

NATIONAL REPORT: AUSTRIA

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A. General

- 1. What kinds of formal relationships between a couple (e.g. different/same-sex marriage, different/same-sex registered partnership, etc.) are regulated by legislation? Briefly indicate the current legislation.**

In Austria, one has to differentiate between marriage and registered partnerships: The former is regulated by the Austrian Marriage Act, which entered into force in 1938 and was last amended in 2013.¹ The latter was recently introduced by the Austrian Registered Partnership Act, which entered into force in 2010 and enables same-sex couples to register their partnership at the competent district authority.² Hence, two different kinds of formal relationships exist in Austria: on the one hand, marriage, which is open to different-sex couples, and, on the other hand, the registered partnership of same-sex couples.

- 2. To what extent, if at all, are informal relationships between a couple regulated by specific legislative provisions? Where applicable, briefly indicate the current specific legislation. Are there circumstances (e.g. the existence of a marriage or registered partnership with another person, a partner's minority) which disqualify the couple?**

A comprehensive legal framework regulating informal relationships is currently lacking in Austria.³ Generally, one has to distinguish between the internal (the relations between the partners) and external (the relations between a partner in an informal relationship and third persons) dimension of informal relationships.⁴ Where the Austrian legislator has introduced specific rules for informal relationships, they mainly concern the latter. These provisions equate partners in an informal relationship with spouses and they are aimed at avoiding outcomes that would be contrary to the principle of equality:⁵

¹ For an overview see M. HINTEREGGER, *Familienrecht*, Verlag Österreich, Vienna, 2013, at p. 23 et seq.

² See e.g. H. JESSER-HUß, 'Die eingetragene Partnerschaft', *JAP*, 2010/2011/13, at p. 111; K. GRÖGER, 'Das Eingetragene Partnerschafts-Gesetz (EPG)', *ÖJZ*, 2010/23, at p. 197.

³ Austrian Supreme Court, Legal Proposition RS0109605, Judgement of 01.04.1998, 9 Ob 96/98b.

⁴ F. LINDER, in: E. GITSCHTHALER and J. HÖLLWERTH (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1085.

⁵ The following list is not exhaustive, but includes the most important provisions commonly referred to in the legal literature. For further examples see e.g. M. NEUMAYR, 'Neue Regeln für nichteheliche Lebensgemeinschaften? Von den öffentlich-rechtlichen Folgen einer Lebensgemeinschaft im Außenverhältnis bis zum „Zivilpakt“', in: Österreichischer Juristentag (ed.), *Zivilrecht - Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2013, pp. 119-136, at p. 121 et seq.

- Section 14 Austrian Tenancy Act stipulates that after the death of one partner the other partner is entitled to step into the tenancy agreement and become the contracting party of the agreement, if the informal relationship has existed for at least 3 years.⁶
- Section 5 para. 1 Austrian Condominium Act allows two natural persons to jointly purchase a condominium. Before the amendment of the Austrian Condominium Act in 2002 this possibility was restricted to spouses.
- Section 55 Austrian Copyright Act determines that a partner in an informal relationship may – after the death of the other partner – take single photographs of portraits that were created upon order. Section 77 Austrian Copyright Act contains the so-called ‘protection of the letter’ (*Briefschutz*) according to which letters, personal diaries and similar confidential notes must not be disclosed to the public, if after the death of the author the legitimate interests of close relatives would be violated by such disclosure. Pursuant to S. 77 para. 2 the term ‘close relatives’ includes partners in an informal relationship.
- According to S. 382b, c and d Austrian Enforcement Act a violent partner may be ordered to leave the common home. Before 1997 this option was only available to spouses.
- Section 72 para. 2 Austrian Criminal Code stipulates that partners in an informal relationship should be treated like relatives pursuant to S. 72 para. 1 Austrian Criminal Code. Hence, if the Austrian Criminal Code provides for particular consequences for relatives, these provisions equally apply to partners in an informal relationship.⁷ As an example reference can be made to the grounds for exemption from punishment, e.g. if vehicles have been used without permission (S. 136 para. 4 Austrian Criminal Code).
- The Austrian Code of Criminal Procedure also contains rules for partners in an informal relationship by referring to the term relatives contained in S. 72 Austrian Criminal Code, which includes partners in an informal relationship. Partners in an informal relationship are, for example, exempted from the duty to testify or may refuse to testify against the other partner.⁸
- Section 20 Austrian Jurisdiction Act regulates the grounds for excluding a judge from particular proceedings and explicitly refers to partners in an informal relationship. Hence, a judge is excluded in matters concerning his/her partner.⁹
- Section 321 para. 1 No. 2 Austrian Code of Civil Procedure allows a witness to refuse to testify if the answer to the question concerns his/her partner.

⁶ F. LINDER, in: E. GITSCHTHALER and J. HÖLLWERTH (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1099.

⁷ For further provisions contained in the Austrian Criminal Code see F. LINDER, in: E. GITSCHTHALER and J. HÖLLWERTH (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1102 et seq.

⁸ Sections 156 para. 1 No. 1, 157 para. 1 No. 1 Austrian Code of Criminal Procedure; for further provisions contained in the Austrian Code of Criminal Procedure see F. LINDER, in: E. GITSCHTHALER and J. HÖLLWERTH (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1103 et seq.

⁹ F. LINDER, in: E. GITSCHTHALER and J. HÖLLWERTH (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1105.

- Pursuant to S. 32 Austrian Insolvency Code close relatives are *inter alia* persons who live with the debtor in an extramarital partnership. In this case the partner has to prove that he/she neither knew nor must have been aware of the intent of the debtor to disadvantage the creditor.¹⁰
- Section 106 para. 3 Austrian Income Tax Act states that a partner is a person with whom the taxpayer is married or is living together in an informal relationship with at least one child. Hence, also some provisions of tax law refer to informal relationships.¹¹
- Also social law contains provisions with regard to informal relationships¹², e.g. the health insurance of an insured person may also cover his/her partner in an informal relationship provided that they are not relatives, that they have been living in a joint household for at least 10 months and that the partner is responsible for the household without being paid for his/her work.¹³
- Section 2 Austrian Law on Reproductive Medicine states that medically-assisted reproduction is only allowed in a marriage or an informal relationship, including same-sex couples. Apart from some very limited exceptions, the egg cells and the sperm of the spouses/partners must be used for the medically-assisted reproduction.
- Further, the Austrian Supreme Court has included partners in an informal relationship under the term relatives pursuant to S. 67 para. 2 Austrian Insurance Contract Act. Hence, the insurer cannot have recourse against the injuring party if this party is the partner of the injured person and the harm was not caused by gross negligence.¹⁴
- According to the Austrian Hospitalization Act, which regulates the removal of mentally ill persons to mental hospitals, partners in an informal relationship are entitled to appeal against the reception order.¹⁵
- Also labour law recognizes informal relationships: An employee is entitled to payment, even if he/she is not able to work due to the sickness or the death of his/her partner.¹⁶

¹⁰ Cf. A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2013, at marg. No. 234.

¹¹ See e.g. section 33 para. 4 No. 1 Austrian Income Tax Act.

¹² S. FERRARI, 'Rechtsregeln für nichteheliches Zusammenleben in Österreich', in: I. KROPPEBERG et al. (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, Gieseking Verlag, Vienna, 2009, pp. 167-206, at p. 174.

¹³ Section 123 para. 7a General Austrian Social Security Act; for further provisions contained in the General Austrian Social Security Act see F. LINDER, in: E. GITSCHTHALER and J. HÖLLWERTH (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1103 et seq.; M. NEUMAYR, 'Neue Regeln für nichteheliche Lebensgemeinschaften? Von den öffentlich-rechtlichen Folgen einer Lebensgemeinschaft im Außenverhältnis bis zum „Zivilpakt“', in: *Österreichischer Juristentag* (ed.), *Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2013, pp. 119-136, at p. 124 et seq.; A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2013, at marg. No. 241c.

¹⁴ S. FERRARI, 'Rechtsregeln für nichteheliches Zusammenleben in Österreich', in: I. KROPPEBERG et al. (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, Gieseking Verlag, Vienna, 2009, pp. 167-206, at p. 175.

¹⁵ Section 28 para. 1 Austrian Hospitalization Act.

¹⁶ For further examples regarding labour law see M. NEUMAYR, 'Neue Regeln für nichteheliche Lebensgemeinschaften? Von den öffentlich-rechtlichen Folgen einer Lebensgemeinschaft im

The provisions above clearly indicate the increasing tendency of the Austrian legislator to consider informal relationships and to treat them equally to marriages.¹⁷ In this regard it should be noted that even if explicit provisions are lacking, the Austrian Supreme Court has decided that partners in an informal relationship can be included under the term 'close relatives'.¹⁸

As to the second question the Austrian Supreme Court has held that an informal relationship can exist, even if one of the partners is married.¹⁹ In the decided case the informal partners had lived together for 17 years and had five joint children. They were not married for the only reason that the married partner feared the costs of the divorce. Despite the existing marriage the Austrian Supreme Court has recognized the informal relationship.²⁰ In contrast, in another decision the Austrian Supreme Court in an obiter dictum stated that an informal relationship requires 'to some extent the absence of a spouse'.²¹

3. In the absence of specific legislative provisions, are there circumstances (e.g. through the application of the law of obligations or the law of property) under which informal relationships between a couple are given legal effect (e.g. through the application of the law of obligations or the law of property)? Where applicable briefly indicate the leading cases.

