English Translation[*] of

Christine Godt, Grundstückslasten im Natur- und Umweltschutz - Naturschutzrechtliche Kompensations- und Ausgleichsflächen im Grundstücksverkehr, Notar 2024, pp. 39-46.

⇨ Christine Godt, Land burdens for nature conservation and environmental protection - Compensation measures and off-sets under nature conservation law in German land law[**], Notar 2024, pp. 39-46.

A. Introduction

The entry of limited personal easements, real charges and pre-emptive rights (§§ 1090 ff., 1094 ff., 1105 ff. BGB) in the land title register is part of everyday notarial practice in Germany. Public authorities are often registered as beneficiaries (sic. with the consequence that charges might become perpetual). Positive obligations can be registered, which owners accepted, for example, in connection with a state subsidy (e.g. for land acquisition), a compensation measure under nature conservation law or to avoid a pre-emptive right. For a long time, Germany held a unique position in Europe in securing positive obligations *in rem* in favour of public authorities.[1] However, in recent years France (2016)[2], England (2022)[3], Scotland (2009)[4] have taken legislative action to make registered (environmental) "conservation easements" possible. These were modelled on US[5], Canadian[6], New Zealand[7]

[*] Translation by Anna Waters and Christine Godt; citations remain in line with ´notar´ guidelines.
[**] The translators kept – to the largest extent possible – away from using specific common law property terminology in order to grasp the German concept of land title registration and transfer, the principle "public trust" of the German land registry (Grundbuch) and the related idea of burdenfree good faith acquisition, and the fundamental split of private and public law.
[1] *Godt*, Environmental Duties in the German Land Register, in: Demeyere/Sagaert (eds.), Contract and Property with an Environmental Perspective, 2020, 235.
[2] Art. L 132-3 Code de L'Environnement (effective since 10.8.2016; modified 2019 und 2022); *Mallet-Bricout*, The 'obligation reelle environnementale' in French Law, in: Demeyere/Sagaert (eds.), 2020, (*supra* fn. 1), 215.
[3] Part 7 of the Environmental Act (2021) applicable since November 1, 2022. For details on the legislative process, *Pulman/Hopkins*, The Introduction of Conservation Covenants in English Law, in: Demeyere/Sagaert (eds.), 2020, 185; *Holligan*, Narratives of Capital versus Narratives of Community: Conservation Covenants and the Private Regulation of Land Use, 30 Journal of Environmental Law (2018), 55.
[4] *A. Stevens*, Real Burdens in Scots Law: An Environmental Perspective, in: Demeyere/Sagaert, 2020, (*supra* fn. 1), 143, 155.
[5] *Wyche*, The Meaning and Application of the 'Relatively Natural Habitat' Conservation Purpose of the Internal Revenue Code, ALPS Law Journal, Vol. 6 (2021), 144 with further references, in German: *Disselhoff*, "Die Rolle der nicht-hoheitlichen Flächensicherung im Naturschutz: eine Untersuchung am Beispiel der US-amerikanischen Land Trust-Bewegung" (The Role of Non-Governmental Land Protection in Nature Conservation: A Study Using the Example of the US Land Trust Movement), 2018.
[6] *Gidrol-Mistral*, Quebec Private Law - Destined to Preserve the Environment? in: Demeyere/Sagaert, 2020, (*supra* fn. 1), 125.
[7] In New Zealand, both indigenous lands and agriculturally used lands are subject to the trust regime. The Queen Elizabeth II National Trust (QEII Trust) alone oversees 5023 covenants as of May 2023. Additionally, the New

and Australian[8] regulations. Despite all differences in detail[9] and objectives,[10] these modern legal regulations shed light on the inadequacies of the German legal regime. Apart from a widespread uncertainty in the practical handling of (nature conservation) pre-emption rights,[11] these rules of neighbouring countries unearth problems which are primarily caused by a lack of transparency related to these land charges, against the background of a land transaction law which is founded on the principle of publicity. This obscurity contributes to the fact that nature conservation measures are not passed on or fall into oblivion. This weakens nature conservation as a whole and deepens the already existing enforcement deficit. Against this backdrop, old questions about the relationship between public and private law arise anew: What the legal regime governs land title related obligations, summarised under the term ´land burdens´ (in analogy to § 10 (1) No. 3 ZVG), which do *not* get registered in the land title register? Is good faith acquisition of the full (unburdened) title possible, even for pubic law burdens? It is true that many proprietary use restrictions and statutory pre-emption rights are *de lege lata* not subject to entry in the land register[12] and are not subject to protection in good faith. Yet, where those obligation (such as in the case of property charges) are not directly stipulated by law, both preceding and subsequent procedures ensure that no uncertainty arises with regard to the exercise and enforcement of these rights.[13]

This is not the case for many land burdens under nature conservation law. For example, the Federal Compensation Ordinance (BKompV) of 2020,[14] which applies to infrastructure projects governed by Federal approval regulations, fully exempts the Federal government, and

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Zealand Farm Environmental Trust brings together farming associations, banks, and suppliers to promote environmentally sustainable farming methods, *Gazenbeek*, Private Land Conservation Tools, manuscript for the lecture at the "Workshop Conservation Easements", June 6, 2023 in Berlin, organized by the German Nature Conservation Union (NaBu), and for the ´Eurosite Agriculture, Biodiversity, and Climate Working Group´ on July 3, 2023, p. 3.

[8] For an overview, please refer to *Gazenbeek*, 2023, (*supra* fn. 7), pages 4-5.

[9] Two Differences should be mentioned: (1) In France, the "obligation réelle environnementale" is exclusively classified as a contract (with third-party effect). This has sparked a controversial civil law doctrinal discussion about whether environmental contracts constitute a new type of contract (as argued by Hautereau-Boutonnet, "Le Code Civil - un code pour l'environnement," 2021) or whether they fall under general contract law (as argued by *Grimonprez*, "Les contrats environnementaux au crible des contrats spéciaux: L'offre de réforme des contrats spéciaux," 2021, p. 275).
(2) In the USA, "environmental easements" are primarily registered for tax benefit reasons, leading to associated problems as discussed by Wyche, 2021.

[10] Agricultural transformation goals can also be protected in Germany through easements (as referenced in footnote 45); however, in comparison, they are less common in notarial practice quantitatively compared to entries induced by nature conservation and energy law.

[11] *Wasylow-Neuhaus*, Cooperation between the State and Private Actors in Nature Conservation Law, 2022, p. 458.

[12] For the extent of inquiries caused by this according to § 469 BGB and how authorities handle them, refer to *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), pp. 416, 432, 556 (fn. 2249). However, it remains the case with these statutory pre-emption rights that they function like entries of priority, according to § 1098 BGB.

