The Influence of the Law of Succession and Company Law on Business Succession – The Austrian Way

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Abstract Family companies are of great importance in Austria. Eighty percent of all partnerships and companies are family enterprises in Austria (Bundesminister für Wirtschaft, Familie und Jugend, Mittelstandsbericht 2012, 70 ff). They contribute to the job creation and economic achievement to a large extent. So family enterprises, which are resident in Austria, employ 70 % of the employees (Mandl, Obenaus 2008: 5; http://www.ots.at/presseaussendung/OTS_20090423_OTS0188/familienunternehmen-spielen-eine-wesentliche-rolle-in-der-oesterreichischen-und-europaeischen-wirtschaft-bild). Family enterprises are not only restricted to small companies. The share of middle- sized family enterprises is about 67 %. Fifty percent of the large companies are family enterprises (Bundesminister für Wirtschaft, Familie und Jugend, Mittelstandsbericht 2012: 72).

The Austrian succession law and the company law have different goals: The succession law accepts the testator's will, although there is a boarder: Some of the deceased's family members have a claim for a compulsory portion against the heir, which can be dangerous for the inherited company because of a splitting effect. The company law on the other side wants to unite the different interests of the various partners of a company to ensure the company's existence and progress.

These controversial aspects lead to the questions, first if it is possible to inherit shares of a partnership or a company and second how the testator can fulfil the wishes of the claims for compulsory portion without risking the liquidation of a business.

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1 Business Succession

According to the calculations of KMU Research Austria for the period between 2012 and 2021, there will be a takeover of 52,500 enterprises in Austria. This number corresponds to about 33 % of small and middlesized companies (*kleine und mittlere Unternehmen, KMU*) in Austria.[1]

The overwhelming number of these 52,500 enterprises, which will face a takeover, are family enterprises.[2]

For the years 2012 till 2021 according to the statistics of KMU Research Austria 6,700 takeovers are to be expected per year. The share of family internal succession decreases. The takeover of the company management within the family circle decreases too. Only 2/3 of the partnerships and companies are carried on by family members in the management. As reasons for the reduction of family influence the decreasing number of children in the families, the different background of education and the different professional orientation of the children in comparison to their parents' have to be mentioned. The difficulty to find a family internal successor has increased.[3]

Because of the decreasing number of children and the different professional interests of children of entrepreneurs or company-shareholders, 50 % of the takeovers will take place with family external persons.[4] While in 1996 still 75 % of the companies transferred the management within the family, only 50 % of the management activities were continued by the children in 2006. Fifteen percent of the partnerships and companies were managed by long-term staff members. In 9 % of the cases external public executives were called to the conduct of business.[5]

The succession within the companies, that is the continuation by the public executives or a leading employee will decrease according to tendency[6]; about 8 % of all takeovers of companies (=16 % of the family external takeovers) are executed by a Management Buy Out. The sale to company-external persons dominates with 42 %, followed by leasing of about 28 %. The rest are other constructions.[7]

1.1 Family Business

The term "family business" is not legally defined by the Austrian corporate law. Yet in some of the corporate law regulations the family is referred to or consequences of corporate law are connected with the institution of a family. The legal concept of the

[1] Kalss and Probst 2013: 3.

[2] Kalss and Probst 2013: 3.

[3] Bundesminister für Wirtschaft, Familie und Jugend, Mittelstandsbericht 2012, III – 386 Blg 24. GP, 72; Steiner and Voithofer 2011: 57, 61.

[4] Kalss and Probst 2013: 698.

[5] Kalss and Probst 2013: 699.

[6] Bundesminister für Wirtschaft, Familie und Jugend, Mittelstandsbericht 2012, III – 386 Blg 24. GP, 72.

[7] Kalss and Probst 2013: 699.

family according to §§ 40f ABGB isn't used thereby. Especially also in the public company law (*Aktiengesellschaftsrecht*) there are references to family enterprises, which have to be interpreted differently because of a different purpose.

1.1.1 Examples

- Bringing in of a family enterprise into a private limited company (*Gesellschaft mit beschränkter Haftung, GmbH*)[8]: According to § 6a para 2 GmbHG a company, which has existed for 5 years at a minimum and only its last possessor, his spouse and his children should belong to it as shareholders, may be brought into a company for the purpose of continuation. In this case the duties to bring in the primary deposit (*Stammeinlage*) are reduced.
- Post–foundation agreement (*Nachgründungsvertrag*): According to § 45 para 1 public company act (*Aktiengesetz, AktG*),[9] post-foundation-agreements are subjected to special regulations, if they are contracts of a company with establishers, who want to bring in the investments or other objects of property for a compensation of at least 10 % of the nominal capital in the company. These agreements need the consent of the general assembly (*Hauptversammlung*) and an examination of an extern examiner. These strict rules are also valid for contracts between the company and close relatives of the founder.
- Incompatibility: In the private foundation according to the private foundation act (*Privatstiftungsgesetz*, PSG)[10] the conditions of incompatibility for institutional functions are especially regulated (§§15, 20 and 23 PSG): The beneficiaries of the private foundation should not have the possibility to influence the private foundation's management board decision about money and benefits, so the beneficiaries aren't allowed to be part of the foundation's management board. This incompatibility also includes a group of close relatives, like the spouse of the beneficiary in straight line as well as the relatives till the third collateral line.[11]

1.1.2 The Agricultural Business

In Austria there are special regulations besides the general ones of the ABGB concerning the law of inheritance of middle-sized agricultural and forestry businesses. These special regulations are the exclusive heir act (*Anerbengesetz*),[12] the Tyrolean

[8] RGBl Nr 58/1906 in the version Austrian Federal Law Gazette I Nr 13/2014.

[9] Austrian Federal Law Gazette Nr 98/1965 in the version Austrian Federal Law Gazette I Nr 35/2012.

[10] Austrian Federal Law Gazette Nr 694/1993 in the version Austrian Federal Law Gazette I Nr 111/2010.

[11] Arnold 2013: 258.

[12] Bundesgesetz vom 21. Mai 1958 über besondere Vorschriften für die bäuerliche Erbteilung (Anerbengesetz) in the version Austrian Federal Law Gazette I Nr 2/2008.