Initially, it should be noted that the rules on marriage and engagement cannot be applied by analogy to informal relationships.²² However, due to the lack of a specific statutory regime for informal relationships certain legal consequences especially regarding the dissolution of an informal relationship arise from the application of the general rules of the law of obligations and property law.²³ In particular rules regulating (i) civil law associations (*Gesellschaft bürgerlichen Rechts*) (ii) donations (iii) unjust enrichment and (iv) service contracts are applied with regard to informal relationships.

Außenverhältnis bis zum „Zivilpakt“, in: Österreichischer Juristentag (ed.), *Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2013, pp. 119-136, at p. 119 et seq.

¹⁷ M. NEUMAYR, 'Neue Regeln für nichteheliche Lebensgemeinschaften? Von den öffentlich-rechtlichen Folgen einer Lebensgemeinschaft im Außenverhältnis bis zum „Zivilpakt‘, in: Österreichischer Juristentag (ed.), *Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2013, pp. 119-136, at p. 129.

¹⁸ Austrian Supreme Court, Judgement of 29.08.2002, 8 Ob 127/02p.

¹⁹ Austrian Supreme Court, Judgement of 16.06.1983, 7 Ob 595/83.

²⁰ See also S. FERRARI, 'Rechtsregeln für nichteheliches Zusammenleben in Österreich', in: I. KROPFENBERG et al. (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, Gieseking Verlag, Vienna, 2009, pp. 167-206, at p. 170.

²¹ Austrian Supreme Court, Judgement of 29.08.2002, 8 Ob 127/02p.

²² F. MEISSEL and M. PRESLMAYR, 'Leistungsabgeltung in der Lebensgemeinschaft', in: F. HARRER and R. ZITTA (eds.), *Familie und Recht*, Verlag Orac, Vienna, 1992, pp. 515-544, at p. 517 et seq.

²³ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 75.

If a partner in an informal relationship works in the company of the other partner²⁴ or the partners have built a house together,²⁵ it was often assumed that the partners had impliedly concluded a civil law association pursuant to S. 1175 General Austrian Civil Code.²⁶ According to the prevailing case law an impliedly concluded civil law association requires that effort, capital and other material assets are put together for an economic purpose, the association is at least loosely organised and grants participation rights to both partners.²⁷ Despite the fact that the Austrian Supreme Court does not apply strict criteria when it comes to the question whether partners in an informal relationship have concluded a civil law association,²⁸ the Court decided that a mere accumulation of property is not sufficient for establishing a civil law association.²⁹

If, for some reason, a civil law association cannot be assumed, and one partner made a contribution without expecting something in return, the contribution can be qualified as a donation.³⁰ The question whether a contribution is deemed to be a donation is evaluated by having regard to the overall conduct of the person who made the contribution.³¹ But even if the contribution was made upon a donation contract, the contract can be challenged due to an error (also an error in motivation) or the donation can be revoked upon gross ingratitude.³²

If, however, the contribution cannot be considered as a donation, because it was rendered with regard to a particular purpose, the rules on unjust enrichment come into play, especially S. 1435 General Austrian Civil Code.³³ If someone renders a service, including providing money, goods and services in terms of a certain purpose, the contribution may be reclaimed, provided that the particular purpose was obvious to the beneficiary and could not finally be achieved.³⁴ In terms of an informal relationship the particular purpose could be the further existence of the informal relationship or entering into a marriage; achieving the purpose must not be impossible *ex ante*. Only permanent investments excluding favours or expenses caused by everyday life can, however, be reclaimed, because otherwise the other

²⁴ Austrian Supreme Court, Judgement of 17.03.1993, 3 Ob 515/92.

²⁵ Austrian Supreme Court, Judgement of 07.10.1987, 3 Ob 545/87.

²⁶ M. WITTMANN-TIWALD, 'section 1175 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 32; U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 407 et seq.

²⁷ M. WITTMANN-TIWALD, 'section 1175 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 33; H. KLAAR, 'Rechtsfragen nichtehelicher Lebensgemeinschaft', *AnwBl*, 1989, at p. 18.

²⁸ Austrian Supreme Court, Judgement of 15.10.1998, 2 Ob 200/98w.

²⁹ Austrian Supreme Court, Judgement of 20.04.2010, 1 Ob 23/10d.

³⁰ Section 938 General Austrian Civil Code; E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 78.

³¹ Austrian Supreme Court, Judgement of 18.04.2002, 6 Ob 44/02t.

³² U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 401 et seq.

³³ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 83.

³⁴ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 83.

partner would no longer be enriched.³⁵ Although, generally, services can be reclaimed under S. 1435 General Austrian Civil Code, the Austrian Supreme Court is reluctant to apply this provision to housekeeping activities; rather the Court in this regard refers to S. 1152 General Austrian Civil Code, which regulates service contracts. Section 1152 General Austrian Civil Code stipulates that in the absence of an agreement reasonable compensation is deemed to have been agreed. However, the Austrian Supreme Court has taken the opposite view and has stated that performances rendered within an informal relationship are considered to be complimentary.³⁶ Only in exceptional circumstances is the person rendering the performance entitled to payment, e.g. if it was rendered in expectation of a subsequent counter-performance.³⁷

Finally, the Austrian Supreme Court has decided that the rules on the so-called 'relative surety' (*Angehörigenbürgschaft*) apply equally to partners in an informal relationship.³⁸ Hence a surety is infringing public morals and is therefore void if the undertaken liability is contrary to the guarantor's economic capacity and his/her free will was – at the time of assuming the surety – somehow diluted (*verdünnte Willensfreiheit*) and the creditor was aware of both facts.

4. How are informal relationships between a couple defined by either legislation and/or case law? Do these definitions vary according to the context?

In Austria, no general definition of the term informal relationship (*nichteheliche Lebensgemeinschaft*) exists.³⁹ According to the case law an informal relationship exists if three requirements are cumulatively fulfilled, although in the individual case one of the criteria may be less marked or even completely non-existent:⁴⁰

- Similarity to marriage
- Residential, economic and sexual community (*Wohn-, Wirtschafts-, Geschlechtsgemeinschaft*)
- Long-term relationship.⁴¹

³⁵ Austrian Supreme Court, Judgement of 13.07.2000, 6 Ob 30/00f; cf. A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2013, at marg. No. 254.

³⁶ Austrian Supreme Court, Judgement of 17.03.1999, 9 Ob 31/99w.

³⁷ Austrian Supreme Court, Judgement of 19.12.2001, 9 Ob 291/01m; Austrian Supreme Court, Judgement of 27.01.1983, 6 Ob 817/82; H. KLAAR, 'Rechtsfragen nichtehelicher Lebensgemeinschaft', *AnwBl*, 1989, at p. 18.

³⁸ Austrian Supreme Court, Judgement of 30.06.1988, 1 Ob 87/98w; F. LINDER, in: E. GITSCHTHALER and J. HÖLLWERTH (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1099.

³⁹ C. FISCHER-CZERMAK, 'Wann liegt eine nichteheliche Lebensgemeinschaft vor?', in: E. WAGNER and W. BERGTHALER (eds.), *Interdisziplinäre Rechtswissenschaft – Schutzansprüche und Schutzaufgaben im Recht, Festschrift für Ferdinand Kerschner*, Verlag Österreich, Vienna, 2013, pp. 337-352, at p. 338.

⁴⁰ Austrian Supreme Court, Judgement of 27.05.1988, 3 Ob 61/88; Austrian Supreme Court, Judgement of 31.01.1990, 2 Ob 503/90; Austrian Supreme Court, Judgement of 16.03.2007, 6 Ob 28/07x.

⁴¹ J. STABENTHEINER, 'Die nichteheliche Lebensgemeinschaft – ein Überblick', *NZ*, 1995, at p. 49.

An informal relationship is defined as a relationship similar to marriage and which prima facie appears to be equivalent to marriage.⁴² A residential community means that the partners are living together in a joint home with the intention that this place is their centre of life.⁴³ Another criterion for an informal relationship constitutes the sexual community: The partners have a sexual relationship, except where they are physically not able to have a sexual relationship or have reached an advanced age.⁴⁴ A mere sexual relationship with some overnight stays and joint journeys is, however, not sufficient to establish an informal relationship.⁴⁵ The economic community obliges the partners to contribute financially to the common household, to share his/her goods with the partner and to support the other partner. Further, it is of crucial importance that the relationship is of a long-term nature.⁴⁶ A further distinctive feature – particularly in comparison to a marriage – is that an informal relationship can be unilaterally terminated at any time.⁴⁷ When determining whether an informal relationship exists, the circumstances of the individual case have to be duly taken into account.

5. Where informal relationships between a couple have legal effect:

a. When does the relevant relationship begin?

Due to the fact that there is no objective connecting factor such as entering into a marriage or registering the partnership, the precise date – since and until when an informal relationship lasts – is difficult, if not impossible, to determine.⁴⁸ However, for the application of the legal provisions referring to an informal relationship it is not crucial when the informal relationship has started, but whether it exists/has existed at a certain point in time. This in turn has to be examined as a preliminary step by assessing whether the three criteria explained above in the answer to Question 4 are met.⁴⁹

b. When does the relevant relationship end?

⁴² Austrian Supreme Court, Judgement of 20.06.2000, 3 Ob 209/99b.

⁴³ See C. FISCHER-CZERMAK, 'Wann liegt eine nichteheliche Lebensgemeinschaft vor?', in: E. WAGNER and W. BERGTHALER (eds.), *Interdisziplinäre Rechtswissenschaft – Schutzansprüche und Schutzaufgaben im Recht, Festschrift für Ferdinand Kerschner*, Verlag Österreich, Vienna, 2013, pp. 337-352, at p. 340.