[13] *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 457.

[14] Bundeskompensationsverordnung (BKompV), 14.5.2020, BGBl I, 1088.

- as a rule - project sponsors which realise compensation measures on their own land from the obligation to secure these compensation measures by way of land burdens in the land title registry.[15] How can a notary know about an existing (unregistered) land burden? The regulation deepens already existing uncertainties with regard to other statutory pre-emption rights exempt from registration. Problems have emerged related to the interpretation of legal provisions which trigger pre-emption rights, and doubts arose about the legality of administrative simplifications as practised in some places.[16] Does the buyer's lack of knowledge about these rights lead to unburdened good faith acquisition in case he/she was sufficiently diligent? When does a notary become liable under § 19 Federal Notary Regulation (BNotO)?

This article turns to answering these questions as follows: Firstly (B.), an inventory is made of property charges which are exempt from any public registration. The following section (C.) deals with the question of unburdened good faith acquisition, followed by the question (D.) of the notary's duties to investigate. The final chapter (E.) draws conclusions as to how transparency can be improved, particularly with regard to the BKompV.

B. Unregistered land burdens

German law recognises a large number of land burdens with third-party effect which are exempt from registration. As a matter of principle, land burdens under private law require registration as constitutive pre-requisite (which allows for burdenfree good faith acquisition of a property title), and land burdens under public law are registered in various directories for declaratory reasons (independent from the land title register, § 54 GBO[17], and not submitted to [burdenfree] good faith acquisition). However, there is a large number of special regulations that explicitly exempt rights from registration (e.g. statutory pre-emption rights)

[15] § 12(2) Sentences 2 and 3 of the Conservation Compensation Ordinance state: "[...] Measures to be carried out on public land do not require any real security. Measures to be carried out on the property of the party causing an intervention generally do not require any real security."

[16] Municipalities (including Berlin) sometimes waive their preemptive purchase rights in the unplanned inner areas, among others. This form of waiver is mainly practiced where no centralized inquiry procedure has been established at the state ministry level. *Wasylow-Neuhaus*, 2022, (*supra* fn. 11, 432, 468), considers these general orders and prior waiver declarations to be unlawful.

[17] § 54 GBO: "The burdens resting on a property as such are excluded from registration in the land register, unless their registration is specifically permitted or ordered by law." The most important exceptions to this rule are public burdens in Bavaria and Brandenburg, which are not recorded in registers but rather in the land register. For the historical development of the regulation of public burdens, see *Bartels*, Öffentlich-rechtliche dingliche Rechte und dingliche öffentliche Lasten, 1970, 16 ff.; also see *Demharter*, GBO-Kom., 33. Aufl. 2023, § 54 sec. 2 and 4. Regarding the general issue of public burdens for real estate transactions, see Staudinger/*Gursky*, §§ 883-902 BGB — Allgemeines Liegenschaftsrecht 2, 2013, § 892 para. 69.

or, as in the case of compensation measures, construe statutory *in rem* securities without registration.

I. Statutory pre-emption rights

The basic type of all unregistered rights with third-party effect are statutory pre-emption rights. These refer to the general Civil code rules on pre-emption rights (§ 463 et seq. BGB), according to which the owner is obliged to inform the holder of the pre-emption right in the event of a sale and *„to notify the content of the contract concluded with the third party without delay“* (*lege speciales* in conjunction with § 469 sec. 1 BGB). The entitled party may then to exercise the pre-emptive right in a time frame of usually two months.[18] In agricultural and forestry law, the obligation to notify is secured by parallel public law authorisation obligations (GrundstVG).[19] Pre-emption rights in other sectors, such as urban development,[20] flood and coastal protection,[21] energy pipeline construction,[22] traffic law,[23] and nature conservation law[24] - as a rule - require concretisation through local statutes, planning approval

[18] In accordance with § 469 sec. 2 sentence 2 BGB, these deadlines are typically two months, with deviations in state regulations extending to three months (Baden-Württemberg) or four months (Thuringia). Criticism of these short deadlines can be found in *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 393 and 415.

[19] § 2 and § 35 sentence 1 of the GrdstVG. The entities entitled to a right of first refusal are regulated by state law. For example, in Lower Saxony, the Niedersächsische Landgesellschaft mbH, as the "responsible nonprofit settlement company," exercises the right of first refusal. The factual requirements of § 9 GrdstVG are interpreted narrowly. For instance, the Higher Regional Court of Oldenburg ruled (decision of November 23, 2011 — 10 W 3/11) that a granddaughter who was only in agricultural training already triggered the right of first refusal of the Nds. Landgesellschaft because she was not yet a "farmer" within the meaning of the law. The purchase was concluded at the documented low purchase price (§§ 1098, 464 sec. 2 BGB).

[20] § 24 (1) BauGB: "The municipality has a right of first refusal when purchasing land, 1. within the scope of a development plan, insofar as it concerns areas for which the development plan specifies use for public purposes or for areas or measures for compensation within the meaning of § 1a (3), [...]; 8. in areas according to §§ 30, 33 or 34, if a) there is an urban development problem within the meaning of § 136 paragraph 2 sentence 2 in connection with paragraph 3 [...]. In the case of number 1, the right of first refusal can be exercised already after the beginning of the public display if the municipality has adopted a resolution to establish a development plan [...]."

[21] §99a (1) WHG: "The states have a right of first refusal to properties needed for flood protection or coastal protection measures. [...] § 99a sec. 4 WHG: "The right of first refusal does not require entry in the land register. It takes precedence over contractual and state-law-based pre-emption rights with the exception of those in the field of agricultural and forestry land transactions and settlement matters." [...] Sec. 5: "At the request of the states, the right of first refusal may also be exercised in favor of corporations and foundations under public law."

[22] § 44a (3) EnWG: "In cases of paragraph 1 sentence 1 [CG: "on the areas affected by the plan approval procedure" "from the beginning of the interpretation of the plans [...] until the expropriation"], the project sponsor has a right of first refusal on the affected areas."

[23] §19 Allg. EisenbahnG, § 9a BFemStraßenG, § 15 BWasserstraßenG, § 8a LuftverkehrsG, § 4 MagnetschwebebahnG, § 28a PersonenbeförderungsG.

[24] § 66 Abs. 1 Bundesnaturschutzgesetz (BNatSchG): "The federal states have a right of first refusal to purchase land: 1. located in national parks, national natural monuments, nature reserves, or areas provisionally secured as such, 2. where natural monuments or objects provisionally secured as such are located, 3. where surface waters are located." [...]
Abs. 3: "The right of first refusal does not require registration in the land register. It takes precedence over contractual and statutory rights of first refusal except those in the field of real estate transactions and settlement.

decisions or ordinances which ultimately create transparency. An important exception to this transparency applies to surface waters; for these, the pre-emption right directly arises from § 66 sec. 1 no. 3 Federal Framework Nature Conservation Law (BNatSchG).