Law of Inheritance for Agricultural Estates (*Tiroler Höfegesetz, TirHG*)[13] and the Carinthian Law on Inheritance of Agricultural Estates (*Kärntner Erbhöfegesetz, KEG*).[14] The aim of these legal regulations is to preserve a stable agricultural structure and to prevent the splitting into mini estates. If the farms were subjected to general regulations of the law of inheritance, there would be a splitting of the farms.[15]

The law of exclusive heir (*Anerbenrecht*) is part of the law of inheritance and does not create a new enforceable instrument of the law of inheritance. Only regulations for such a case are created in which the testator has not disposed of his farm or other essential parts by testamentary disposition. It is therefore decreed by the general regulations concerning the law of inheritance, who the heir is. This exclusive heir (*Anerbe*) consequently has to pay in the prize of acquisition (*Übernahmspreis*) into the estate. The other heirs are to be satisfied with money. The requirements, if a hereditary farm is at hand in the sense of special directives, or who the exclusive heir is, are part of these special laws.[16]

1.2 Company Law vs Inheritance Law

The term "family business" concerns two law areas, the business law and the succession law. There is a tension, because the two areas of law pursue different objectives. The company law wants to unite the different interests of the various partners of a company to ensure the company's existence. The company law has an inventory and a balance function.[17]

One of the succession law principles is the testator's testamentary autonomy, to prohibit the company's shattering and to transfer the shares to one person, which is favored by the testator; although it has to be considered that some family members have a claim for compulsory portion so that there exist some limits in the testators' freedom of testation.[18]

[13] Bundesgesetz vom 12.Juni 1900, betreffend die besonderen Rechtsverhältnisse geschlossener Höfe, wirksam für die gefürstete Grafschaft Tirol, GVBlTirVbg 1900/47 in the version Austrian Federal Law Gazette I Nr 2003/112.

[14] Bundesgesetz vom 13.12.1989 über die bäuerliche Erbteilung in Kärnten, Austrian Federal Law Gazette 1989/658 in the version Austrian Federal Law Gazette I 2003/112.

[15] Koziol and Welser 2006: 477; Ferrari in Ferrari and Likar-Peer 2007: 95.

[16] See also Probst in Gruber et al. 2010: 113.

[17] Kalss and Probst 2013: 654.

[18] Kalss in Kalss and Schauer 2001: 101.

2 Inheritance Law

2.1 Principles

The Austrian law of succession takes its origin from two principles, the "testamentary freedom" and the "law related to compulsory portion" of certain close relatives and the spouse (family succession). It is a mixed system.

2.1.1 Testamentary Freedom

Basically the highest principle is the testamentary freedom of the testator over his property. He should have the possibility to decide himself whom he is going to bequeath which part of his property after his death. The testator can decide on his legal succession by testamentary disposition. However this freedom is restricted by the claims of specific persons entitled to the compulsory portion (*Pflichtteilsansprüche, Noterbrecht*). The testator has to bequeath his close relatives (certain relatives) a valuable minimum share of the testator's estate. If the testator does not bequeath any assets, the persons entitled to a compulsory portion are lawfully entitled to a claim against the dormant estate (*ruhender Nachlass*) and against the heirs.[19]

The testamentary freedom is an expression of private autonomy of the law of inheritance. It is the testator's granted right of disposal over his property. Agreements, which oblige a person to testate in a particular sense, are null and void. However this testamentary freedom is numerously restricted.

- Law related to compulsory portion: Even if the testator wants to transfer his whole property to a person by his will, certain persons have a claim to compulsory portion.
- Testamentary capacity (*Testierfähigkeit*): The testamentary capacity is the ability, to erect testamentary dispositions operatively and to cancel them. The ability to make testamentary dispositions is however –as well as the qualified capacity to enter into a contract not given by birth, but it is linked with the maturity of a human being. So § 569 sentence 1 Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) prescribes explicitly that persons under the age of 14 are without testamentary capacity. § 569 sentence 2 and 3 ABGB in conjunction with § 568 ABGB determine, that persons from the age of 14 till the completion of the 18th year of their life can only restrictedly testate at court or in a notarial way. Both must be convinced of the freedom of will and the prudence of the testator. A different testamentary disposition is illegal. From the completion of the 18th year of life every natural person can make a will unless a mental deficiency exists.

[19] Ferrari in Ferrari and Likar-Peer 2007: 3.

– Formal requirements of a will: The testator cannot determine his will of how to distribute his assets arbitrarily, but he must observe the corresponding forms of a will. In § 578 ff ABGB the Austrian succession law presents several forms of private and public wills, which are all equal (no preference to notarial wills). The duty to use legally determined forms of wills is a precondition for their validity. If a compelling form of a will has not been observed, this will is invalid. This is even the case, if the document clearly proves the will of the testator. The testator should – before he is going to dispose of his assets – consider consciously if he wants to take this step. The proof of evidence should moreover minimize the risk of a forgery of the will. The public forms of notarial wills additionally provide the possibility that the testator is sufficiently advised about the consequences of his arrangements before the establishment of his will.[20]

2.1.2 Family Succession

The Austrian law of succession includes the basic principle of the family succession. As far as the testator has not made a testamentary disposition, his legacy is given to his close relatives respectively to his spouse according to § 730 ABGB. Only under the condition that the testator has no relatives alive, legatees are declared statutory successors. If no legatees have been enumerated by the testator, the estate has to be declared heirless and the property has to be transferred to the state (Right of reversion according to § 760 ABGB, *Heimfallsrecht des Staates*).

The relationship between the testator and the legal heirs is based on descent (§§ 143 f ABGB).[21] The parentela system (*Parentelsystem*) declares, who as an heir has been transferred the inheritance to; the relatives inherit according to a certain sequence (§731 ABGB): The first parentela are the children of the testator and their descendants. The second parentela are the parents and the siblings of the testator. The third parentela are the grandparents of the testator and descendants. In the fourth parentela are the great grandparents. The descendants of the great grandparents are no legal heirs. For the determination of the real heir the principle is valid, that the closest relative of the testator excludes the more distant relatives. If the testator has children, the parents of the testator don't get a part of the estate. The right to an inheritance is decided according to the heads, so that all heirs get their assets in equal parts. The legal right to an inheritance of the spouse is to be considered independently from that.

The basic principle of the family law of inheritance manifests itself in so far, that in spite of the testamentary disposition there has to be attributed a claim to compulsory portion to a certain group of close relatives, independently of the designated heirs by the testator.[22]

[20] Koziol and Welser 2006: 502.

[21] New structured by the Namensrechtsänderungsgesetz 2013 (NamRÄG 2013), Austrian Federal Law Gazette I Nr 15/2013.

[22] Likar-Peer in Ferrari and Likar-Peer 2007: 335.