⁴⁴ Austrian Supreme Court, Legal Proposition RS0047017, Judgement of 21.05.2014, 3 Ob 31/14a; C. FISCHER-CZERMAK, 'Wann liegt eine nichteheliche Lebensgemeinschaft vor?', in: E. WAGNER and W. BERGTHALER (eds.), *Interdisziplinäre Rechtswissenschaft – Schutzansprüche und Schutzaufgaben im Recht, Festschrift für Ferdinand Kerschner*, Verlag Österreich, Vienna, 2013, pp. 337-352, at p. 345.

⁴⁵ Austrian Supreme Court, Judgement of 21.05.1996, 5 Ob 2104/96i.

⁴⁶ Austrian Supreme Court, Judgement of 05.10.1999, 2 Ob 314/98k.

⁴⁷ Austrian Supreme Court, Judgement of 18.12.2007, 10 ObS 121/07b; C. FISCHER-CZERMAK, 'Wann liegt eine nichteheliche Lebensgemeinschaft vor?', in: E. WAGNER and W. BERGTHALER (eds.), *Interdisziplinäre Rechtswissenschaft – Schutzansprüche und Schutzaufgaben im Recht, Festschrift für Ferdinand Kerschner*, Verlag Österreich, Vienna, 2013, pp. 337-352, at p. 346.

⁴⁸ Cf. P. RUMMEL, 'Ehe, Familie, Lebensgemeinschaft – Rechtsdogmatisches und Rechtspolitisches', *ÖJZ*, 1991, at p. 60.

⁴⁹ Cf. P. RUMMEL, 'Ehe, Familie, Lebensgemeinschaft – Rechtsdogmatisches und Rechtspolitisches', *ÖJZ*, 1991, at p. 60.

Similarly to the beginning of an informal relationship also the termination can only be determined by assessing whether the requirements necessary to establish an informal relationship are still fulfilled or have already ceased to exist.

The provisions which currently refer to informal relationships neither link the beginning nor the termination of an informal relationship to specific legal consequences, but rather stipulate that the existence of the informal relationship entails certain legal effects. The existence of an informal relationship has to be assessed according to the established definition.⁵⁰

6. To what extent, if at all, has the national constitutional position been relevant to the legal position of informal relationships between a couple?

The Austrian Constitution does not contain a rule regulating the scope of protection of a marriage or an informal relationship.⁵¹ Respective provisions are, however, contained in the European Convention on Human Rights (ECHR), which is directly applicable in Austria. In Art. 12 ECHR the right to marriage is enshrined, whereby the concrete design of this right is left to the national laws. Informal relationships are protected by Art. 8 ECHR, which contains the right to respect for family and private life.⁵²

From a fundamental rights point of view, the Austrian legislator is not obliged to provide a legal framework for informal relationships.⁵³ The Austrian Supreme Court has held, for example, that the fact that the dependent's pension for partners in an informal relationship is not regulated by law is not unconstitutional.⁵⁴ If, however, rules are introduced, they have to comply with the principle of equality and must be objectively justified.⁵⁵ The Austrian Constitutional Court decided that the fact that same-sex couples can register their partnership, whereas for heterosexual couples the same possibility is not provided, does not violate the principle of equality, because those couples are entitled to enter into a marriage.⁵⁶ Further, according to established case law from the European Court of Human Rights and the Austrian Constitutional Court the legislator is not obliged to treat an informal relationship entirely equally with a marriage.⁵⁷

⁵⁰ See the answer to Question 4.

⁵¹ A. DEIXLER-HÜBNER, 'Die Regelung gleich- und verschiedengeschlechtlicher Lebenspartnerschaften', *iFamZ*, 2008, at p. 200.

⁵² A. DEIXLER-HÜBNER, 'Die Regelung gleich- und verschiedengeschlechtlicher Lebenspartnerschaften', *iFamZ*, 2008, at p. 201.

⁵³ M. HINTEREGGER, 'Nichteheliche Lebensgemeinschaft und Grundrechte', in: Österreichischer Juristentag (ed.), *Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2013, pp. 58-76, at p. 66.

⁵⁴ Austrian Supreme Court, Judgement of 25.11.2008, 10 ObS 123/08y.

⁵⁵ M. HINTEREGGER, 'Nichteheliche Lebensgemeinschaft und Grundrechte', in: Österreichischer Juristentag (ed.), *Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2013, pp. 58-76, at p. 66.

⁵⁶ Austrian Constitutional Court, Decision of 22.09.2011, B 1405/10, *iFamZ*, 2012/4.

⁵⁷ ECtHR, *Johnston v. Ireland*, No. 9697/82, 18.12.1986; Austrian Constitutional Court, Decision of 22.09.2011, B 1405/10, *iFamZ*, 2012/4.

Hence, the current situation in Austria that informal relationships are not subject to a comprehensive legal regime can be explained by the fact that from a constitutional point of view such a statute is not considered necessary.

7. To what extent, if at all, have international instruments (such as the European Convention on Human Rights) and European legislation (treaties, regulations, and directives) been relevant in your jurisdiction to the legal position of informal relationships between a couple?

The relation between partners in an informal relationship is protected by Art. 8 European Convention on Human Rights, which directly applies in Austria.⁵⁸ However, even Art. 8 ECHR does not oblige the legislator to treat a marriage and an informal relationship equally.⁵⁹ To date, international instruments have had no effect on the position of heterosexual partners in an informal relationship.⁶⁰

8. Give a brief history of the main developments and the most recent reforms of the rules regarding informal relationships between a couple. Briefly indicate the purpose behind the law reforms and, where relevant, the main reasons for not adopting a proposal.

Until the end of the 19th century concubinage was deemed to be illegal in Austria and was prosecuted under administrative criminal law.⁶¹ The first efforts to regulate informal relationships were undertaken at the beginning of the 20th century and after the First World War. However, these attempts were frustrated shortly thereafter by the legislation of the post-war period.⁶²

Apart from the Austrian Victims Welfare Act (*Opferfürsorgegesetz*), which already took informal relationships into consideration at the time of its introduction in 1947, the Austrian legislator has only in recent decades started to adopt rules equating, under certain conditions, informal relationships with marriages.⁶³ In terms of their practical importance, crucial provisions have been the introduction of S. 14 para. 3

⁵⁸ Regarding heterosexual couples see ECtHR, *Johnston v. Ireland*, No. 9697/82, 18.12.1986; regarding same-sex couples see ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24.6.2010 and ECtHR, *P.B. and J.S. v. Austria*, No. 18984/02, 22.7.2010.

⁵⁹ P. PERNTHALER and I. RATH-KATHREIN, 'Der grundrechtliche Schutz von Ehe und Familie', in: R. MACHACEK, W. PAHR and G. STADLER (eds.), *40 Jahre EMRK, Grund- und Menschenrechte in Österreich*, Engel, Kehl am Rhein, 1992, at p. 268 et seq.

⁶⁰ Article 23 International Covenant on Civil and Political Rights is not directly applicable in Austria.

⁶¹ J. STABENTHEINER, 'Die nichteheliche Lebensgemeinschaft – ein Überblick', *NZ*, 1995, at p. 49.

⁶² For examples see J. STABENTHEINER, 'Die nichteheliche Lebensgemeinschaft – ein Überblick', *NZ*, 1995, at p. 49.

⁶³ M. NEUMAYR, 'Neue Regeln für nichteheliche Lebensgemeinschaften? Von den öffentlich-rechtlichen Folgen einer Lebensgemeinschaft im Außenverhältnis bis zum „Zivilpakt“', in: Österreichischer Juristentag (ed.), *Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2013, pp. 119-136, at p. 129.

Austrian Tenancy Act in 1967 and S. 5 para. 1 Austrian Condominium Act in 2002.⁶⁴ A further harmonization between marriages and informal relationships gave rise to – at least partly – the act amending family law in 2009.⁶⁵

In 2004 the Austrian Green Party presented its idea of a ‘civil pact’ (*Zivilpakt*) and submitted a proposal for a respective statute in 2005.⁶⁶ In contrast to a marriage the civil pact should have been easier to terminate without any significant consequences; in terms of inheritance the civil pact would have been treated similar to the marriage.⁶⁷ In 2009, the judicial committee finally voted on the proposal, but it did not reach the necessary majority and was therefore rejected.⁶⁸

9. Are there any recent proposals (e.g. by Parliament, law commissions or similar bodies) for reform in this area?

Although the need to clarify the legal status of persons who have opted for this novel form of union is generally recognized, no legislative proposals are currently under consideration.⁶⁹ Even in the working programme of the Austrian government for the years 2013-2018 the further development of the inheritance law – in particular the improvement of the status of partners in an informal relationship – is mentioned.⁷⁰ To date, however, no concrete proposals have been brought forward.⁷¹

B. Statistics and estimations

10. How many marriages and, if permissible, other formalised relationships (such as registered partnerships and civil unions) have been concluded per annum? How do these figures relate to the size of the population and the age profile? Where relevant and available, please provide information on the gender of the couple.

⁶⁴ Section 14 Austrian Tenancy Act stipulates that after the death of one partner the other partner is entitled to step into the tenancy agreement. Section 5 para. 1 Austrian Condominium Act allows two natural persons to jointly purchase a condominium.

⁶⁵ See S. FERRARI, ‘Rechtsregeln für nichteheliches Zusammenleben in Österreich’, in: I. KROPFENBERG et al. (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, Giesecking Verlag, Vienna, 2009, pp. 167-206, at p. 175.