In practice, pre-emption rights are prone to disputes.[25] However, the comparatively high number of proceedings obscures the fact that statutory pre-emption rights, insofar as they are recognised by the parties, are often only the trigger for negotiations in practice, which ultimately lead to a waiver of the exercise of the pre-emption right and instead to the entry of a proprietary land burden (either a ´limited personal easement´ or a ´real charge´[26]).[27] There are two different constellations: Either the authority waives the pre-emption right and the purchaser (i.e. new property owner) accepts nature protecting obligations and agrees to secure them *in rem*. Or the authority exercises its pre-emptive right in favour of a "third party"[28] which acquires the property and accepts – vis-à-vis the public authority - the registration of an easement/covenant on the property.[29]

Legal practitioners are confronted with various uncertainties. It is often unclear whether there is a pre-emptive right to a property at all (*supra*: What is a "surface water", "built-up inner area" which triggers the emergence of the pre-emption right?). It has therefore been suggested that authorities remove the uncertainty by registering reservations (technically, a “Vormerkung” under § 883 BGB).[30] However, this is rarely practiced. As a rule, the notary makes an enquiry and requests a negative certificate.[31] In cases where these enquiries to the

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When ownership is acquired through the exercise of the right of first refusal, contractually established rights of first refusal expire. § 463 to 469, 471, 1098 paragraph 2 and §1099 to 1102 of the Civil Code apply. The right of first refusal does not extend to a sale to a spouse, registered life partner, or first-degree relative."
Abs. 4: "The federal states may, upon request, also exercise the right of first refusal in favor of public-law corporations, foundations, and recognized nature conservation associations."

[25] *Wasylow-Neuhaus*, 2022 (*supra* fn. 11), 414, 444, 447: The parties involved lodge appeals against the exercise decision in over 10 % of cases.

[26] Whereas previously (for historic reasons), there was a north-south divide (north: a preference for "personal limited easement"; south: "real charges"), the difference appears to be blurring. The (southern) Administrative Court of Regensburg reasonned in several judgements about the advantages of the "personal limited easement": Judgement of 17.12.2013 - RO 4 K 11.1548 para 110; Judgement of 26.10.1992 - RO 11 K 00.2143 para 18; Judgement of 29.09.1992 - RO 11 K 91.0599 – Natur und Recht (NUR) 1993, 346, 347.

[27] *Wasylow-Neuhaus*, 2022, (*supra* fn. 1), 419, 430, 440, 457.

[28] Due to § 66 sec. 4 BNatSchG (*supra* fn. 24); § 99a sec. 5 Federal Water Law (WHG) (*supra* fn. 21).

[29] In terms of positive law, the obligation to consent to the easement is set out in Section 26 sec. 5 sentence 3 BbgNatSchAG. *Wasylow-Neuhaus* suggests that this regulation be included in the BNatSchG (i.e. additional security for the fulfilment of obligations, either through easements and/or the registration of a conditional priority notice). In the case of a conditional priority notice, the conditional transfer claim is secured in the event that the owner does not fulfil his obligations, *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 470; on the admissibility of the conditional priority notice Heckschen et al./ *Evers*, Beck'sches Notarhandbuch, Beck, 7th ed. 2019, § 8 para. 25.

[30] *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 449 und 476.

[31] In praxis *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 416.

lower nature conservation authorities become excessive,[32] the authorities resort to other practices.[33] Centralised enquiry procedures at the ministry are deemed to be legally unproblematic.[34] In contrast, blanket waivers in advance[35] or presumption rules for areas not included in the public cadastre[36] meet with legal reservations.[37]

II. Securing Compensation and Offset Measures

The second large group of non-registrable, obligations with third-party effect are those for the implementation of compensation measures for impact mitigation under nature conservation law. § 15 sec. 4 sentence 1 BNatSchG[38] is limited to the unspecific requirement that the measures must be "legally secured".[39] Th concretisation is delegated to the discretion of the authority. The only stipulations are that the time period must be specified (§15 sec. 4 sentence 2 BNatSchG)[40] and that the measures must be recorded in a compensation register (§ 17 sec. 6 BNatSchG). Until today (July 2023), the compensation registers are only publicly accessible

[32] The reasons are often ignorance and careless reading of the provisions of state law (e.g. on the inner area) *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 432.
[33] On the inconsistent practice of the federal states *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 431 f.
[34] *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 432.
[35] To the extent that any exemptions are granted on a flat-rate basis, he considers this to be unlawful (ibid., 473).
[36] An implicit waiver effect was regulated in Berlin, for example, see Official Gazette Berlin of 20 January 2014, 243.
[37] *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 427, 465, 468.
[38] § 15 (4) BNatSchutzG: "Compensatory and replacement measures must be maintained and legally secured for the period required in each case. The maintenance period must be specified by the competent authority in the authorisation notice. The polluter or their legal successor is responsible for implementing, maintaining and securing the compensatory and replacement measures.".
[39] The regulation was introduced in 2009 in order to counter the enforcement deficit recognised at the time with regard to compensation areas, see Schlacke/*Schrader*, BeckOK-Umweltrecht, 2nd ed. 2017, BNatSchG § 15 Rn 49. The commentary literature calls for "a measure that goes beyond the determination to secure the success of the compensation in a legally binding and enforceable manner", ibid. para. 53.
[40] The literature has called for the immanent definition of the development goal (cf. § 15 Lütkes/Ewer/*Lütkes*, Bundesnaturschutzgesetz-Kommentar, 2011, para. 56. This is now expressly stipulated in § 12 sec. 1 sentence 2 BKompV: "The maintenance period is based on the duration required to achieve the compensation goal; as a rule, it does not exceed 25 years." § 12 sec. 2 sentence 4 BKompV: "Legal protection must be provided for as long as the adverse effects on the ecosystem and the landscape caused by the intervention persist".

in five federal states.[41] In practice, the standard safeguarding measure is the purchase of land;[42] until the 2010s, safeguarding by contract[43] was still considered to be sufficient.