2.2 Range of Testamentary Freedom

In Austria there is the institution of the law related to compulsory portion. § 762 ABGB enumerates the children of the testator, the parents (insofar as there are no children present) and the spouses as the circle of people concerned. According to § 537a ABGB registered partners of same-sex partnerships are equal to spouses (*Bundesgesetz über die eingetragene Partnerschaft, EPG*)[23]; see also point 6.[24]

2.3 The Institute of Fideicommissum

According to the present legal situation there is no legal institution of fideicommissum in Austria. Until 1938 §§ 618 ff ABGB regulated the legal institution of the fideicommissum. The German Reich Law Gazette 1938 I 825 repealed the regulations of the fideicommissum and other fixed assets in Austria. This law was taken over into the legal acquis by the Second Republic of Austria in 1945.[25] According to this the fideicommissum isn't part of the Austrian legal system.[26]

3 Legal Incapacity Before Death

3.1 Statutory Provisions in Case of Dementia

In case of permanent loss of capacity a guardian (*Sachwalter*) can be appointed by court. The shareholder can also create a precautionary authority (*Vorsorgevollmacht*) and can designate a person who should exercise the shareholder's rights and duties in case of incapacity. A shareholder can also give a general power of attorney (*allgemeine Vollmacht*) to another person, knowing that he/she won't have the necessary legal capacity and the capability to exercise the rights and duties in the future.

3.1.1 Precautionary Authority

The precautionary authority is a special form of agency regulated in § 284 f ABGB. The person who will need to be represented in the future, charges somebody, who should intervene in case of a mental disease, at the time in which the

[23] Austrian Federal Law Gazette I Nr 135/2009.

[24] Bittner/Hawel in Kletečka and Schauer 2010: §§ 762, 763 marginal number 7; Werkusch in Kletečka and Schauer 2010: § 537a marginal number 2.

[25] StGBl 1945/188.

[26] The historical development of the fideicommissum in Austria, see Kalss and Probst 2013: 28 et seq; Scheuba in Kalss and Schauer 2001: 147, 157 et seq.

legal capacity still exists.[27] Basically every person has the right to be empowered, especially family members. Likewise persons may be designated as the authorized representatives, who live in a common household with the authorizer. Those persons are excluded, who have a close relationship to a care facility.[28] After the occurrence of the mental disease, a doctor's special opinion (*fachärztliches Gutachten*) is required. The precautionary authority of the shareholder or the company's contract or the private foundation's agreement can request for two independent special opinions, if the mental illness is as far as that the legal capacity is gone.[29]

3.1.2 Guardian

At the appointment of a person as a guardian, it is necessary to check how far the mental illness is and how far the extent is so that the person cannot handle his/her affairs independently. The later incompetent person has to appoint a suitable person for the office of the guardian, which may also handle the shareholders' exercises (§279 ABGB).

§ 275 ABGB mentions that the guardian has to fulfill all the assignments ordered by the court. In special matters the guardian needs the court's authorization. The important decisions, such as capital increases or the company-act amendments which intervene on the shareholder's assets, are subject to the court's approval. Without the approval, the guardian's measures are illegal and ineffective.[30]

3.2 Precautions in the Articles of Associations

There are two possibilities to agree to articles of association, that a person can exercise the shareholder's rights and duties in case of permanent legal incapacity:

– precautionary authority (§§ 284 ff ABGB): The precautionary authority can only be applied if the authority is granted in form and content. If the precautionary authority should cover all the shareholder rights, this special power must be named explicitly in the document.[31] This is necessary because otherwise the financial matters would not be part of the ordinary business operation and would not be part of the precautionary authority (§ 284a para 2 ABGB in conjunction with § 154 para 3 ABGB). It is important that the document will be established as a qualified precautionary authority, that means it must be built by a lawyer,

[27] OGH 7 Ob 98/12f; OGH 3 Ob 154/08 f; Spruzina in Gruber et al. 2010: § 23 marginal number 5, 8.

[28] Hopf in Koziol et al. 2014: § 284f ABGB marginal number 3.

[29] Kalss and Probst 2013: 672.

[30] Kalss and Probst 2013: 677.

[31] OGH 3 Ob 154/08 f.

notary or at court.[32] One of these bodies has to inform the principal about the scope of the legal effects and the withdrawal rights. The scope of the precautionary authority can be embellished at the shareholder's leisure. This is the basis to ensure that the assignee can exercise the shareholder's rights.[33]
– Age clause: If shareholders exercise a specific organ function in the company, age limits can be agreed on in the articles of association. At the time the shareholder reaches a specific age, he/she can't continue a management board or supervisory board function anymore. This is especially the case if the board member will lose the legal capacity in the foreseeable future. It is also possible to agree to an article of association, that a person can continue to fulfill his mandate after a specific age with the other shareholders' approval.[34]

4 Consequences for a Business in Case of Death

4.1 The Entrepreneur's Death

If the entrepreneur dies, the enterprise is integrated into the deceased's estate and it is finally passed over to the heir or heirs by devolution (*Einantwortung*). The heir becomes the new owner of the enterprise by devolution. The heir is liable for the testator's obligations according to civil law and business law (*Unternehmensrecht*). In the case of civil law, the heir is liable for obligations according to the inheritor's declaration (*Erbserklärung*), which he has provided. If the heir of an enterprise provides an unconditioned inheritor's declaration (*unbedingte Erbserklärung*), he is liable for all the obligations towards the testator's obligees and towards the legatees for their legacies, no matter if the estate includes enough assets (§§ 801 f ABGB). If the heir provides a conditioned inheritor's declaration (*bedingte Erbserklärung*), the liability is restricted to the amount of the assets of the inheritance after the establishment of an inventory. If there are several heirs, each person is liable according to his part of the inheritance.

Besides the civil law liability, there is the liability of the business law of § 40 lit 1 business law act (*Unternehmensgesetzbuch, UGB*).[35] The heir is unrestrictedly liable for all civil law commitments connected to the enterprise, unless he excludes this liability. Such an exclusion is possible in different ways:

– Discontinuance of the enterprise within three months from the transfer of title onwards;
– Entry of the exclusion of liability into the commercial register;
– Publication of the exclusion in an individual way or in a different and customary way.

[32] Hopf in Koziol et al. 2014: § 284 g ABGB marginal number 5; Spruzina in Gruber et al. 2010: § 23 marginal number 21.

[33] Kalss and Probst 2013: 678 et seq.

[34] Kalss and Probst 2013: 684.

[35] dRGBl S 219/1897 in the version Austrian Federal Law Gazette I Nr 50/2013.

4.2 Death of a Partner in a Partnership

In the following text four forms of Austrian partnerships will be presented (non-commercial partnership, general partnership, limited partnership, silent partnership)[36]:

(a) Non-commercial partnership (*Gesellschaft bürgerlichen Rechts, GesBR*): Starting with January 1st, 2015[37] there will be some amendments in the non-commercial partnership law. According to § 1208 ABGB this partnership is dissolved in the case of a partner's death. The partnership assumes, that with the absence of a shareholder who is personally liable, the interest in a continuous cooperation and the continuation of the partnership ceases. To prevent the liquidation agreements on articles of association may be made.

(b) General partnership (*Offene Gesellschaft, OG*): The general partnership consists of two or more shareholders, who do not only incur liability with the property of the partnership but also with their private property. If one of the partners dies, this partnership is dissolved according to § 131 sentence 4 UGB. As a consequence the partnership has to be liquidated. The partnership assumes, that with the absence of a shareholder who is personally liable, the interest in a continuous cooperation and the continuation of the partnership ceases. To prevent the liquidation agreements articles of association may be made.

