdam), the exercise of public authority by the notary would conflict with a fundamental regulation of the notarisation procedure. It might be possible, however, to regulate the procedure solely with regard to contract law, provided such a regulation did not affect the immediate executability of notarised deeds.

<sup>111</sup> Basedow: *Un droit commun des contrats pour le marché commun*, *Revue Internationale De Droit Comparé* 1998 p. 7 ff., 22, sees a clear opening for jurisdiction in European contract law in Art. 95 EGV (Amsterdam); cf. also Schwarze / Herrfeld, *EU-Kommentar*, 2000, Art. 95 EGV Ed. No. 12, 22 f.; on the Groeben / Bardenhewer / Pipkorn commentary on the EU contract: Vol. 2, 5<sup>th</sup> Ed. 1999, Art. 100a, Ed. No. 27

<sup>112</sup> Richter: *Der Notar im Recht der europäischen Gemeinschaften*, *MittBayNot Special Ed.* 1990 pp. 20 ff., 25; Hommelhoff, *loc. cit.* FN (81) p. 73.

<sup>113</sup> Häsemeyer, *loc. cit.* FN (70) pp. 267 ff.

<sup>114</sup> Häsemeyer, *loc. cit.* FN (70) p. 168 ff.

<sup>115</sup> Basedow, *loc. cit.* (111) p. 17 ff.; Müller-Graf: *Europäisches Gemeinschaftsrecht und Privatrecht*, *NJW* 1993 pp. 13 ff., 17 emphasises the meaninglessness of the subsidiarity principle in internal market matters; Seidel, in *Mindestharmonisierung im Binnenmarkt*, 1996, *Opinion* p. 68 ff., 79 points out that the officials carrying out law shaping regarding the internal market in the European Community are '*not minimal, and are adequate to the function required*'; against a unified solution see Stürner: *Die notarielle Urkunde im europäischen Rechtsverkehr*, *DNotZ* 1995, pp. 343 ff., 356

<sup>116</sup> *Europäischer Codex des notariellen Standesrechtes* of 03./04.02.1995, *DNotZ* 1995 pp. 329 ff.

<sup>117</sup> Schippel: *Der europäische Codex des notariellen Standesrechtes*, *DNotZ* 1995 pp. 334 ff. 342

would be the basis for considering notarisatioin by a notary in future legislation in Europe.

Objections raised to carrying out a possible harmonisation at a lower level than the procedural rules for certification in individual countries can be countered by the fact that more stringent rules than those contained in the norm laid down by a directive would be permitted. What Schippel<sup>118</sup> established for the *Déontologie Notariale* would also apply to a directive on European notarisatioin procedure law: “*It focuses the attention of all members on finding the best possible constitution for the notarial profession, and, perhaps far more than the downward pull exerted by a directive, would be likely to lead people to the conviction that the notaries can only fulfil their role in Europe and guarantee their continued existence if they harmonise their professional obligations themselves to a very high standard*”.

Either a niche occupation or the wide possibility of actively shaping contract law – these alternatives for the notary will be decided at European level. The chances for future shaping of law by the notary – notarial prevention – will only exist if there is a notarial procedure law that would give an absolute guarantee of contractual justice. Then one could conceive of an amendment to the timesharing directive that would order that, if a contract were notariaily certified, and provided essential components of the contract adhered to a given form, (in this contract type they would have an AGB character), revocation and withdrawal rights would lapse, legal certainty would be established and the binding character of the contract would start from the time of its conclusion, any further dispositions made by the parties thereafter would not be endangered, and thus disputes over the contract would be avoided.

## VI. Theses

1. The shaping of law by notaries relates to legal transactions. It presupposes freedom of contract as the sphere where it forms the law.
2. Independence and impartiality are the functional characteristics of the shaping of law by notaries in the legal market. They justify the provision of preventive handling of contractual form as a specific legal service performed by the notary.

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<sup>118</sup> Schippel, loc. cit. FN (117) p. 343

3. In German substantive law the function of the notary in shaping law is attested to an impressive degree in the law of obligations, in company law, in inheritance law and in family law.
4. Contractual freedom and contractual justice are not mutually exclusive, provided unequal status seen in the actual superiority or situational inferiority of one of the contracting parties is avoided. Preventive handling of contracts by the notary removes situational inferiority.
5. Legal limits to contractual freedom, which come into play when a party to the contract 'places' contract conditions and so bring about control of content by the judge, avoid any actual inferiority on the part of a contracting party.
6. Notarisation by the notary, as preventive handling through provision of an 'inner' form related to the contents of the contract that leads to contractual justice, renders the restriction of contractual freedom by an obligatory steering of the contract by the law superfluous and enables subjective shaping of the contract to be done. A consequence of this form should be the right of the parties to form the contents of the contract freely and to cause a contractual relationship to arise when the contract is concluded.
7. The notarial procedure for causing the existence of contractual justice legitimises the law-shaping function of the notary in contract law. The europeanisation of regulations under the contract law of the member states requires there to be a European law on notarisation procedure, so that the law-shaping function of the notary is guaranteed.