When it comes to privately owned properties, real burdens or limited personal servitudes are usually registered for the sake of legal certainty, as the provision in § 15 sec. 4 sentence 3 BNatSchG, which states that the polluter is responsible for compensation and replacement measures, is considered not to be sufficient.[44] However, in the case of state-owned properties (even before the BKompV was issued), it became common practice to waive the registration of measures in the land registry.[45] This practice is now adopted by § 12 sec. 2 BKompV (2020)[46] and goes even further. Not only are measures on property held by the public hand exempt from any security requirement, but the provision extends the exception as a standard assumption to measures carried out on the sponsors´s premisses. A guideline for the implementation of the BKompV lists the following arguments for these exemptions:[47] The public sector cannot get insolvent, and compliance with existing compensation obligations can be expected.[48] However, security measures shall be registered once the sale to private parties is projected. For compensation measures developped on land owned by the project

[41] The registers are only publicly accessible in Hesse (Section 52 (2) HessNatG: "NATUREG"), Rhineland-Palatinate (Section 2 No. 3a LKompVzVO), Saxony-Anhalt (Section 18 II NatSchG ISA), Berlin (Section 19 (4) Nature Conservation Act Bln "FIS-Broker"), Schleswig-Holstein (compensation register). However, they do not function consistently and are structured according to different principles (partly limited to impact compensation measures; partly linked to water law). There are also eco-account registers, the mapping of which is limited to enhancement areas: § 2 sec. 4 HbgÖkoKontoVO and Saxony. In Bavaria, the right to information in the Compensation Ordinance is limited to municipalities for measures on their municipal territory (Bavaria: § 15 BayKompVO).

[42] *A. Mengel et al*, Methodology of intervention regulation in a nationwide comparison, Federal Agency for Nature Conservation (Bundesamt für Naturschutz, BfN), 2018, 289.

[43] The explanatory memorandum to Section 15 BNatSchG (BT-Drucks 16/12274, 58 of 17 March 2009) considers lease agreements to be sufficient if the state itself is the project sponsor (and there is also sufficient temporal security in the event of termination; see Frenz/Müggenborg/ *Guckelberger*, Bundesnaturschutzgesetz - Kommentar, 2nd edition 2016, Section 15 para. 88. Lease agreements are not sufficient for all others, *Schrader*, 2017, (*supra* fn. 39), BNatSchG § 15 para. 53. On the practice of lease agreements *Mengel et al*, 2018, (*supra* fn. 42), 290.

[44] In individual federal states, there are special rules for property law protection in agricultural law, for example for "production-integrated measures" for changing areas in "pledged area models" (NRW, Bavaria), *Mengel et al*, 2018, (*supra* fn. 42), 297.

[45] Confirmed by personal information from Susanne Boldt, Upper Nature Conservation Authority Hesse (Kassel), 2.8. 2023.

[46] Text *supra* fn. 15.

[47] Federal Agency for Nature Conservation (BfN) and Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (ed.), Handreichung zum Vollzug der Bundeskompensationsverordnung, 2021, 93 (download: https://www.bfn.de/eingriffsregelung, last accessed 24 May 2023).

[48] The sweeping nature of this statement is surprising. The lack of long-term safeguarding is considered the central reason for the enforcement deficit of compensation measures, *Koch*, § 15, in: Schlacke (ed.) GK-BNatSchG, 2017, para. 29. Only recently have Deutsche Bahn and the state road construction authorities also made efforts to prevent further degradation of the compensation areas under their control by setting up (internal, non-public) registers such as FINK and KoKa (for FINK, see: https://www.deutschebahn.com/resource/blob/264730/6979f dacld41997120921a5214d1bb4e/fink handbuch-data.pdf; for KoKa only Saxony: https://www.listsachsen.de/fis_kisskoka.html, last accessed 29 June 2023). The success of these measures has to be determined in the future.

sponsor, there is no need for proprietary security, since all relevant provisions are sufficiently described in the approval. This is at least the case as long as the respective provisions are sufficiently precise in the approval decision. The argument is that compensation obligations apply to the legal successor of the addressee of the compensation measure decision by law, as stipulated in § 15 sec. 4 sentence 3 BNatSchG. The next paragraph in the guideline is rather vague: "*The fundamental obligation for legal security pursuant to § 15 sec. 4 sentence 1 BNatSchG remains unaffected by the waiver of real security*."[49] Unlike statutory pre-emption rights, however, a legal practitioner cannot determine such property burdens by inspecting the records in the case of aquisition. Similar to non-registered pre-emption rights (see above "surface waters") and in states without publicly accessible compensation registers, a legal practitioner can only clarify the legal situation by making inquiries to the authorities. But unlike default cases in nature conservation where a good natural condition may indicate a protection status according to BNatSchG, there is usually no suspicion of the existence of a land burden in the case of compensation measures - let alone for enhancement areas. If a measure is forgotten over time (a common occurrence[50]) and the seller does not provide any indications, there is a high risk that an inquiry will not be made and the buyer will not be informed of the obligation to implement compensation measures.

Due to the manifold enforcement problems with compensation measures, a majority of federal states promote the cooperation of project sponsors with land agencies and/or qualified nature conservation companies. Five federal states grant a liberalising effect for the project sponsor and allow the full transfer of the administrative duty to the contractor (i.e., the certified organisation).[51] Four out of five of these states designed the passing on of the duty as a decision of the project sponsor which needs to be notified to the authority; only one state submits the decision to a prior approval (Saxony-Anhalt). In Brandenburg, the transfer of duty is bound to a contract with a certified entity, the contract must be long-term and be part of the approval decision. Usually, no entry of a land burden in the title register will be required. This regime is perceived as advantageous for the protection of the environment, because it allows the creation of biotope networks using land pools and the maintenance is carried out by qualified personnel. However, transparency is only ensured once an entry is made in the land

[49] These rules come as a surprise, since in the cross-state empirical study by *Mengel et al*, 2018, 292, the representatives of the authorities reported deficiencies in the implementation of avoidance and compensation areas.
[50] See also *Schrader*, 2017, (*supra* fn. 39), BNatSchG § 15 para. 49.
[51] § 5 Bbg. FPV (Brdb GVBI Part II, Nr. 8 v. 19.3.2009, 111); § 14 ÖkokontoVO-MV v. 22.5.2014; § 11 S. 2 HbgNatSchG; § 5 Abs. 6 S. 2 HessKV, § 7 Abs. 3 NatSchG L-SA i. V. m. KompPflÜtrST (2011).

register or a cadastre. Yet, those registrations have remained an exception.[52] The exchange of the parties being obliged to compensation measures will only be known to the competent authority (and only if notification duties are complied with).