(c) Limited partnership (*Kommanditgesellschaft, KG*): A limited partnership consists of two different groups of persons. Besides the general partners (*Komplementäre*), who are liable with their private property for the obligations of the partnership (like the shareholders of the general partnership), there are limited partners (*Kommanditist*). They are only restrictedly liable for the liability amount agreed upon in the articles of association.

   – General partner: If a general partner of a limited partnership dies, this company is dissolved according to § 131 sentence 4 UGB. As a consequence the partnership has to be liquidated.
   – Limited partner: If a limited partner dies, the company is not dissolved, according to § 177 UGB. The limited partner share is hereditary. With the transfer of title the company continues with the heirs of the limited partner. If there is not only one heir but several persons, the limited partner share is split into several parts according to the proportional right to an inheritance.

(d) Silent partnership (*Stille Gesellschaft, StG*): The silent partnership consists of the entrepreneur and the dormant partner, who contributes with his money to the company of the entrepreneur to finance it. According to § 184 lit 2 UGB the partnership is not dissolved at the death of the limited partner. The silent partnership is hereditary. It is part of the inheritance after the death of the testator

[36] The European Economic Interest Grouping (EEIG; Europäische wirtschaftliche Interessenvereinigung) is excluded from this presentation.

[37] Austrian Federal Law Gazette I Nr 83/2014; Wöss, S. 2014. Der Tod des GesbR-Gesellschafters nach der GesbR-Novelle, Journal für Erbrecht und Vermögensnachfolge, 126–137.

and is passed over to the heir with the transfer of title. If there are several heirs, the partnership shares are split into corresponding shares according to the proportional right to an inheritance. In this case several legal relations are created between the new dormant partners and the entrepreneur. If however the entrepreneur dies, the legal relations are dissolved. The death of a shareholder of a private limited company or the public company doesn't concern the continuance of the company.[38]

In the Austrian companies the shares are part of the estate and can be transmitted to the heirs, without their liquidation (in contrast to the partnership). The legal position of a public company has to be assessed differently from that of a partnership. The interest in a company and the dead testator's share are basically part of the inheritance. The shares in both company groups are part of the estate. By transfer of title they pass over to the heirs.

The public company cannot simply deprive the inheritance in general of the company share or the shares.[39]

(e) Private limited company (*Gesellschaft mit beschränkter Haftung, GmbH*): In this company each shareholder can only keep one company share according to § 75 GmbHG. In case of death the law proceeds from the permissibility of division, so that in case of several heirs the participation is made according to their proportional right to an inheritance. The partnership agreement may also provide in case of death the indivisibility, so that the heirs only acquire together the company share.

(f) Public company (*Aktiengesellschaft, AG*): Shares as such are indivisible. Because of the obvious higher number of shares and the possibility of an issue of a multitude of single shares (one euro share), this is of minor importance. Shares of a portfolio do not have to follow a uniform regime. They are singularly attributed to the heirs according to the right to an inheritance together with the transfer of title.

4.3 Provisions in the Articles of Association

On the basis of the freedom to determine the content of a contract of partnership law the continuation may already be taken in the articles of association.

(a) The renewal clause (*Fortsetzungsklausel*): The renewal clause is an agreement that the shareholders want to continue with the partnership in the case of a shareholder's death. The partnership is continued without a dissolution. The shareholder's heirs do not have any rights to succeed into the position of the testator. The partnership's share is replaced by a claim of indemnity.

[38] Kalss in Gruber et al. 2010: § 32 marginal number 6.

[39] OGH 2 Ob 593, 594/90, ecolex 1990, 756; OGH 6 Ob 1013/92, GesRZ 1994, 141; OGH 5 Ob 110/99 h, RdW 2000/307; Kalss in Gruber et al. 2010: § 32 marginal number 8.

(b) Successorship clause (*Nachfolgeklausel*): The successorship clause is the agreement among the partners in case of a shareholder's death that the partnership isn't dissolved but is continued with the heirs of the dead partner. In this case there is also no claim of indemnity of the heirs as they still are shareholders of the partnership. The simple successorship clause allows each heir the entry into a partnership, so that also unwelcome people may become partner of the partnership.
(c) Qualified successorship clause (*qualifizierte Nachfolgeklausel*): It is an agreement on articles of association that only a certain person, who fulfils certain requirements, takes the position of a shareholder as a successor of the dead testator. It is allowed that a certain person is named or that the person should have specific qualities (for example educational background, job experience). The choice has to be made among the people who take the position of an heir. By this agreement it is secured, that a person – who takes the position of a shareholder – is also wanted by the other shareholders.
(d) Accession clause (*Eintrittsklausel*): The accession clause allows a third party after the shareholder's death to enter the partnership instead of the testator. In this case there is a contract to the benefit of a third party, because the third (a stranger) is not yet a shareholder.

In this case the succession does not at all have to be taken into account. The admitted person is free to decide if he wants to enter the partnership. If he declines, the agreement on articles of association fails.

4.4 Exercise of the Shareholder's Rights After His Death

(a) Non-commercial partnership: If the shareholder dies, the heir gets a compensation. The heir consequently receives the value of the testator's partnership-share in cash.[40]
(b) General partnership and limited partnership: The membership of a dead partner passes on to the pure estate, who gets the position of a liquidation partner. According to § 810 para 1 ABGB the estate is represented ex lege by the potential heirs, who have provided an inheritor's declaration. Between the testator's death and the devolution (*Einantwortung*) the potential heirs have the right to use, to represent and to administer the estate. The corresponding representatives follow the laws and duties of an enterprise in liquidation.[41] Only in case if the potential heirs have disputes in the exercise of their common rights and duties, or if the inheritor's declaration is inconsistent (*widersprüchliche Erbantrittserklärung*) the inheritance court can appoint an administrator of the estate (*Nachlassverwalter*, § 156 lit 2, § 157 lit 4 and § 173 lit 2 Außerstreitgesetz).[42]

[40] OGH 1 Ob 607/52; Schauer in Gruber et al. 2010: § 31 marginal number 79.
[41] Schauer in Gruber et al. 2010: § 31 marginal number 11 et seq.
[42] Spruzina in Kletečka and Schauer 2010: § 810 marginal number 9.

(c) Private limited company and public company: At the shareholder's death the company share is part of the inheritance. The shareholder's rights and duties are executed by the administrator of the estate.[43]

According to § 810 ABGB the court transfers the management of the estate to the heir. He sets measures according to the ordinary business enterprise (*Maßnahmen des ordentlichen Wirtschaftsbetriebes*), such as the right to vote without the inheritance court's permission. The sale of the share needs the decision of the court at any time.