⁶⁶ Available at: www.parlament.gv.at/PAKT/VHG/XXII/A/A_00712/imfname_049597.pdf.

⁶⁷ J. CORNIDES, ‘Alles gleich? Gesetzesinitiativen zur Schaffung eines Zivilpaktes und einer Eingetragenen Partnerschaft’, *JBl*, 2008, at p. 287; M. NEUMAYR, ‘Neue Regeln für nichteheliche Lebensgemeinschaften? Von den öffentlich-rechtlichen Folgen einer Lebensgemeinschaft im Außenverhältnis bis zum „Zivilpakt“’, in: Österreichischer Juristentag (ed.), *Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2013, pp. 119-136, at p. 131.

⁶⁸ Available at: www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00562/fname_174191.pdf.

⁶⁹ Austrian Supreme Court, Legal Proposition RS0109605, Judgement of 01.04.1998, 9 Ob 96/98b; see C. FISCHER-CZERMAK and B. BECLIN, ‘Neue Regeln für nichteheliche Lebensgemeinschaften?’, in: Österreichischer Juristentag (ed.), *Zivilrecht – Neue Regelungen für nichteheliche Lebensgemeinschaften*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 2012.

⁷⁰ Available at: www.justiz.gv.at/web2013/file/2c94848642ec5e0d0142fac7f7b9019a.de.0/regprogramm.pdf.

⁷¹ According to the information provided by the Ministry of Justice by e-mail dated 04.02.2015.

Marriages (available only for heterosexual couples) concluded per annum in Austria since 2003:⁷²

Year	Marriages	Total Population	Average age at the first marriage female	Average age at the first marriage male
2003	37,195	8,118,245	27.7	30.4
2004	38,528	8,169,441	27.9	30.6
2005	39,153	8,225,278	28.1	30.9
2006	36,923	8,267,948	28.6	31.4
2007	35,996	8,295,189	28.8	31.6
2008	35,223	8,321,541	28.9	31.7
2009	35,469	8,341,483	29.1	31.8
2010	37,545	8,361,069	29.3	31.9
2011	36,426	8,388,534	29.5	32
2012	38,529	8,426,311	29.8	32.2
2013	36,140	8,477,230	29.8	32.2

Registered partnerships (available only for same-sex couples) concluded per annum in Austria since 2010:⁷³

	2010	2011	2012	2013
Total	705	433	386	368
Male	450	259	231	203
18-30 years	125	81	93	85
30-50 years	532	306	260	247
Over 50 years	243	131	109	74
Female	255	174	155	165
18-30	120	79	80	93
30-50	309	214	184	189
Over 50 years	81	55	46	48

11. How many couples are living in an informal relationship in your jurisdiction? Where possible, indicate trends.

In 2013, there were 353,000 informal relationships in Austria.⁷⁴ This number has more than doubled in the last twenty years (compared to 169,000 informal relationships in 1995).

12. What percentage of the persons living in an informal relationship are:

⁷² Statistik Austria, available at: www.statistik.at/web_de/statistiken/bevoelkerung/eheschliessungen/023945.html.

⁷³ Statistik Austria, available at: www.statistik.at/web_de/statistiken/bevoelkerung/gleichgeschlechtliche_partnerschaften_eintragung_und_aufloesung/partnerschaftsbegrueendungen/053657.html.

⁷⁴ Statistik Austria, available at: www.statistik.at/web_de/statistiken/bevoelkerung/haushalte_familien_lebensformen/familien/023079.html.

- a. Under 25 years of age?
- b. Between 26-40 years of age?
- c. Between 41-50 years of age?
- d. Between 51-65 years of age?
- e. Older?

The following data is only available for the year 2012.⁷⁵ The table below shows the number of persons living in an informal relationship in 2012, according to their age:

Age	Total persons	Percentage
Under 25 years of age	83,906	0.99%
Between 26-40 years of age	303,476	3.6%
Between 41-50 years of age	143,323	1.7%
Between 51-65 years of age	85,916	1.01%
Older	32,757	0.38%
	649.378	7.7%

- 13. How many couples living in an informal relationship enter into a formal relationship with each other:**
- a. Where there is a common child?
 - b. Where there is no common child?

The Generations and Gender Programme⁷⁶ has found that ‘the presence of children promotes the increasing incidence of marriage. When there are children in the household, over two thirds of respondents are married, another 21% live in cohabitation.’⁷⁷ Although without any reference to children it can further be stated that in 2012 73% of all persons entering into a marriage had previously lived together at the same address – highly likely as partners in an informal relationship.⁷⁸ Unfortunately, other statistics, estimations or research studies do not exist on this issue. Also, an enquiry directed towards the family sociologist and family judge Dr. Thomas Bauer (Regional Appellate Court Linz/Upper Austria) did not provide any further information.

- 14. How many informal relationships are terminated:**
- a. Through separation of the partners?
 - b. Through the death of one of the partners?

⁷⁵ This data was made available upon request. Many thanks to Mag. Karin Klapfer from Statistik Austria for her assistance in this regard.

⁷⁶ The Generations and Gender Programme is a longitudinal survey of 18-79 year olds in 19 countries. In Austria the second survey was conducted in 2012/2013 with 5,000 persons between the ages of 18-44. I. BUBER-ENNSER, N. NEUWIRTH and M.R. TESTA (eds.), *Families in Austria 2009-2013*, AV-Astoria, Vienna, 2013, at p. 9, available at: www.ggp-austria.at.

⁷⁷ I. BUBER-ENNSER, N. NEUWIRTH and M.R. TESTA (eds.), *Families in Austria 2009-2013*, AV-Astoria, Vienna, 2013, available at: www.ggp-austria.at.

⁷⁸ Statistik Austria, *Demographisches Jahrbuch 2012*, Bundesanstalt Statistik Österreich, Vienna, 2013, at p. 28, available at: www.statistik.at/dynamic/wcmsprod/idcplg?IdcService=GET_NATIVE_FILE&dID=177261&dDocName=080293.

Neither the beginning nor the termination of informal relationships is statistically recorded. Unfortunately, also no official estimations or research studies on this issue exist. Also, an enquiry with the family sociologist and family judge Dr. Thomas Bauer (Regional Appellate Court Linz/Upper Austria) did not provide any further information. Therefore, no information regarding the duration or the reason for the termination of the informal relationship is available.⁷⁹

15. What is the average duration of an informal relationship before its termination? How does this compare with the average duration of formalised relationships?

In 2013, the average duration of a marriage was 13.2 years. In contrast, in 2003, a divorce claim was filed after an average of 12 years.⁸⁰ The possibility of same-sex couples registering their partnership has existed since 1st January 2010. Hence, no figures as to the average duration of these relationships exist, only the numbers of dissolutions of registered partnerships are available:

	2010	2011	2012	2013
Dissolution of registered partnerships	1	13	26	37

Unfortunately, neither official statistics nor official estimations nor research studies exist and therefore no comparisons can be made.⁸¹ Also, an enquiry with the family sociologist and family judge Dr. Thomas Bauer (Regional Appellate Court Linz/Upper Austria) did not provide any further information.

16. What percentage of children are born outside a formal relationship? Of these children, what percentage are born in an informal relationship? Where possible, indicate trends.

The available statistics merely distinguish between children born within a marriage and children born out of wedlock. The latter category includes children born in an informal relationship, but also single mothers.

	2003	2005	2007	2009	2010	2011	2012	2013
Children born within a marriage	49,803	49,621	47,122	46,356	47,131	46,587	46,183	46,477
Children born out of wedlock	27,141	28,569	29,128	29,988	31,611	31,522	32,769	32,853
Percentage of children born out of wedlock	35.3%	36.5%	38.2%	39.3%	40.1%	40.4%	41.5%	41.4%

⁷⁹ According to the information provided by Statistics Austria, the Austrian Institute for Family Studies and the Vienna Institute for Demography by e-mails dated 02.02.2015 and 03.02.2015.

⁸⁰ Statistik Austria, available at: www.statistik.at/web_de/statistiken/bevoelkerung/scheidungen/022912.html.

⁸¹ According to the information provided by Statistics Austria, the Austrian Institute for Family Studies and the Vienna Institute for Demography by e-mails dated 02.02.2015 and 03.02.2015.

The figures clearly indicate that the number of children born out of wedlock is steadily increasing, whereas concurrently the number of children born within a marriage has fallen consistently over the last ten years. Although scientific evidence is lacking in this regard, it is highly likely that there is a relation between the increasing number of informal relationships and the number of children born out of wedlock.⁸² Unfortunately, other official statistics, estimations or research studies on this issue do not exist. Also, an enquiry with the family sociologist and family judge Dr. Thomas Bauer (Regional Appellate Court Linz/Upper Austria) did not provide any further information.

17. What is the proportion of children living within an informal relationship who are not the couple's common children (excluding foster children)?

In 2013, there were 352,000 informal relationships in Austria.⁸³ Of these, 152,000 informal relationships had children, whereby 149,000 informal relationships had children under the age of 27 years. From these 149,000 informal relationships 39.6 % were so-called 'patchwork families', which means that at least one partner brought his/her children from previous relations into the new 'patchwork family'.⁸⁴

18. How many children are adopted within an informal relationship:

- a. **By one partner only?**
- b. **Jointly by the couple?**
- c. **Where one partner adopted the child of the other?**

In 2013, 91 adoptions within Austria (*Adoptionsvermittlungen im Inland*) were completed, whereby no distinction was made with respect to the adopting person.⁸⁵ Unfortunately, other official statistics, estimations or research studies on this issue do not exist. Also, an enquiry with the family sociologist and family judge Dr. Thomas Bauer (Regional Appellate Court Linz/Upper Austria) did not provide any further information.