The situation becomes even more complicated where compensation registers and so-called ´eco-points´ or ´eco-accounts´ (tradeable compensation units under mitigation banking schemes) are linked. Because eco-accounts, as far as they are established on the basis of state law pursuant to § 16 BNatSchG, must be publicly accessible so that the rights are tradable.[53] Where eco-accounts are established, compensation measures are not necessarily publicly registered and accessible.[54] So-called eco-points (units under mitigation banking schemes) are awarded for (permanent) amelioration measures and credited to the project sponsor. The sponsor can not only offset the points for his or her own business later in time, but can sell them (§ 16 sec. 2 sentence 1 BNatSchG). This potentially means frequent register changes through "entry and exit booking." This public-law offsetting claim is either transferred directly by "assignment" (§ 398 BGB) or is regulated as a preliminary agreement for the subsequent transfer of a right by purchase (§§ 453, 433 BGB), depending on the decision of the respective state. After the measure is carried out, it becomes credited as a compensation measure, the eco-units get deleted from the eco-account and get recorded as compensation measure in the compensation registry. Due to the identical situation, § 15 sec. 4 sentence 2 BNatSchG (third party effect) will also apply in these cases. Yet, which rules apply to incorrect register entries? Unlike for CO_2 emission rights in § 7 sec. 4 TEHG, no public faith (thus no good faith acquisition) is stipulated for these registries. The recording and deletion of compensation measures are considered as "administrative internal measure without external effect against any land owner."[55] Against this background, one wonders how outsiders can learn about measures with third party effect, how they can ascertain the legal status of land, and which due diligence obligations might arise.

C. Burdenfree good faith acquisition of public-law property charges?

[52] Occasionally, the authority does have an easement registered in its favour. However, this is not done automatically, especially as a certified land agency often looks after state-owned areas for nature conservation, on which - according to current practice - no registrations are regularly made.
[53] *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 258 m. w. N.
[54] Cp. only BaWü, Bay and NRW. For the transfer of (publicly accessible) eco-points to (non-publicly accessible) compensation measure registers: § 9 sec. 2 sentence 3 ÖKVO BaWü, § 16 sec. 4 BayKompV, § 6 sec. 4 ÖkokontoVO NRW.
[55] *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 259 with reference to *C. Tausch*, Art. 6b, Kommentar zum BayNatSchG, 2007, para. 14 (commentary on the previous 2011 version of the current BayNatSchG of 2022).

All this begs the question of what is the legal effect of unregistered nature conservation or agricultural obligations: Can immovables be burdenfree acquired in good faith? Do those registers, like the (controversial) presumption effect in the case of pre-emption rights, exert the presumption that land is or is not burdened with nature conservation (sic: impact mitigation) obligations? These records clearly lack the legal status of construction charges registers because most of them are only managed as internal files. For this reason, these records cannot provide good-faith protection comparable to public registers. Consequently, a good-faith provisions akin to § 7 sec. 4 of the German Carbon Allowances Trading Act (TEHG) is missing.[56]

This suggests that good-faith protection depends on the qualification of obligations as "public" or "private".[57] If a compensation measure is classified as a public charge (§ 54 GBO), a public law construction burden (§ 83 Muster-BauO) or a right similar to a statutory pre-emption right[58], then burdenfree good-faith acquisition would be excluded.[59] However, to the extent that a measure is qualified as a private law agreement for which registration is constitutive and to which general property law is applicable, property titles could be acquired burdenfree in good faith under § 892 sec. 1 sentence 2 BGB as long as the burden is not registered and the buyer acts in good faith. The words ("also apply to successors in title") in § 15 sec. 4 BNatSchG were only added in 2009. The obligation to secure a compensation meaure was only introduced in 2002 and did not contain these words.[60] In other words, the Federal legislator left it to the state legislators to decide whether the security is implemented

[56] § Section 7 (4) TEHG of 21 July 2011 (Federal Law Gazette I, 1475): "If an allowance is entered in the emissions trading register for someone, the content of the register is deemed to be correct. This does not apply to the recipient of issued allowances if he is aware of the inaccuracy at the time of issue".

[57] This line of demarcation was used in the 1960s to consider the property law effect of public law rights in rem and public charges in rem, see 1. F. Bartels, 1970, (*supra* fn. 17), 147. This distinction also applies analogously to ecopoints, which in some federal states are assigned directly (in this case, however, the qualification as a public-law set-off claim would be inappropriate; instead, they would be sui generis asset items under property law) or as a public-law set-off claim, the allocation of which the parties can only agree on in advance under the law of obligations and the seller promises to submit an application for set-off in favour of the buyer. The literature therefore recommends making the purchase price payment subject to a condition precedent, see *Wasylow-Neuhaus*, 2022, (*supra* fn. 11), 277 with reference to Frenz/Müggenborg/*M. Ohms*, BNatSchG, 2nd ed. 2016, § 16 para. 47.

[58] These pre-emptive rights exist in principle by law; the obligation to register them is often excluded by way of declaration (*supra* section 2a), after there was a lively dispute in the 1960s about the unencumbered acquisition of properties with unregistered municipal pre-emptive rights, see *M. Lutter*, Die Grenzen des sogenannten Gutglaubensschutzes im Grundbuch, AcP 164, 1964, 122, 135 with further references.

[59] Staudinger/*Gursky*, 2013, (*supra* fn. 17), § 892 marginal no. 69 speaks of "good faith resistance".

[60] Wording of §18 sec. 5 sentence 1 BNatSchG (as counted at the time): "The federal states shall issue further regulations in accordance with §§ 19 and 20 and to ensure the implementation of the measures to be taken under § 19".

by public-law or private-law instruments.[61] This was systematically consistent, since depending on each state´s tradition, public law property burdens are registered in the land title registry or in separate registers. These are not considered to be part of the real estate transactions.[62] The (implicit) reference to the regulatory authority of the states implies that the legal nature of the charge is to be classified by the respective state law. Even the 2009 amendment did not bring about a uniform federal regulation. The chosen formulation ("also apply to successors in title") is based on the provision for building restrictions in § 83 sec. 1 sentence 2 of the Model Building Ordinance (Muster-BauO).[63] Also this provision distinguishes between public and private construction restrictions. If not provided for by public law, bilateral agreements between the owner and the supervisory construction authority can have third-party effects if these get recorded in the (public) land charges register ("Baulastenverzeichnis").

If the model was the (public) land charge, which is registered in the public cadastre or (in Southern Germany) in the land title register, its nature would be legally binding on the property and "good faith resistant". Such a burden with third-party effect does not necessarily require an entry in the land title register, but must be publically noticeable, either by entry in another public register or, like pre-emption rights (see above), become "public" in another way (through an entry in public planning or through the objective, legally determined location of the property). However, these conditions are not met for compensatory measures. A cogent public-law nature cannot necessarily be derived from § 15 sec. 4 sentence 3 BNatSchG. Today, private law registration in the land register is the standard; for a long time, a private maintenance contract was held to be sufficient for "security". Conversely, § 15 sec. 4 sentence 3 BNatSchG differs from any other model of private building restriction agreements in two fundamental respects. Firstly, this (Federal) rule does not demand registration. This is consistent with the federal order since building charges fall into the legal competence of the

[61] Explanatory memorandum to the law in BT-Drucks 14/6378 of 20 June 2001, 48: "Possible security regulations include, for example, those on the establishment of compensation registers or on entries in lists of building charges or security in rem."