As mentioned before – if § 810 ABGB doesn't work out – an administrator of estate is appointed by court, for example if there are disputes about the accounting or if the heirs' declarations are contradictory.[44]

5 Last Wills

5.1 Range of a Last Will

The possibility of anticipated inheritance by testamentary disposition is basically possible on all assets. This does not mean that the mandatory provisions of the compulsory portion could be avoided. In particular, the compulsory portion establishes under certain circumstances a supplemental compulsory portion claim (*Pflichtteilsergänzungsanspruch*) against the person, who has obtained assets by the testator's last will or by a gift.[45]

A testamentary disposition that determines the succession of the entrepreneur or the company's shares is allowed. But for the transferability of the shares the corporate law provisions must be considered for every association type (differentiation between partnerships and companies, see point 4.3.).[46]

5.2 Requirements and Conditions

Condition (*Bedingung*): § 696 ABGB determines that a condition is an attached provision in a will or in a legacy. The occurrence or the abolition of legal effects are dependent on a known incident. It is unknown whether this incident happens or not. The heirs do not have to set up an action to achieve the condition. The condition may be suspensive or subsequent. The condition is suspensive, if the legal effects should occur only with the fulfillment of the condition. The condition is subsequent, if the legal effects occur but at the same time certain actions shall be continuously set.[47]

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[43] Kalss in Kalss and Schauer 2001: 104; Kalss in Gruber et al. 2010: § 32 marginal number 70.

[44] Kalss in Gruber et al. 2010: § 32 marginal number 70.

[45] Saurer in Gruber et al. 2010: § 3 marginal number 2.

[46] Kalss and Probst 2013: 699.

[47] Spruzina in Kletečka and Schauer 2010: § 696 marginal number 12 et seq.

Imposition (*Auflage*): This is a provision that commits the heir or legatee to a particular behaviour. If the heir or legatee does not fulfill his obligation, he forfeits his grant. If the legatee has no possibility to fulfill the task, it is already sufficient to act in a similar way (fulfillment surrogate, *Erfüllungssurrogat*).[48]

Executor (*Testamentsvollstrecker*): In a testamentary disposition the testator can name an executor (§ 816 ABGB). He has to fulfill the testator's last will. This lasts until the time of the devolution (*Einantwortung*) to the heirs. The executor may simultaneously act as the administrator of estate (*Nachlassverwalter*) if he is appointed by court.[49]

The testator can also order a reversionary inheritance (*Nacherbschaft*) in his last will.

5.3 Other Forms

Such provisions, requirements and conditions can be included in last wills. Especially in entrepreneurs-wills it is sometimes provided that specific, trustworthy persons of the entrepreneur should stay as Managing Directors or Supervisory Board members after the shareholder's death. It is also possible that specific corporate structures shouldn't be changed after the testator's death (keep the status quo in the company for a long term). Such measures can be useful to set up continuity in the company. The literature advises against doing such clauses in last wills, because these clauses contribute to a petrifaction of the company and may be impedimental to get rapid decisions in personnel matters.[50]

6 Right to a Compulsory Portion

In Austria there is the institution of the law related to compulsory portion. § 762 ABGB enumerates the children of the testator, the parents (insofar as there are no children present) and the spouses as the circle of people concerned. According to § 537a ABGB registered partners of same-sex partnerships are equal to spouses (*Bundesgesetz über die eingetragene Partnerschaft, EPG*)[51]. [52]The descendants of

[48] Welser in Rummel 2000: § 710 ABGB marginal number 1; Kalss, Probst 2013: 687 et seq; Spruzina in Kletečka and Schauer 2010: § 709 marginal number 2.

[49] Apathy in Koziol et al. 2014: § 816 ABGB marginal number 2; Fritsch in Ferrari and Likar-Peer 2007: 244; Gruber, Sprohar-Heimlich, Scheuba in Gruber et al. 2010: § 18 marginal number 49 et seq; Kalss and Probst 2013: 685 et seq.

[50] Kalss and Probst 2013: 688.

[51] Austrian Federal Law Gazette I Nr 135/2009.

[52] Bittner, Hawel in Kletečka and Schauer 2010: §§ 762, 763 marginal number 7; Werkusch in Kletečka and Schauer 2010: § 537a marginal number 2.

the ancestors and the collateral relatives of the testator (siblings, uncles and aunts) are not part of the circle of persons entitled to a compulsory portion.

6.1 Calculation of the Compulsory Portion

The compulsory portion share regulates the amount of the legitimate portion that means the minimum amount of the inheritance. It is the fractional part of the legal inheritance. The compulsory portion's share of the children is half of what they would get as their legal inheritance share (§ 765 ABGB). The descendants get a third of the legal inheritance (§ 766 ABGB).

There are no requests possible if reasons for exclusion are to be found with the person entitled to compulsory portion:

- Lawful disinheritance (§§768 ff ABGB, *rechtmäßige Enterbung*): Basically the law related to compulsory portion is imperative law (*zwingendes Recht*). Therefore all the persons entitled to compulsory portion have a claim to get a part of the estate. But in case if a potential heir causes a reason for disinheritance to the testator, the testator can exceptionally give the heir not even that part of his abatement. The testator may therefore withdraw by testamentary disposition also this part of his property from the heir. Reasons for disinheritance are the abandonment of the testator in emergency (§ 768 Z 2 ABGB), the heir's conviction on the basis of criminal law to a lifelong or 20 year long prison sentence (§ 768 ABGB) and the relative legal incapacity (*relative Erbunfähigkeit*) to inherit (§ 540 and § 542 ABGB).
- Legal incapacity to inherit according to §§ 538 ff ABGB (*Erbunwürdigkeit*): The entitlement to inherit is the capacity to become an heir. If the capacity is missing, the person is legally unable to inherit. It is to be distinguished between the absolute and the relative incapacity to inherit. § 33 sentence 2 ABGB is case of absolute incapacity (*absolute Erbunwürdigkeit*): A foreigner may be deprived of his entitlement to inherit in Austria if the laws of a foreign state treat an Austrian heir worse than a national citizen. Cases of relative incapacity to inherit (disqualification from inheritance) are for example the committing of an intentional crime (robbery, serious bodily harm), which is threatened by more than a 1-year sentence of imprisonment (§ 540 case 1 ABGB), or the breach of the parental duties (§ 540 sentence 2 ABGB). The falsification of the testator's will can also be a relative reason for a legal incapacity to inherit because of the forgery of the will.
- Renunciation of inheritance (§ 531 ABGB, *Erbverzicht*): The renunciation of inheritance is a contract between the testator and the potential heir about the renunciation of his status as a potential heir (*Erbaussicht*).[53] The renunciation of

[53] Wall in Gruber et al. 2010: § 21 marginal number 3; Likar-Peer in Ferrari, Likar-Peer 2007: 299.

inheritance also includes in case of doubt the renunciation of compulsory portion (see § 767 ABGB).[54]

– Renunciation of compulsory portion (*Pflichtteilsverzicht*; § 551 ABGB per analogy): In this case the future heir renounces his compulsory portion towards his future testator.[55]

According to § 762 ABGB the children of the testator are equally entitled to compulsory portion as the spouses, respectively the recorded partner of the registered partnership. In so far as the testator has no descendants the parents, grandparents and great grandparents are lawfully entitled to attesting the claim to compulsory portion.