In Austria, either a single person or spouses can adopt a child.⁸⁶ Thus, in informal relationships only one partner can adopt a child; they cannot jointly adopt a child. Due to the fact that single persons are allowed to adopt children, it follows that also one partner in an informal relationship can adopt the child of the other partner. The

⁸² Statistik Austria, available at: www.statistik.at/web_de/statistiken/bevoelkerung/geburten/022899.html.

⁸³ Statistik Austria, available at: www.statistik.at/web_de/statistiken/bevoelkerung/haushalte_familien_lebensformen/familien/023079.html.

⁸⁴ Statistik Austria, available at: www.statistik.at/web_de/statistiken/bevoelkerung/haushalte_familien_lebensformen/familien/044931.html.

⁸⁵ Bundesministerium für Familien und Jugend, *Jugendwohlfahrtsbericht*, Vienna, 2013, at p. 9, available at: www.bmfj.gv.at/familie/kinder-jugendhilfe/statistik.html.

⁸⁶ A. DEIXLER-HÜBNER, 'section 191 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 3.

adopting person has to have attained the age of 25.⁸⁷ The provision according to which the adopting person has to be at least 16 years older than the adoptee was held unconstitutional by the Austrian Constitutional Court in December 2014.⁸⁸ On an interim basis this provision will remain valid until 31st December 2015. The adoption must be agreed upon between the adopter and the adoptee in a written contract, which requires the court's approval in order to be effective.⁸⁹

19. How many partners in an informal relationship have been in a formal or an informal relationship previously?

In the course of the Generations and Gender Programme respondents were asked about the number of their previous partnerships. It was found that 'one-half were living together with a partner for the first time, while for approximately one in seven it was already the second time. Only some four percent of respondents reported to have lived together with a partner three times or more often.'⁹⁰ Unfortunately, other official statistics, estimations or research studies on this issue do not exist. Also, an enquiry with the family sociologist and family judge Dr. Thomas Bauer (Regional Appellate Court Linz/Upper Austria) did not provide any further information.

C. During the relationship

20. Are partners in an informal relationship under a duty to support each other, financially or otherwise:

- a. **Where there are no children in the household?**
- b. **Where there are common children in the household?**
- c. **Where there are other children in the household?**

Partners in an informal relationship are not obliged to mutually support each other, regardless of whether there are no, common or other children living in the same household.⁹¹ Since the amendment of the General Austrian Civil Code in 2009 S. 139 para. 2 General Austrian Civil Code obliges partners to undertake any effort to support minor stepchildren in order to protect the child's welfare. However, no similar obligation exists as between the partners themselves.

21. Are partners in an informal relationship under a general duty to contribute to the costs and expenses of their household?

The Austrian Supreme Court has decided that an informal relationship does not entail a duty of mutual assistance (*Beistandspflicht*).⁹² The partners do not have to

⁸⁷ Section 193 para. 1 General Austrian Civil Code.

⁸⁸ Austrian Constitutional Court, Decision of 11.12.2014, G 18/2014-14.

⁸⁹ Section 192 para. 1 General Austrian Civil Code.

⁹⁰ I. BUBER-ENNSER, N. NEUWIRTH and M.R. TESTA (eds.), *Families in Austria 2009-2013*, AV-Astoria, Vienna, 2013, at p. 9, available at: www.ggp-austria.at.

⁹¹ Austrian Supreme Court, Legal Proposition RS0096997, see Judgement of 29.01.1966, 5 Ob 1508/96.

⁹² Austrian Supreme Court, Judgement of 29.01.1996, 5 Ob 1508/96; A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2013, at marg. No. 240.

contribute financially to the partnership.⁹³ In contrast, S. 90 para. 1 General Austrian Civil Code states that spouses are obliged to mutually assist each other. In this regard mutual assistance is understood as any material and non-material support including contributions to the joint household.⁹⁴ In 2009 the Austrian legislator introduced a duty to support the child of the other partner, but refrained from laying down a similar obligation as between the partners.⁹⁵

Although no respective obligation is stipulated, it has to be borne in mind that case law has defined an economic community – which constitutes one element of an informal relationship – as a community in which both partners have to support each other in case of hardship, have to contribute to maintenance and have to share its assets.⁹⁶ Further, the Austrian Supreme Court has decided that partners in an informal relationship have to jointly bear the costs of living or that one partner contributes to the maintenance of the other.⁹⁷ Besides, it must be noted that the maintenance claim of a partner living in an informal relationship against his/her ex-spouse is suspended for the duration of the informal relationship.⁹⁸ Due to the hybrid definition of informal relationships in Austria, it should however be borne in mind that the economic community criterion – although vital – is not a mandatory prerequisite for all informal relationships.⁹⁹

22. Does a partner in an informal relationship have a right to remain in the home against the will of the partner who is the owner or the tenant of the home?

In general, no obligation to live together arises from an informal relationship. Accordingly, a right of residence cannot be assumed.¹⁰⁰ After the informal relationship has terminated, the partner who is the owner or the tenant of the home can seek the vacation of the apartment and is entitled to file an action for

⁹³ Cf. P. RUMMEL, 'Ehe, Familie, Lebensgemeinschaft – Rechtsdogmatisches und Rechtspolitisches', *ÖJZ*, 1991, at p. 60.

⁹⁴ Regional Court Salzburg, Judgement of 20.02.2012, 21 R 414/11w; Regional Court for Civil Matters Vienna, Judgement of 17.07.2012, 44 R 227/12a; P. SMUTNY, 'section 90 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 26, 31.

⁹⁵ F. LINDER, in: E. GITSCHHALER and J. HÖLLWERTH (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1089.

⁹⁶ Austrian Supreme Court, Legal Proposition RS0047035, see e.g. Judgement of 08.07.1981, 3 Ob 186/09p; U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 13.

⁹⁷ Austrian Supreme Court, Judgement of 09.10.1997, 2 Ob 258/97y.

⁹⁸ Austrian Supreme Court, Legal Proposition RS0047108, see Judgement of 21.05.2014, 3 Ob 31/14a.

⁹⁹ Austrian Supreme Court, Legal Proposition RS0021733, see e.g. Judgement of 30.08.1972, 1 Ob 188/72.

¹⁰⁰ A. DEIXLER-HÜBNER, 'Rechtliche Regelungen für Lebensgemeinschaften im Innenverhältnis', *iFamZ*, 2012, at p. 194.

possession.¹⁰¹ Such a claim will only be dismissed if the court considers it frivolous, e.g. the claim was only filed in order to harm the ex-partner.¹⁰²

Hence, a partner, who has no independent right concerning the home, is not entitled to remain in this home against the will of the other partner, rather he/she has to move out voluntarily, if he/she does not want to be confronted with a respective claim.

23. Are there specific rules on a partner's rights of occupancy of the home:

a. In cases of domestic violence?

Interim orders for protection against domestic violence can be requested by close relatives, including partners in an informal relationship under S. 382b Austrian Enforcement Act.¹⁰³ The interim order will be granted – irrespective of whether a title belongs to the applicant with regard to the home¹⁰⁴ – when physical attacks, threats of physical attacks or any conduct that severely affects the mental health of the applicant render a further cohabitation unbearable and the home is urgently needed by the applicant for his/her accommodation. The respondent is either ordered to leave the home or is prohibited from returning to the home. In most cases both orders are issued accumulatively.¹⁰⁵ The effect of such interim orders is limited to three months and will only be prolonged if proceedings have been commenced on the question of who is entitled to use the home.¹⁰⁶ If such proceedings have been initiated before the interim order was requested, the court has to determine its term of validity, at most until the end of the proceedings. In this time period the applicant has a right to occupy the home, regardless of whether a title belongs to him/her regarding the home.

b. In cases where the partner owning or renting the home is absent?

A person's long absence does not affect the ownership structure or any other rights of disposal. Hence, if a partner in an informal relationship does not have his or her own title with regard to the home, no rights can be derived from the fact of being a partner in an informal relationship. Even if it can be presumed that the partners have concluded a sublease agreement, this agreement is only binding as between the partners and does not have any effect in relation to the tenant.¹⁰⁷ The only remedy

¹⁰¹ Austrian Supreme Court, Legal Propositions RS0011874 and RS0010337, see e.g. Judgement of 22.10.2010, 9 Ob 69/10b, Judgement of 19.11.2008, 3 Ob 202/08i.

¹⁰² Austrian Supreme Court, Legal Proposition RS0010345, see e.g. Judgement of 21.11.2013, 1 Ob 181/13v.

¹⁰³ J. GEBERT and A. KOLLER, 'Die einstweilige Verfügung nach § 382b EO – effektiver Rechtsschutz gegen Gewalt in der nichtehelichen Lebensgemeinschaft?', *iFamZ*, 2008, at p. 154.

¹⁰⁴ E. KODEK, 'section 382b Austrian Enforcement Act', in: P. ANGST, *Exekutionsordnung*, Manz Verlag, Vienna, 2008, at marg. No. 16.

¹⁰⁵ E. KODEK, 'section 382b Austrian Enforcement Act', in: P. ANGST, *Exekutionsordnung*, Manz Verlag, Vienna, 2008, at marg. No. 10.

¹⁰⁶ J. GEBERT and A. KOLLER, 'Die einstweilige Verfügung nach § 382b EO – effektiver Rechtsschutz gegen Gewalt in der nichtehelichen Lebensgemeinschaft?', *iFamZ*, 2008, at p. 154.