[62] In accordance with the division of competences under the Basic Law: Art. 72 sec. 3 no. 2 GG "nature conservation" (without general principles) (concurrent federal legislation with power of derogation; before 2006 "framework legislative competence"), Art. 74 sec. 1 no. 1 "civil law", no. 18 GG "urban land use", no. 29 nature conservation (general principles) (concurrent federal legislation).

[63] Building encumbrances, list of building encumbrances: § 83 MBO "(1) 'By declaration to the building supervisory authority, property owners may assume obligations under public law to do, tolerate or refrain from doing, tolerating or refraining from doing something on their property which do not already arise from public law regulations. 2 Notwithstanding the rights of third parties, building encumbrances shall become effective upon entry in the register of building encumbrances and shall also have effect vis-à-vis legal successors. (2) The declaration pursuant to paragraph 1 must be made in writing; the signature must be publicly notarised or made before the building supervisory authority or recognised by it […]".

states. The fact that there is no "Model Compensation Ordinance" similar to the Model Building Ordinance does not change this. Secondly, nature conservation measures differ from "agreements" in the (public) construction charge register in that the actual order about compensation measures is an additional administrative act (§ 15 sec. 2 BNatSchG) which precedes registration. The law separates the administrative obligation to compensate and the obligation "to maintain and secure" which is imposed on the "project sponsor and their successors in title" (§ 15 sec. 4 BNatSchG). While the measure may have been proposed by the project sponsor, the decision about the compensation measure is not an "agreement" or "administrative contract", but an administrative act. The responsibility to secure the measure is based on this act, affecting both the project sponsor and their successors in title. Yet, it is not clear which “successor in title” is meant. Is it the successor of the allowance to impair the environment in the first place or is it the successor in title to the land on which the compensation measures are realised? Therefore, the bare comparison with the model of public building charges does not allow a clear qualification as public or private.

The legislative record for § 15 sec. 4 sentence 3 BNatSchG suggests that the federal legislator in 2009 intended a joint and several liability provision.[64] The idea was that the obligation should be doubled if the project sponsor sells the real estate. This legal construction mirrors the public law doctrine of the double responsibility of the actor and the owner. Yet, the conception of the Federal Ordinance of 2020 (BKompV) seems to be slightly different. The justification for § 12 sec. 2 sentence 2 BKompV refers to the fact that a real burden is not necessary because it is already covered by § 15 sec. 4 sentence 3 BNatSchG.[65]

As a result, § 15 sec. 4 sentence 3 BNatSchG turns out to be a rather peculiar norm. The order about the compensation measure under § 15 sec. 2 BNatSchG has a single addressee, namely the project sponsor who causes the impairment to nature and usually realises the mitigation measure at a different location. This person is also subject to the obligation to act (to "maintain" and "secure") under § 15 sec. 4 sentence 1 BNatSchG, related to the designated property. The responsibility to secure also applies also to the successor in the title.[66] Yet, the doctrinal relationship between these two paragraphs is unclear. On the one hand, § 15 sec. 2

[64] BT-Drucks 16/12274 of 17 March 2009, 58: "As the legal successor of the polluter is also responsible for the fulfilment of the compensation obligations in accordance with sentence 3, the competent authority can hold both parties liable if the compensation measures have not been properly implemented.".
[65] BfN-Guidance, 2021, (*supra* fn. 47), 93. The doctrinal idea is that securing *in rem* is not necessary for land which is owned by the project developer if the corresponding provisions in the authorisation notification are sufficiently specific.
[66] This extension of responsibility applies to universal succession and special succession (whereby the good faith protection of the German land register only applies to legal transactions).

and sec. 4 BNatSchG could refer to "the same" basic obligation, or they could regulate "separate" obligations of different quality. The federal ordinance 2020 probably assumes that they refer to "the same" basic obligation. It interprets § 15 sec. 4 sentence 3 BNatSchG as a statutory extension of the legal effect of the administrative act to "its successors in title". This "third-party effect" of the administrative act based on § 15 sec. 2 BNatSchG seems to be what the ordinance is referring to when it waives the duty to secure *in rem*. Presumably, this is also the conceptual idea of representatives of authorities of those federal states which provide for a releasing effect when the project sponsor concludes a contract with a (certified) land pool. They also argue that the responsible party for the compensation measure can be identified from the administrative act which is available at the (nature conservation) authority.[67] However, this construction most probably does not correspond to the intention of the federal legislator in 2002 (see above), who wanted to separate the obligations according to the division of competences between the federal and state governments. § 15 sec. 4 sentence 1 BNatSchG establishes the obligation to secure according to state law. § 15 sec. 4 sentence 3 BNatSchG divides the obligation in case of succession. According to the legislative reasoning, the "or" does not imply a chronological, successive responsibility ("first the originator, then the successor in title"), but an "alternative" responsibility. This makes clear that not simply the successor of the administrative act is meant, but rather the successor of the property title to the land. With regard to the constitutional division of competences, the federal legislator in 2009 could not regulate more comprehensively.

The construction as a double obligation is more convincing. A security obligation which is primarily focused on a plot of land should (also) be linked to the property title. The way how the Federal legislator has formulated the Federal Nature Conservation Act not only preserves the division of competences between the federal and state level. The language also "objectifies" the security obligation, similar to a modern operation allowance for industrial facilities. While those permits grant a sequential entitlement in time regardless of who runs the site, the security obligation entails obligations with regard to the plot of land where the conservation measures are realised that are decoupled from the permit and decision on the conservation measure. In this sense, the measure order has a downstream regulatory effect on private law relations.[68] Whether the security is implemented in private law or public law may

[67] (Anonymous) representative of an area pool in Brandenburg, interview 16 June 2023.
[68] This doctrine is called in German „privatrechtsgestaltende Wirkung“, see *Tschentscher*, Der privatrechtsgestaltende Verwaltungsakt als Koordinationsinstrument zwischen öffentlichem Recht und Privatrecht, DVB12003, 1424.

be left to the state legislator. However, if the security is implemented in private law, it must comply with the private law framework.[69] This stratification corresponds to the core of compensation and replacement measures, which already rest for their own sake on the permit.[70] Article 15(4) BNatSchG adds a third regulatory level for the security of the compensation measure on that property where it gets realised. This is consistent because securing the measure over time must separate the original measure addressees from the property owner and also obligate the latter. This obligation remains "public law-rooted" and therefore cannot be shaken off by bona fide acquisition. The purpose of Article 15(4) sentence 3 BNatSchG is twofold: it not only cuts off the argument for the successors in the land property title that they are not recipients of the decision, but also that they did not know anything about the obligations on the property. However, this design with regard to the piece of land must be made public either through public registers or the land title registry. This is because ´compensation real estate´ is not obviously burdened.