According to § 731 ABGB all children of the first parental as well as their descendants are entitled to inherit. With the *Erbrechtsänderungsgesetz* 1989 *(ErbRÄG* 1989) the regulation has been abolished that only legal children are entitled to inherit.[56] Therefore illegal children are equal to legal children according to the intestate succession.

Independent from descendants' or ancestors' rights the surviving spouse or legitimate partner has specific privileges:

– Intestate succession: The intestate succession of the surviving spouse is independent from the intestate succession of the relatives (§ 757 ABGB in connection with § 759 ABGB). A precondition for the possibility to inherit is the maintained state of marriage at the time of the testator's death. If the testator's marriage had been legally divorced at the time of the testator's death, then the surviving former spouse is not granted any law of intestate succession.[57]

  The scope of the legal right of a spouse depends on the fact, that the heirs of the parentela exist. In addition § 757 para 1 ABGB draws its own borderline (*Erbrechtsgrenzen*): According to § 757 para 1 case 1 ABGB the spouse is attributed besides the other relatives of the first parentela (descendants of the testator and his descendants) one third of the inheritance. According to § 757 lit 1 sentence 2 ABGB in connection with sentence 3 the spouse is attributed besides the parents and the siblings of the testator – in so far as there are no descendants – two thirds of the estate. Descendants of formerly deceased siblings of the testator are not attributed any inheritance (limit of the legal right to an inheritance). Besides the testator's grandparents the spouse also inherits two thirds of the inheritance. If there are only relatives beyond the grandparents, the spouse gets the whole inheritance. The fourth parentela (great grandparents) don't get any inheritance, if a spouse is also a legal heir. In these cases the spouse is the only heir.

[54] OGH 7 Ob 202/73, NZ 1974, 155; Werkusch in Kletečka and Schauer 2010: § 551 marginal number 2; Apathy in Koziol et al. 2014: § 551 marginal number 1.

[55] OGH 1 Ob 201/73, EvBl 1974/113; Werkusch in Kletečka and Schauer 2010: § 551 marginal number 2; Apathy in Koziol et al. 2014: § 551 marginal number 1.

[56] Austrian Federal Law Gazette Nr 656/1989.

[57] OGH 1 Ob 411/97 s; OGH 6 Ob 259/02 k; Scheuba in Kletečka and Schauer 2010: § 757 marginal number 4; Spitzer 2003: 837, 845 ff.

- Compulsory portion: Besides existing descendants and ascendents of the testator the spouse – under the precondition of an existing marriage – is attributed according to § 765 ABGB half of what the spouse would get as legal inheritance.
- Right to maintenance (*Unterhaltsanspruch*): The right to maintenance can't basically be passed on by inheritance, yet all existing claims may be passed on (by inheritance). The liability to provide (financial) support may partially be passed on (by inheritance). It should be distinguished between the duty to provide maintenance of spouses and that of divorced spouses. The right to maintenance of a sustained marriage according to § 796 ABGB provides a legitimate maintenance claim towards the heirs of an inheritance. A precondition is, that the marriage is sustained at the time of the death. The right to maintenance, however, exists only till the time of the death or the remarriage of the spouse. If the testator dies, the divorced spouse has according to § 78 Marriage Law Act (*Ehegesetz, EheG*)[58] furthermore a claim of post-nuptial support by the heirs of the inheritance.
- legacy in advance pursuant to law (*gesetzliches Vorausvermächtnis*): Independent from the ancestor or the descendant with whom the spouse or the registered partner of a same-sex partnership shares the inheritance he may claim the legacy in advance pursuant to law (§ 758 ABGB). The legacy in advance pursuant to law comprises the right of residence in the matrimonial flat and the further use of the movable objects, which belong to the matrimonial household (furniture, dishes, pictures). The surviving spouse/the registered partner is lawfully entitled to use these objects insofar as they are necessary for the continuation of the household according to the previous circumstances of living. The spouse's right of habitation, the right to further use the matrimonial flat is independent from a concrete need of a flat. The legacy in advance pursuant to law may be added to the law of succession of the spouse and can only be removed by disinheriting him/her.
- Right of residence according to the tenancy law: According to § 14 para 2 and 3 tenancy law act (*Mietrechtsgesetz, MRG*)[59] there is the right of pre-emption (*Eintrittsrecht*) of certain persons into a tenancy agreement. This is a case of subrogation (*Sonderrechtsnachfolge*). At the testator's death the spouse, the companion, the relative in straight line (including affinitive children) as well as the testator's siblings enter a tenancy agreement. Those who enjoy the right of subrogation according to § 14 MRG precede the heirs of the tenant. Those who enjoy the right of subrogation have to have an urgent need to live there and must have lived so far in the same household with the deceased tenant. If they don't enter the tenancy it follows the intestate succession.

[58] dRGBl I S 807/1938 in the version Austrian Federal Law Gazette I Nr 15/2013.

[59] Austrian Federal Law Gazette Nr 520/1981 in the version Austrian Federal Law Gazette I Nr 50/2013.

6.2 Right to a Compulsory Portion and Business Succession

The succession of company shares is generally subject to the same rules as the succession of any other property object. There aren't any exceptions.

7 Anticipated Succession and the Maintenance of the Transferor's Shareholder Position

7.1 Forms of Anticipated Succession

The anticipated succession is one of the most important points and key questions in family business. It means, that the succession is completed by a transaction between the deceased and another person before the testator's death. Austrian law provides in addition to the last will or a contract of inheritance the possibility of a transfer contract (usually a donation or a purchase inter vivos). The anticipated succession is the best possibility especially in the internal family business succession. It is a psychologically safer variety of business transfer in a family with several potential heirs, because the capacity for conflicts after the testator's death is minimized. The parents as the shareholders furnish an anticipated solution for the business transfer, so that the descendants don't have a choice.[60]

The advantages of this transmission variety are currently in family businesses that subsequent children may be incorporated into the company very early and that they gain experiences in business. An undesirable behaviour of the child can be mitigated by binding legal arrangements. In the worst case the transfer to the successor can be annulled. What matters is the right time for the business succession. There is a risk that the testator doesn't want to start new challenges and that the business transition is delayed or neglected.[61]

The objective of a successful business – especially of a family business – is the cohesion of all the shares in the family. In order to ensure this, the current shareholder and the prospect heirs can agree to a transfer agreement (*Übergabevertrag*). This transfer agreement, which includes elements of family law, inheritance law and company law, includes the following core parts:

- The transfer of the company or the company's shares, including the transfer of management and supervisory functions
- The supply in favor of the transferor and his spouse
- Precautionary measures in favor of the transferor in case of undesirable developments

[60] Kalss and Probst 2013: 699, 701; Saurer in Gruber et al. 2010: § 3 marginal 5; Lorz and Kirchdörfer 2011: § 5 marginal number 1.