¹⁰⁷ See S. PERNER, M. SPITZER and E. KODEK, *Bürgerliches Recht*, Manz Verlag, Vienna, 2012, at p. 232.

available to the partner, who does not have a legal title, is the so-called trespass action (*Besitzstörungsklage*), which protects the concrete possession regardless of the actual entitlement.¹⁰⁸ Accordingly, if someone disturbs or precludes the partner's possession without authorization (e.g. by changing the door locks), that partner can submit a trespass action, which does not however create any substantive rights.

24. Are there specific rules on transactions (e.g. disposal, mortgaging, subletting) concerning the home of partners in an informal relationship:

There are no specific rules on transactions concerning the home of the partners in an informal relationship. The answers below are therefore based on the general rules of the law of obligations and property law.

a. Where the home is jointly owned by the partners?

In the case of ordinary joint ownership both parties are authorized to dispose of their share, e.g. each owner can sell, mortgage or bequeath his/her share, as far as he/she does not infringe the rights of the other owner.¹⁰⁹ Although the asset in question is shared, each co-owner nonetheless remains the sole proprietor of his/her share.¹¹⁰ However, the joint owner cannot let his or her share, because this requires a 'real asset'.¹¹¹ The letting of a jointly owned home belongs to the ordinary administration, which will be decided by the majority of the votes, which is not counted according to the number of persons being joint owners, but according to their shares.¹¹² In the event of a tie, the court has to decide.¹¹³ Hence, if the partners own the home with equal shares, they have to agree whether they want to let their home or not. In the case of disagreement one party refrains from letting their home or submits the issue to the court.

One has to distinguish between regular joint ownership and a condominium, which results in a so-called partnership of owners (*Eigentümerpartnerschaft*). The shares belonging to the joint owners can only jointly be sold, mortgaged or submitted to execution;¹¹⁴ all transactions require the consent of both owners.¹¹⁵

¹⁰⁸ Section 339 General Austrian Civil Code; section 454 Austrian Code of Civil Procedure.

¹⁰⁹ Section 829 General Austrian Civil Code; H. GAMERITH, 'section 829 General Austrian Civil Code', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2000, at marg. No. 1.

¹¹⁰ Section 361 General Austrian Civil Code; H. BÖHM, 'section 829 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 1.

¹¹¹ H. GAMERITH, 'section 829 General Austrian Civil Code', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2000, at marg. No. 1; H. BÖHM, 'section 829 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 7.

¹¹² Section 833 General Austrian Civil Code.

¹¹³ H. BÖHM, 'section 833 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 21.

¹¹⁴ Section 13 para. 3 Austrian Condominium Act.

¹¹⁵ H. WÜRTH, 'section 13 Austrian Condominium Act', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2003, at marg. No. 6.

b. Where the home is owned by one of the partners?

The sole owner of the home can freely dispose of his/her property. He/she may sell or let the object in accordance with the general rules on the law of obligations or grant other persons limited *rights in rem* (e.g. servitudes, mortgage). This follows from the broad definition of ownership, which is the right to dispose arbitrarily of the substance and fruits of the property and to exclude everyone else from it, subject to limitations imposed by law or the rights of other parties.¹¹⁶ Hence, if the other partner does not have any rights as regards their home, the other party is not restricted in his/her transactions.

c. Where the home is jointly rented by the partners?

Joint tenants are equally entitled and obliged: One tenant cannot dispose of his/her right on his/her own.¹¹⁷ It follows that subletting is only possible if both tenants agree to this. Generally, the landlord cannot prohibit subletting, apart from a few exceptions.¹¹⁸ In the case of a breakdown of an informal relationship the joint tenants either have to terminate the contract or reach an agreement – with the consent of the landlord – on which partner will remain in the home.¹¹⁹ Joint tenants can only terminate the contract together.¹²⁰ One tenant cannot file an action for possession (*Räumungsklage*) against the other tenant.¹²¹ If the partners are joint tenants, the rules regarding joint ownership apply by analogy with the restriction that the possibility of transferring the right to rent the home of one tenant is excluded (S. 825 et seq. General Austrian Civil Code).¹²²

d. Where the home is rented by one of the partners?

When the home is rented by one partner only, he/she can autonomously exercise his/her right without obtaining the consent of the other partner. Hence, the tenant may e.g. sublet his/her home or terminate the contract according to the rental agreement, but his/her transactions are not somehow restricted by the fact that the rental property also serves as the home of the other partner.

25. Under what circumstances and to what extent can one partner act as an agent for the other?

¹¹⁶ Section 364 General Austrian Civil Code.

¹¹⁷ Regional Court for Civil Matters Vienna, Judgement of 29.10.1997, 41 R 633/97k.

¹¹⁸ Section 1098 General Austrian Civil Code; section 11 Austrian Tenancy Act.

¹¹⁹ Austrian Supreme Court, Judgement of 28.4.1999, 3 Ob 12/99g.

¹²⁰ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 47.

¹²¹ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 47.

¹²² H. BÖHM, 'section 825 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 32.

Section 96 General Austrian Civil Code stipulates that the spouse who manages the household and earns no income of his or her own represents the other spouse in legal transactions of daily life (*Schlüsselgewalt*). Since a similar provision has not yet been introduced for informal relationships and S. 96 General Austrian Civil Code cannot be applied by analogy, the issue of representation has to be decided according to the general rules, S. 1002 et seq. General Austrian Civil Code.¹²³ The authorization to act as an agent for another person is an unilateral declaration of will. Generally, no formal requirements have to be considered when authorizing another person. The agent can be authorized to various extents:

- general authorization (*Generalvollmacht*), which allows him/her to conclude all possible transactions as long as they are not of a highly personal nature
- authorization for particular types of transactions (*Gattungsvollmacht*)
- authorization for a particular transaction (*Spezialvollmacht*).¹²⁴

Besides the authorization, it is necessary that the agent has at least a limited capacity to contract and discloses the fact that the transaction is made for another person.¹²⁵ Section 1029 General Austrian Civil Code regulates the *prima facie* authorization (*Anscheinsvollmacht*). In applying this provision the Austrian Supreme Court has decided that a man who – through his behaviour – entitled a third person to rely on the fact that he had previously authorized his partner to conclude transactions, which could also concern him, had to undertake the liabilities resulting from this contract.¹²⁶ Hence, if there are sufficient circumstances arising from the conduct of the authorising party, the other partner in an informal relationship can be entitled to act as an agent for him/her.

Further, if a person over the age of 18 years cannot conclude contracts of daily life due to a mental illness or mental disability and has no guardian or a legal or appointed representative, his or her immediate relatives, including his/her partner in an informal relationship, may represent him/her in these transactions provided that the concluded contracts are in accordance with the lifestyle of the represented person.¹²⁷ However, the partner is only allowed to represent the other partner if they have lived together for three years in the same household.¹²⁸

26. Under what circumstances can partners in an informal relationship become joint owners of assets?

¹²³ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 431.

¹²⁴ S. PERNER, M. SPITZER and E. KODEK, *Bürgerliches Recht*, Manz Verlag, Vienna, 2012, at p. 124 et seq.

¹²⁵ Sections 1017 et seq. General Austrian Civil Code; D. RUBIN, 'section 1002 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 46 et seq.

¹²⁶ Austrian Supreme Court, Judgement of 15.04.1971, 1 Ob 94/71.

¹²⁷ Sections 284b, 284c para. 1 General Austrian Civil Code; S. FERRARI, 'Rechtsregeln für nichteheliches Zusammenleben in Österreich', in: I. KROPFENBERG et al. (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, Gieseking Verlag, Vienna, 2009, pp. 167-206, at p. 173.

¹²⁸ Section 284c para. 1 General Austrian Civil Code.

Section 825 General Austrian Civil Code provides four different possibilities as to how joint ownership can be established: (i) coincidence, (ii) statute, (iii) last will or (iv) contract. Practically speaking, joint ownership is most often created by last wills or contracts, whereby in terms of informal relationships the latter will be even more important.¹²⁹ If the partners together purchase a certain asset, they become the joint owners of it. Further, partners form a so-called partnership of owners (*Eigentünerpartnerschaft*) if they are acquiring condominium ownership together according to S. 13 et seq. Austrian Condominium Act (*Wohnungseigentumsgesetz*).¹³⁰ This requires that every partner has an equal share of the minimum proportion, which is necessary for acquiring condominium ownership.¹³¹

27. To what extent, if at all, are there specific rules governing acquisitions and/or transactions in respect of household goods? In answering this question briefly explain what is meant by household goods.

There are currently no specific rules governing acquisitions and/or transactions of household goods in force. Partners in an informal relationship may therefore either separately or jointly purchase household goods.¹³² If a partner has had an asset before entering into the informal relationship and makes it available for the joint household, he/she nonetheless remains the sole owner of the asset.¹³³ If the partners are the joint owners of an asset, they have to agree on the administration, use or possible sale of the asset, otherwise the court has to decide on disputed issues upon request.¹³⁴

In terms of marriage, case law has defined household goods (*Hausrat*) pursuant to S. 758 General Austrian Civil Code as all movables belonging to the marital household.¹³⁵ This definition does not merely include furniture and household devices, but also luxury goods, such as oriental carpets.¹³⁶ With regard to an informal relationship no respective definition exists.

28. Are there circumstances under which partners in an informal relationship can be regarded as joint owners, even if the title belongs to one partner only?

¹²⁹ H. BÖHM, 'section 825 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 11.