This leads to the core question: Can the state waive the publicity of property-related obligations?[71] In other words, can the state intervene in land title transactions in this form? These questions are not new. Marcus Lutter has already argued for municipal pre-emption rights which are legally prescribed but not registered that burden-free bona fide acquisition must be possible.[72] His constructive argument is the strong traffic protection granted by the German land title register,[73] which in principle is to the detriment of the materially entitled party.[74] More importantly for *Lutter*, in the event of the exercise of an (unregistered) statutory pre-emption right, subordinate creditors lose their rights due to the third party effect of the statutory pre-emption right.[75] Jurisprudence did not adopted this view, despite the fact that the state strongly interferes with the real estate market. Gursky has explained this by arguing that

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[69] OLG Munich, decision of 13 February 2019 - 34 Wx 202/18, elaborating the principle of certainty under property law in the case of registered easements and real charges which secure compensation measures under nature conservation law.

[70] In German „Huckepackverfahren“ (piggyback procedure), in more detail *Godt*, Haftung für Ökologische Schäden, 1997, 220.

[71] As advocated *supra*, the competence to regulate the security of the compensation measure lies with the state legislator. If one wishes to follow the reasoning of the federal legislator of the BKompV that the third-party effect already follows from § 15 sec. 4 sentence 3 BNatSchG, the waiver would fall into the competence the federal government. Yet, even this assumption cannot exempt land burdens from the publicity principle of property law.

[72] *Lutter*, 1964, (*supra* fn. 58), 122, 135.

[73] Constructive difficulties of (abstract formal) commerce protection and (individual) trust protection drive *Lutter* (*supra* fn. 58), see there fn. 3-6. Note the difficulties in finding the proper terminology (there fn. 3) ("irrefutable presumption"), 124 ("objectified trust" and "fiction").

[74] With reference to Westermann, *Lutter* argues (*supra* fn. 58), 137: "Non-registration is, where the burdens affect all pieces of land equally (e.g., property taxes), generally tolerable; however, the lack of good faith protection affects the system, and appears extraneous to the transfer regime of immovables."

[75] A construction paralleled to the German ´Vormerkung´, *Lutter*, 1964, (*supra* fn. 58), 137.

a strong protection of good faith would contradict the public-law character of these burdens.[76] Yet, a discomfort persists,[77] especially where transparency is possible but not established.

Under constitutional reasoning, it is crucial whether the burden mirrors the "situation of the piece of land" that the successor in title must accept as a given. The conservation measure is constitutive for the administrative allowance, so is the security for the compensation measure on a separate plot of land. The security is time limited to the extent that the impairment and the conservation measure last. The conflict between nature conservation on the one hand and the commerce protection in real estate (here: good faith acquisition) emerges through the temporal dynamics.[78] The land determined for the compensation measure may need to become upgraded in terms of nature conservation (the development goal is stipulated in the administrative decision, but the obligation is not evident to a bona fide purchaser if it is not registered) or the maintenance obligation was not or not sufficiently fulfilled (thus, the quality degraded over time). In both cases, the purchaser cannot identidy the burden, neither by an inquiry of the land itself, nor by regulation. However, a real estate regime that relies on publicity as a systemic cornerstone and binds real estate transactions to land registries and cadastres, the waiver of transparency (whether by the legislator because it does not set up a cadastre or does not specify disclosure obligations, or by the authority because it waives a land register entry) does not remain without effect on third parties. The lack of transparency is exacerbated where measures and administrative decisions, such as compensation measures and eco-accounts, diverge spatially and in time. The split multi-level regulation on the federal and state level adds to additional legal uncertainty.

For these reasons, it can be argued that the legislator did not adequately fulfil its duties to regulate conflicts at hand. It did not create a legal framework that installs the necessary transparency[79] which secures the property transfer against fraud.[80] This calls for regulatory improvements, either by way of comprehensive compensation measure registries under state law in parallel to public land charge registers, or by way of a federal framework that provides for entries in public registers. The recent regulation in §12 BKompV further deepens existing legal uncertainties and runs counter to the interests of both real estate commerce protection

[76] *Gursky*, 2013, (*supra* fn. 17), para. 69.
[77] *Gursky*, 2013, (*supra* fn. 17), para. 69.
[78] Temporal dynamics have always caused problems. In this regard, technological and natural change are not dissimilar. On technological change with regard to easements, see *Lutter*, 1964, (*supra* fn. 58), p. 156 and further references therein.
[79] Compare the counter-current in neighboring countries with registers that only have "relatively" binding effects (France) or the recently introduced registers (UK) that make environmental burdens subject to registration, see Art. 132-3 of the French Code de l'Environnement (2016); Chap. 30, Part 7, § 120 Environment Act 2021.
[80] A decrease in transparency, as is well-known, leads to increased transaction costs.

and environmental protection. As a minimum, § 12 sec. 2 sentence 3 BKompV should be narrowly interpreted. The waiver presumption may only apply to situations where compensation measure is related to one, not seperable plot of land owned by the project developer which is *essential for its operational business* ("betriebsnotwendig" in terms of tax law). Where the compensation measure is related to several or separable plots of land, especially if *not essential for the operation* ("nicht betriebsnotwendig"), the legal presumption of § 15 BNatSchG can no longer be assumed, and the entry of a security right to the land register is required.[81] Ultimately, the existing lack of transparency also affects the legal representatives, who must extend their efforts to investigate[82] and who face increased liability risks.

D. Duty to Inform and Professional Liability

Against this backdrop, questions arise regarding the notarial duty to inform and professional liability under § 19 Federal Code for Notaries (BNotO).[83] For statutory pre-emption rights, approval requirements, registered easements, and publicly accessible registers of compensatory areas, the legal situation is clear: §§ 18 and 20 Federal Notarisation Act (BeurkG) require the notary to inform the parties of a real estate purchase contract about approval reservations and the possibility of statutory pre-emption rights; he/she has to record this notification in the deed. A missing note does not affect the validity of the transaction, but may shift the burden of proof against the notary in liability cases.[84] The notary must only inform about further details such as requirements, procedure, and significance of the pre-emption right if the general duty to inform under § 17 BeurkG suggests to do so.[85] If the parties in practice want to avoid a potential pre-emption scenario (such as through a