[61] Kalss and Probst 2013: 702.

– Supply of discounted heirs
– Additional measures such as the release of compulsory portion of prospect heirs.[62]

7.2 *Influence of the Testator in His Shareholder's Position*

There are several possibilities to supply the transferring testator[63]:

– Time-shifted share transfer: The testator often doesn't intend to transfer his shares immediately and in one act to the heirs. In many cases the shareholder rather wants to retire over a longer period[64] from the company. In this case it is useful to predestinate the extent of the transfer of the shares (the tranches of transfer) and the total planned transition period. As an alternative the testator can define the company's goals to achieve which are combined with the shareholder's transition. The pro longed transition process leaves the transferor the possibility to participate to get revenue and influence over the suffrage.
– enjoyment of fruits and benefits (*Fruchtgenussrecht*) for the transferor: An enjoyment of fruits and benefits entitles the transferring shareholder to benefit from economic use of the transferred business share. The enjoyment of fruits and benefits also has the protective function against a sale by the donee. Typically the transferor combines the transfer of the shares with the duty (by the tool of the enjoyment of fruits and benefits) to finance the transferor's pension by the share's income.[65] The enjoyment of fruits and benefits could be included as a condition in a donation (§ 938 ABGB in conjunction with § 709 ff ABGB).[66]
– Income of the company: More instruments for designing the supply of the entrepreneur are the undisclosed participation, the sub-participation of the testator or a pension. All instruments are characterized, that the transferor gets a certain amount of money out of the company's profit to finance his living.[67]
– Supply by other conditions: It is also conceivable, that a condition (§ 709 ABGB) is formulated. The condition causes an appropriation of the donated share and commits the gifted donee to conclude an enjoyment of fruits and benefits with the donator or to deliver maintenance services (payment of pensions). The condition is designed, so that the transferee loses his share if he/she breaks the engagement, for example in case of non-compliance with the obligations under the contract of enjoyment of fruits and benefits to the surviving spouse or the person

[62] Kalss and Probst 2013: 709.
[63] Kalss and Probst 2013: 717 et seq.
[64] Briem 2012: 31.
[65] OGH 6 Ob 70/00b.
[66] OGH 1 Ob 503/78, SZ 51/25.
[67] Kalss and Probst 2013: 731 et seq.

entitled to a compulsory portion. The revoking party has the burden of proof that the condition isn't complied with the agreement.

– Insurance independent from the company's income (*ertragsunabhängige Versicherung*): To avoid the risk that the company isn't in the position to generate the transferor's financial claims, it is possible to establish a supply independent from the company's income, for example a direct insurance.[68] The transferor gets a secured maintenance after his departure, even in case of economic failure of the company.[69]

8 Foundation and Trusts as Instruments for Business Succession

8.1 Set Up of a Foundation

In addition to the Federal Foundations and Funds Act (*Bundes-Stiftungs- und Fondsgesetz, BStFG*)[70] and some federal legislation acts, which are exclusively for the creation of foundations and funds with charitable purposes, it is possible to establish private foundations for charitable and non-charitable purposes on the basis of the Private Foundation Act (*Privatstiftungsgesetz, PSG*).[71] A private foundation (§ 1 PSG) is an entity, which is associated with a particular asset. This property is subject to a specific purpose. The private foundation has no members. The purpose of the private foundation expresses the will of the founder. This may be concentrating on the care of the family members. The foundation must have beneficiaries.[72]

A private foundation is established by the foundation's statutes. It is the basis of the private foundation. The foundation statutes contain details (§9 PSG), including the name and address of the private foundation, the dedication of the assets (at least EUR 70.000.-), the foundation's purpose, the designation of the beneficiaries (or the disclosure of any council, which names the beneficiaries), and whether the private foundation is built for a definite or indefinite period of time. The foundation statutes need a notorial deed (*Notariatsakt*).[73]

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[68] Spiegelberger 2009: § 1 marginal number 44.

[69] Kalss and Probst 2013: 734 et seq.

[70] Austrian Federal Law Gazette Nr 11/1975 in the version Austrian Federal Law Gazette I Nr 161/2013.

[71] Bundesgesetz über Privatstiftungen und Änderungen des Firmenbuchgesetzes, des Rechtspflegergesetzes, des Gerichtsgebührengesetzes, des Einkommensteuergesetzes, des Körperschaftsteuergesetzes, des Erbschafts- und Schekungssteuergesetzes und der Bundesabgabenordnung, Austrian Federal Law Gazette Nr 694/1993 in the version Austrian Federal Law Gazette I Nr 111/2010.

[72] Kalss in Doralt, Kalss 2001: 45 et seq; Kalss in Kalss et al. 2008: marginal number 7/10; Helbich in Csoklich et al. 1994: 2.

[73] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 13.

After the establishment, the first foundation board is appointed. Furthermore a foundation's control is necessary (for example, if the minimum amount of assets is not specified in euros but in a foreign currency). In consequence the private foundation is registered by the first foundation board. The foundation board members declare that the property is entirely owned by the foundation. Finally the Register court (*Firmenbuchgericht*) examines the foundation's notification. In compliance with the statutory requirements, the private foundation is registered in the companies register (*Firmenbuch*). With the entry the private foundation is legally existing.[74]

8.2 Influence of Family Members in a Foundation

It depends on how the founder decides to set up the foundation. Basically the private foundation has two organs, a private foundation's management board (*Stiftungsvorstand*; minimum three members) and a foundation auditor (*Stiftungsprüfer*). A supervisory board (*Aufsichtsrat*) must be used in the private foundation only under certain conditions (§ 22 para 1 PSG).[75] In the foundation statutes other organs can be created as well. So specific persons like family members have the possibility to influence the foundation's organisation.[76]

- The founder's position isn't limited to only one person. Several family members could also be founders. The preservation of the founder's rights can be secured by the inclusion of several family members in the foundation's statutes. It is also possible to establish a founder's private limited company, that means a company, which is under the influence of the family members.[77]
- Family advisory board (*Beirat*): The family members can participate in the private foundation by including a family advisory board to manage and control the foundation within the limitations by law and by jurisdiction.[78]

The law concedes the family members as beneficiaries just a few rights:

- According to § 30 PSG the beneficiary has the opportunity to demand information on the foundation's performance, as well as the right of access to the financial statements, the management report, the foundation statutes and the

[74] Kalss in Kalss et al. 2008: marginal number 7/17 et seq; Csoklich in Csoklich et al. 1994: 49 et seq.