¹³⁰ J. STABENTHEINER, 'Das neue Wohnungseigentumsrecht im Überblick', *immolex*, 2002, at p. 163.

¹³¹ H. WÜRTH, 'section 14 Austrian Tenancy Act', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2003, at marg. No. 4.

¹³² Cf. H. BÖHM, 'section 825 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 1, 10.

¹³³ Section 354 General Austrian Civil Code.

¹³⁴ H. BÖHM, 'section 833 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 21.

¹³⁵ Austrian Supreme Court, Judgement of 20.12.1984, 6 Ob 716/84.

¹³⁶ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 86.

Section 380 General Austrian Civil Code provides that ownership can only be acquired with a legal title and a legal mode of acquisition.¹³⁷ This excludes the possibility that someone is regarded as an owner even if no title belongs to the person. It follows that partners in an informal relationship are only considered to be joint owners if they have acquired the item together.¹³⁸ In this case also the title belongs to both partners.

29. How is the ownership of assets proved as between partners in an informal relationship? Are there rebuttable presumptions?

Due to the lack of specific rules which are applicable to informal relationships the general rules on property law apply.¹³⁹ In case of a dispute the person who claims to be the owner has to prove that he/she has acquired the ownership of the item with a legal title and a respective mode of acquisition and that currently the defendant possesses the item; the claimant has to describe the item.¹⁴⁰ Section 323 General Austrian Civil Code contains the presumption that the possessor (*Besitzer*) of an item has also a valid legal title and cannot be requested to provide this title. Besides the possibility to prove ownership, S. 372 General Austrian Civil Code grants a facilitated option, where a person claiming his/her ownership only has to prove a 'better right to possession' against the other person (*actio publiciana*).¹⁴¹

Indications as to whether one or the other partner in an informal relationship has become the owner of the item are e.g. who was present at the time of purchasing the asset, who made the decision to purchase, who paid for the asset, which name is written on the invoice.¹⁴² In the case of doubt it is presumed that both partners are joint owners.¹⁴³ Since it can turn out to be very difficult to prove ownership after many years, it is recommended to keep all receipts and to maintain lists, which in case of doubt provide information on the question of who is the owner of what.¹⁴⁴

30. How is the ownership of assets proved as regards third parties? Are there rebuttable presumptions?

¹³⁷ P. MADER, 'section 380 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2014, at marg. No. 1.

¹³⁸ Cf. U. AICHHORN, 'Vermögensaufteilung und Erbrecht bei nichtehelicher Lebensgemeinschaft', in: M. GRUBER et al. (eds.), *Erbrecht und Vermögensnachfolge*, Verlag Österreich, Vienna, 2010, at marg. No. 78.

¹³⁹ Sections 369 et seq. General Austrian Civil Code.

¹⁴⁰ Section 370 General Austrian Civil Code.

¹⁴¹ Only a qualified (honest, real and legitimate) possessor is entitled to file an *actio publiciana*.

¹⁴² E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 86.

¹⁴³ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 86.

¹⁴⁴ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 429.

When it comes to proving ownership, no distinction is made as to whether it has to be proved as between the partners in an informal relationship or in relation to third parties. Accordingly, reference can be made to the answer to Question 29.

31. Under what circumstances, if any, can partners in an informal relationship become jointly liable for debts?

If partners in an informal relationship have a joint bank account, they are both liable for the debts resulting from this account and in case of doubt every partner has to pay half of the debt.¹⁴⁵ Also a loan which has been jointly taken out entails the liability of both partners, because usually the creditor will not abandon a security if it does not receive an equal security in return.¹⁴⁶ If the partners are both parties to a rental agreement, they are also jointly liable for the costs resulting from the rent.¹⁴⁷

32. On which assets can creditors recover joint debts?

This issue depends upon the individual case and the contract underlying the joint debts, in particular with regard to the securities provided by the debtors. It can also be agreed upon that the creditor cannot recover the debts on assets, but has to turn to e.g. a guarantor. Generally, it must be borne in mind that in the case of non-repayment the creditor cannot automatically resort to the debtors' assets to satisfy the debt, but has to initiate civil proceedings with a subsequent execution procedure. Due to the many contract designs possible, no general answer to this question can be given. However, from the practical point of view the partners in an informal relationship will often take out a loan when building or buying a house or an apartment together.¹⁴⁸ The creditor will usually grant the loan subject to the condition that the purchased property serves as security, which has to be registered in the land register. In this case the creditor can resort to the property, if the debtors do not repay the money.

Another case concerns the home which is jointly rented by both partners: S. 1101 General Austrian Civil Code grants the landlord a legal lien on the tenants' moveable property in the rented home.¹⁴⁹ Even if only one partner is the contracting party to the rental agreement, but the other partner is living in the same household, the legal

¹⁴⁵ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 88.

¹⁴⁶ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 429; E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 88.

¹⁴⁷ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 47.

¹⁴⁸ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 429.

¹⁴⁹ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 47.

lien in favour of the landlord also extends to all movable assets (*eingebraachte Sachen*) of the other partner.¹⁵⁰

33. Are there specific rules governing the administration of assets jointly owned by the partners in an informal relationship? If there are no specific rules, briefly outline the generally applicable rules.

Due to the lack of specific rules the general rules regulating the administration of joint ownership apply: In this regard one has to differentiate between ordinary and extraordinary administration, whereas the former concerns measures which are in the interest of all owners, because they are necessary and not associated with high costs, the latter includes considerable changes with regard to the maintenance or better use of the jointly owned asset in question.¹⁵¹ Regular measures will be decided by the majority of the votes, which is not counted according to the number of persons being joint owners, but according to their shares.¹⁵² In the event of a tie, the judge has to decide.¹⁵³ Matters falling within the scope of extraordinary administration must be decided unanimously.¹⁵⁴ If such a decision could not be reached, the owners, whose shares amount to at least one half can persist on the desired measure.¹⁵⁵ However, the outvoted owners can require some sort of security for future damages. If security is not provided, but the persons do not want to resign their ownership, the court has to finally decide whether and under which conditions the measure should be realised.¹⁵⁶ With regard to the jointly owned condominium (*Eigentümergeinschaft*) the shares of the partners can be sold, mortgaged or submitted to execution only jointly.¹⁵⁷

D. Separation

34. When partners in an informal relationship separate does the law grant maintenance to a former partner? If so, what are the requirements?

In the case of separation the ex-partners are not entitled to claim maintenance under current Austrian law.¹⁵⁸ To avoid legal uncertainty partners in an informal relationship are well advised to conclude a so-called partnership agreement

¹⁵⁰ O. RISS, 'section 1101 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2012, at marg. No. 4.

¹⁵¹ H. BÖHM, 'sections 833 and 834 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 5, 13.

¹⁵² Section 833 General Austrian Civil Code.

¹⁵³ H. BÖHM, 'section 833 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 21.

¹⁵⁴ H. BÖHM, 'section 834 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 17.

¹⁵⁵ Section 834 General Austrian Civil Code.

¹⁵⁶ Section 835 General Austrian Civil Code; H. GAMERITH, 'section 835 General Austrian Civil Code', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2000, at marg. No. 2.

¹⁵⁷ Section 13 para. 3 Austrian Condominium Act.

¹⁵⁸ A. DEIXLER-HÜBNER, 'Rechtliche Regelungen für Lebensgemeinschaften im Innenverhältnis', *iFamZ*, 2012, at p. 193.

(*Partnerschaftsvertrag*) including an explicit clause on maintenance in case of separation.¹⁵⁹

It should however be noted that S. 235 para. 1 General Austrian Civil Code stipulates that the father of a newborn child is obliged to reimburse the expenses incurred by the birth as well as the maintenance costs of the mother for a period of eight weeks after the birth. If other expenses become necessary due to the birth, the father also has to bear these costs. The claim becomes statute-barred three years after the birth.¹⁶⁰ Although this provision does not require the existence of an informal relationship, it may equally apply to separated partners who had an informal relationship. From a practical point of view this provision is of minor importance, because usually these costs are covered by social insurance or social welfare.¹⁶¹

35. What relevance, if any, upon the amount of maintenance is given to the following factors/circumstances:

- a. **The creditor's needs and the debtor's ability to pay maintenance?**
- b. **The creditor's contributions during the relationship (such as the raising of children)?**
- c. **The standard of living during the relationship?**
- d. **Other factors/circumstances (such as giving up his/her career)?**

Due to the fact that Austrian law does not currently grant maintenance to a former partner, no criteria for determining the amount of maintenance exist.

36. What modes of calculation (e.g. percentages, guidelines), if any, apply to the determination of the amount of maintenance?

Due to the fact that Austrian law does not currently grant maintenance to a former partner, no methods of calculation for the determination of the amount of maintenance have been developed.

37. Where the law provides for maintenance, to what extent, if at all, is it limited to a specific period of time?

Currently, Austrian law does not grant maintenance to a former partner.¹⁶² However, a maintenance claim which results from the birth of a child according to S. 235 General Austrian Civil Code is limited to a period of eight weeks after the birth and becomes statute-barred after three years from the birth.¹⁶³

¹⁵⁹ A. DEIXLER-HÜBNER (ed.), *Der Ehevertrag*, Linde, Vienna, 2013, at p. 227 et seq.

¹⁶⁰ Section 235 para. 2 General Austrian Civil Code.

¹⁶¹ F. MEISSEL, 'Unterhaltsansprüche aus Lebensgemeinschaft? Nichteheliche Lebensgemeinschaften und Unterhalt (Teil II)', *EF-Z*, 2008, at p. 15.