[81] This interpretation for § 12 Abs. 2 S. 3 BKompV is suggested by Notary J. Garbe-Emden, communication dated July 24, 2023. The author is grateful for the input.
[82] Just as acquisitive prescription, known as "radical loss of rights," has indirect effects, forcing all parties involved, especially the land registry office, to exercise the utmost precision and caution (Lutter, 1964, *supra* fn. 58, fn. 14), so does the opaque preservation of rights necessitate increased scrutiny. These encumbrances significantly impact the value of the property.
[83] Regarding the subsidiarity of liability according to § 19 sec. 1 sentence 2 BNotO, refer to Ganten/Hertefflöstmann/*Ganten*, BNotO, 4th edition 2018, § 19 para. 2235; as a prerequisite for liability, the submission of this information is essential for the coherence of the lawsuit, see Heinemann/Trautrims/*Reinhardt*, Notarrecht, 2022, § 19 para. 23.
[84] Haug/Zimmermarin/*Eggenstein*, Amtshaftung des Notars, 4. edn. 2018, para. 544; Heckschen et al./*Hogl*, 2019, (*supra* fn. 29), § 35 para. 82G.
[85] Grziwotz/Heinemann/*Heinemann*, BeurkG, 3. edn. 2018, § 20 para. 5.

dissolving condition), the notary is obliged to inform about § 465 BGB.[86] Since it is usually not known whether a pre-emption right exists or is exercised in individual cases, the notary can only indicate the possibility and may be instructed by the parties to obtain a negative certificate.[87] The notary determines property burdens which are registered in the land title registry based on his duty to inspect the land title register under § 21 BeurkG. There is no obligation to inspect the public land charge registries kept by the lower supervisory construction authorities (which exists in all federal states except Bavaria and Brandenburg),[88] (§ 54 GBO). In cases where the notary cannot be sure that the parties are aware of possibly existing public burdens, "it is advisable to point out the possibility to the parties."[89] The same applies *mutatis mutandis* to real estate which might be registered as compensation measure area.

A maiore ad minus, one cannot assume an independent notary duty to determine unregistered compensation obligations. However, the notary is obligated under the general advisory and instructional duty of § 17 BeurkG to counteract legal errors.[90] If the consultation brings to light that the parties have different ideas about the possible uses of the land, one party may be mistaken about the legal use restrictions. Inthat case, the notary must provide a hint and has to record it. He is responsible for ensuring that the negotiation purpose is fulfilled. This is especially the case when case law requires a design that secures performance and reciprocal duties.[91] While conselling on economic consequences (including the price) does not belong to the notary's obligations[92], those questions become part of the advisory dutes where legal restrictions can be lifted. However, it remains the duty of the parties to present their ideas; the notary does not need to investigate.[93] But the notary must check whether the declarations of intent are coincident and are correct with regard to the disclosed facts.[94] Under certain

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[86] Grziwotz/Heinemann/*Heinemann*, BeurkG, 3. edn. 2018, § 20 para. 5. § 465 BGB stipulates that agreements are invalid which make the purchase dependant on the condition that the pre-emption right is not used or grant a right to withdraw in case of its excerise.
[87] Heckschen et al./*Kindler*, 2019, (*supra* fn. 29), § 31 para. 167; *Winkler*, BeurkG, 20. edn. 2022, § 20 para. 53. This duty emerges in any case when it is evident that a pre-emption right exists, Ganter/Hertefflöstmarm/*Ganter*, Handbuch der Notarhaftung, 4. edn. 2018, para. 1220.
[88] Prevailing legal opinion, see OLG Schleswig NJW-RR 1991, 96; Ganter/Hertel/Wöstmann/*Ganter*, 2018, [*supra* fn. 84]), para. 903; for the deviating opinion see: *Masloh*, Zivilrechtliche Aspekte der öffentlich-rechtlichen Baulasten, NJW 1995, 1993 („überholt" 1996).
[89] Heckschen et al./*Hogl*, 2019, (*supra* fn. 29), § 35 para. 82G. *Masloh*, 1995, (*supra* fn. 88), even deduces from the BGH decision of May 17, 1994, NJW-RR 1994, 1021, that there is an obligation to inspect, about which the parties must be informed, and deletion proposals must be made upon request.
[90] For case law see *Winkler*, 2022, (*supra* fn. 87), § 17 para. 247.
[91] *Winkler*, 2022, (*supra* fn. 87), ibid.
[92] To the economic significance and appropriateness of the transactions, he/she does not have to pay attention, Heckschen et al./*Hogl*, 2019, (*supra* fn. 29), § 35 para. 82.
[93] *Winkler*, 2022, (*supra* fn. 87), § 17 para. 213.
[94] *Winkler*, 2022, (*supra* fn. 87), ibid.

circumstances, he/she may be obliged to uncover the motives if this is the only way the intended purpose can be revealed.[95] The notary has to identify the factual core.[96] Evidently, this raises challenges for notaries. Unlike with statutory pre-emption rights, there is also no regulated application procedure (or analogously applicable rules) for compensation measures. Additionally, in practice, the state (unlike with pre-emption rights) has nothing to lose and authorities may take their time. Under these conditions, what is an appropriate decision time? Again, there is considerable legal uncertainty.

E. Conclusion

The current legal uncertainty with regard to non-registered, environment-related property burdens strain real estate transactions. This shortcoming is currently evident when compared with the reorganization of environmental easements/conservation covenants in European neighboring countries, all of which - despite lacking (UK) or weaker (F) land register traditions - provide for mandatory register entries. The foreseeable EU Nature Restoration Act[97] will demand additional efforts from Member States to reduce systemic deficiencies in the enforcement of nature conservation law. Against this backdrop, the waiver of land register entries by § 12 BKompV, which exacerbates existing legal uncertainty, is unacceptable. § 12 sec. 2 sentence 3 BKompV should be abolished without replacement in a timely manner in order to enhance transparency regarding privately-owned land burdened with environmental obligations. In the medium term, transparency should be created for all nature conservation-related property burdens, either under state law through comprehensive registers for compensation measures or through federal model regulations that provide for public registers alongside entries in the land title register. Additionally, consideration should be given to supplementing the German Civil Code with a new § 1093a BGB, which transparently regulates easements on properties for the benefit of the environment,[98] regardless of whether the entry follows a public law obligation or whether the easement was privately agreed upon.

[95] *Lerch*, BeurkG, 5. edn. 2016, § 17 para. 13.
[96] *Lerch*, BeurkG, 5. edn. 2016, ibid.
[97] The Council and the European Parliament reached agreement on a common text on 8 November 2023, see press release from the EU Parliament: https://www.europarl.europa.eu/news/en/press-room/20231031PRO8714/eu-nature-restoration-law-meps-strike-deal-to-restore-20-of-eu-s-land-and-sea.
[98] The discussion about the regulatory need of such an additional norm will follow in a separate article.