[75] Arnold in Arnold and Ludwig 2014: marginal number 6/1.

[76] Arnold in Arnold and Ludwig 2014: marginal number 6/2.

[77] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 129.

[78] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 212.

supplementary foundation statute (*Stiftungsurkunde und Stiftungszusatzurkunde*). The right of access can't be demanded judicially.[79]

- According to § 27 PSG a beneficiary can apply at court for the appointment and dismissal of members of the private foundation's organs.[80]
- The beneficiary can apply for the annulment of the private foundation at court (§ 35 para 3 PSG). He can also apply at court for the reversal of the resolution of annulment adopted by the foundation's management board (§ 35 para 4 PSG).[81]

In addition, the founder can transfer the following rights to the beneficiary:

- The founder can transfer the right to the beneficiary to nominate the members for the management board of the private foundation.[82]
- The founder can grant the beneficiaries more participation and control rights, such as access to information rights, the right to initiate special audit, and influential rights in the management board of the private foundation (appointment rights, dismissal rights, right of direction).[83]
- The founder can authorize beneficiaries to become a member of certain organs, as long as the statutory rules are applied: for example the incompatibility rule (§ 15 para 2 PSG) mentions, that a beneficiary or a close relative can't be a member of the foundation's management board).[84] In practice the beneficiaries are often members in an advisory board (*Beirat*), which has relevant participation rights and control rights in the private foundation.[85]

8.3 Distinction of the Austrian Private Foundation to the Trust

The "trust" as it is understood by the common law systems isn't a part of the Austrian legal system. Sometimes the term "trust" will be translated and seen as equivalent with the terms "*Treuhand*" or "Foundation". This is incorrect, because they are all different legal instruments.[86]

[79] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 134; Arnold in Arnold, Ludwig 2014: marginal number 13/10.

[80] Arnold 2013: § 27 PSG marginal number 29.

[81] Arnold, 2013: § 35 PSG marginal number 19 et seq; Arnold in Arnold and Ludwig 2014: marginal number 13/10.

[82] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 141; Torggler in Gassner et al. 2000: 68.

[83] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 144 et seq; Arnold in Arnold and Ludwig 2014: marginal number 13/10 f.

[84] Arnold in Arnold and Ludwig 2014: marginal number 13/13.

[85] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 141.

[86] Klampfl 2009: 425 ff; Wolff in Gruber et al. 2010: § 43 marginal number 1.

The Austrian Administrative Court (*österreichischer Verwaltungsgerichtshof*) described the trust as follows[87]: "*The term "trust" refers to a creation, that is completely foreign to Austrian law and can be associated only with great difficulty to a specific legal instrument. The possible legal instrument range from a pure Treuhandschaft to processes, that have similarities to foundations or enjoyment of fruits and beneficiaries and reversionary inheritance.*"[88]

Austria hasn't signed the Hague Trust Convention[89] yet. National rules on the recognition of foreign trusts are also missing. Nevertheless the trust's legal construction and its legal consequences are recognized in Austria. In this case "recognition" means, that the trustee is the formal owner of the trust property and certain rights and obligations exist between the trustee, the beneficiary and the protector.[90]

Trust	Austrian private foundation
In a trust the trustee is the owner of the trust property.	The private foundation is a legal entity of its own, and the owner of the foundation's property.
The construction of a trust doesn't need any requirement of form.	The foundation has requirements of form (notarial deed, registration into the company register).
In case of a "breach of trust" the trustee is liable for damages to the beneficiaries.	The foundation's board of management is liable for damages in respect to the foundation and the founders.

Reference: Scheuba in Kalss and Schauer 2001: 159; Wolff in Gruber et al. 2010: § 43 marginal number 1 footnote 2; Klampfl 2009: 425 et seq; Petritz 2008: 275

9 Further Developments

In the working programme of the Austrian Government 2013–2018 the further development of the Austrian law of inheritance is mentioned, which includes a reform of the system of compulsory portion, and comprises the improvement of the position of childless spouses and partners as well as the company succession.[91]

In February 2014 the Austrian Minister of Justice concreted the plan: The compulsory portion should not be paid immediately after the devolution (*Einantwortung*); there should be the possibility, that – especially also for the protection of family enterprises – persons entitled to a compulsory portion should get their part of the

[87] VwGH 20.9.1988, 87/14/0167; VwSlg 6352 F/1988.

[88] The original court decision in Germain: "Der Begriff "Trust" bezieht sich auf eine Gestaltungsform, die dem österreichischen Recht völlig fremd ist und nur mit großen Schwierigkeiten einer bestimmten Gestaltungsform zugeordnet werden kann. Die möglichen Gestaltungsformen reichen dabei von einer reinen Treuhandschaft bis zu Vorgängen, die gewisse Ähnlichkeiten mit Stiftungen oder Fruchtgenußstellungen bzw auch mit Nacherbschaften haben können."

[89] Convention on the law applicable to trusts and on their recognition, concluded on July 1st, 1985.

[90] Wolff in Gruber et al. 2010: § 43 marginal number 47.

[91] Arbeitsprogramm der österreichischen Bundesregierung 2013 – 2018 Erfolgreich.Österreich 86.

estate over several years. Not only relatives and spouses should remain legal heirs, but also the companion (*Lebensgefährte*) should ex lege have a claim for a share of the inheritance.[92]

Legal projects concerning politics for an alteration of the inheritance law isn't only to be found in the present official governmental statement. The programme of the Austrian Government of 2004–2008 already allowed, that, besides the setting of a time limit for the validity of an oral will,[93] also the spouse's situation – without a direct descendant of the testator – should be improved. Moreover it was suggested that the chargeability of donations should be newly regulated as well as the advanced payments according to the will of the testator. The programme of the Austrian Government 2008–2013 provided under the item "Home policy, Justice and Defence" a comprising reform of the law related to compulsory portion. Thereby the law related to compulsory portion shouldn't be totally abolished.[94]

Since 2014 some reform plans are under discussion; the reform of the Austrian Succession Law 2015 has almost been finished.[95]

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[92] Justizminister will das Erben einfacher machen, Kurier vom 12.2.2014 (http://kurier.at/politik/inland/justizminister-will-das-erben-einfacher-machen/51.039.850); a comparative study: Cach 2014: 418.

[93] Regierungsprogramm der Österreichischen Bundesregierung für die XXII. Gesetzgebungsperiode 10 f.

[94] Regierungsprogramm der Österreichischen Bundesregierung für die XXII. Gesetzgebungsperiode 10 f.

[95] see www.parlament.gv.at; Kalss 2015: 50; Cach 2015 (in press).

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