¹⁶² F. MEISSEL, 'Unterhaltsansprüche aus Lebensgemeinschaft? Nichteheliche Lebensgemeinschaften und Unterhalt (Teil II)', *EF-Z*, 2008, at p. 13.

¹⁶³ See the answer to Question 34.

38. What relevance, if any, do changed circumstances have on the right to continued maintenance or the amount due?

Currently, Austrian law does not grant maintenance to a former partner.

39. Is the maintenance claim extinguished upon the claimant entering:

- a. **Into a formal relationship with another person?**
- b. **Into an informal relationship with another person?**

Currently, Austrian law does not grant maintenance to a former partner. However, it should be noted that the maintenance claim of a partner living in an informal relationship against his/her ex-spouse is suspended for the duration of the informal relationship.¹⁶⁴

40. How does the creditor's maintenance claim rank in relation to:

- a. **The debtor's current spouse, registered partner, or partner in an informal relationship?**
- b. **The debtor's previous spouse, registered partner, or partner in an informal relationship?**
- c. **The debtor's children?**
- d. **The debtor's other relatives?**

Under current Austrian law a former partner is not entitled to a maintenance claim.

41. When partners in an informal relationship separate, are specific rules applicable to the determination of the ownership of the partners' assets? If there are no specific rules, which general rules are applicable?

Under Austrian law no specific rules for the determination of the ownership of the partners' assets exist when the partners in an informal relationship separate. Generally, the owner is the person who has acquired the ownership of a certain property either through an original, e.g. adverse possession or a bona fide purchase, or derivative mode, e.g. purchase or inheritance. Section 380 General Austrian Civil Code stipulates that no ownership can be acquired without a legal title and a legal mode of acquisition. A legal title constitutes every legal transaction, such as a sale or barter, aiming to transfer ownership. In terms of the mode of acquisition one has to distinguish between movable and immovable goods: The former can be acquired by handing over the asset, whereas the latter requires registration in the land register.¹⁶⁵ Hence, the question of ownership has to be determined according to the general rules regulating the acquisition of ownership.

42. When partners in an informal relationship separate, are specific rules applicable subjecting all or certain property (e.g. the home or household goods) to property division? If there are no specific rules, which general rules are applicable?

¹⁶⁴ Austrian Supreme Court, Legal Proposition RS0047108, see Judgement of 21.05.2014, 3 Ob 31/14a.

¹⁶⁵ Sections 426, 431 General Austrian Civil Code.

There are no specific rules subjecting all or certain property to a property division in case of separation. Commodities, such as furniture, a motor vehicle, and a television set, have to be divided according to the formal ownership.¹⁶⁶ The general principle is that every partner receives what he/she owns.¹⁶⁷ If items have been jointly purchased during the relationship, it is presumed that both partners share the ownership equally.¹⁶⁸ If one partner claims that he/she is the sole owner of the asset, he/she has to prove this.¹⁶⁹ Items can be divided by different means: Primarily, a so-called *de facto* division (*Naturalteilung*) should be preferred.¹⁷⁰ If a *de facto* division is impossible or infeasible a so-called civil division (*Zivilteilung*) by selling the item and distributing the proceeds becomes necessary.¹⁷¹ The same rules apply if the partners in an informal relationship have jointly bought a house or an apartment.¹⁷² If the partners have built a house together, it has to be kept in mind that the house belongs to the owner of the estate, regardless of who actually paid the costs for building the house.¹⁷³

43. Do the partners have preferential rights regarding their home and/or the household goods? If so, what factors are taken into account when granting these rights (e.g. the formal ownership of the property, the duration of the relationship, the needs of each partner, the care of children)?

Currently, partners in an informal relationship do not have any preferential rights regarding their home or household goods. The division of the home and household goods is conducted pursuant to the general principles of property law without granting one partner any preferential rights. However, some authors argue that a legal provision is urgently needed with regard to the partner who does not have his or her own right to reside in the previously shared apartment; it is proposed that the partner should be granted a right to reside in the apartment for a limited period of time or that the apartment should even be assigned to one partner by a judicial decision for a longer period of time, if he/she needs the apartment urgently.¹⁷⁴

¹⁶⁶ A. DEIXLER-HÜBNER, 'Probleme der Leistungsabgeltung im Zusammenhang mit der Auflösung der Lebensgemeinschaft', *ÖJZ*, 1999, at p. 201.

¹⁶⁷ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 86.

¹⁶⁸ U. AICHHORN, 'Vermögensaufteilung und Erbrecht bei nichtehelicher Lebensgemeinschaft', in: M. GRUBER et al. (eds.), *Erbrecht und Vermögensnachfolge*, Verlag Österreich, Vienna, 2010, at marg. No. 78.

¹⁶⁹ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 421.

¹⁷⁰ F. PARAPATITS, 'section 843 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 1.

¹⁷¹ Section 843 General Austrian Civil Code.

¹⁷² Sections 825 et seq. General Austrian Civil Code; cf. E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 53.

¹⁷³ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 53.

¹⁷⁴ C. FISCHER-CZERMAK and B. BECLIN, 'Reformvorschläge für nichteheliche Lebensgemeinschaften', *iFamZ*, 2012, at p. 191; A. DEIXLER-HÜBNER, 'Rechtliche Regelungen für Lebensgemeinschaften im Innenverhältnis, Überlegungen de lege lata und de lege ferenda', *iFamZ*, 2012, at p. 197.

44. How are the joint debts of the partners settled?

There are no specific rules regulating the settlement of joint debts in case of separation. Usually, the person owning the capital has to repay the loan – at least in the internal relationship as between the ex-partners. However, if loans have been jointly taken out, the creditor will not discharge one debtor from his/her liability, unless it receives an equal security.¹⁷⁵ Hence, an agreement with the creditor is recommended, which discharges one partner either completely from his/her liability or he/she is only liable as a guarantor after the separation. Further, it is recommended to clarify the issue of who pays the instalments in case of separation in a partnership agreement.¹⁷⁶

45. What date is decisive for the determination and the valuation of:

a. The assets?

With regard to separation in an informal relationship no determination and valuation of assets is necessary, because each partner generally remains the owner of his/her assets – even during the relationship. If the partners are joint owners, they either have to divide the asset in kind or, if that is impossible or infeasible, a so-called civil division (*Zivilteilung*) by auctioning the asset and distributing the proceeds becomes necessary.¹⁷⁷ With regard to separation when there is an informal relationship a valuation of a benefit only becomes necessary if one partner reclaims a particular performance under S. 1435 General Austrian Civil Code.¹⁷⁸ Generally, the asset has to be returned in kind. If that is impossible or infeasible the residual value at the time of the separation will be determined by the judge according to his/her free conviction pursuant to S. 273 Austrian Code of Civil Procedure.¹⁷⁹

b. The debts?

Due to the fact that separation does not affect joint debts, no date is required for the determination and valuation thereof. Despite the separation both partners remain liable for debts. If they mutually reach another agreement, they also have to agree on the date upon which only one partner should repay the debt. Hence, it is a matter of agreement.

¹⁷⁵ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 429; E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 88.

¹⁷⁶ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 429.

¹⁷⁷ Section 843 General Austrian Civil Code.

¹⁷⁸ See the answer to Question 46.

¹⁷⁹ Austrian Supreme Court, Judgement of 29.09.1999, 6 Ob 60/99p; Austrian Supreme Court, Judgement 11.06.1981, 7 Ob 600/81.

46. On what grounds, if any, and to what extent may a partner upon separation claim compensation upon the basis of contributions made or disadvantages suffered during the relationship?

Partners in an informal relationship will usually give each other gifts. If there is no doubt about whether it has been a donation, it can be revoked due to gross ingratitude, which requires a criminal offence against the donor.¹⁸⁰ A further possibility to have a gift returned is to challenge the donation contract due to a misconception – also in terms of the motive (*Irrtumsanfechtung*) – when entering into the contract.¹⁸¹ Upon the successful cancellation of the contract, the beneficiary has to return the gift.¹⁸²

Services rendered in an informal relationship are deemed to be complimentary. In the case of separation no compensation is granted. If both partners are working or one is working and the other is responsible for the household, none of the partners can reclaim compensation, because favours or continuous contributions in a monetary or non-monetary form do not fulfil a purpose in the future; by their very nature they are restricted to a certain period of time and therefore do not provide an entitlement to compensation after separation. Only ‘long-term’ investments, which outlast the relationship, can be compensated or must even be returned according to the rules on unjust enrichment, S. 1435 General Austrian Civil Code.¹⁸³ Such investments are, for example, the purchase of furniture, the financial contribution for a joint vehicle or assistance in the partner’s company; hence the services must always be for the benefit of both partners.¹⁸⁴ Along these lines it has been held that financial contributions to the education of one partner cannot be reclaimed, because they are only in the interest of one partner.¹⁸⁵ Further, the beneficiary must have been aware of the fact that the contribution was made in expectation of obtaining something in return. This particular purpose can be the continued existence of the informal relationship or entering into a marriage. If the intended purpose can no longer be realised, the item must primarily be returned in kind. If that is impossible or infeasible, e.g. it involves a fitted kitchen, a reasonable price according to the residual value has to be paid, which will be determined by the judge pursuant to S. 273 Austrian Code of Civil Procedure.¹⁸⁶ Work performances have to be paid according to the collective agreements agreed upon by the employers’ and employees’

¹⁸⁰ Section 948 General Austrian Civil Code.

¹⁸¹ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 401 et seq.

¹⁸² Section 877 General Austrian Civil Code.

¹⁸³ Austrian Supreme Court, Judgement of 13.07.2000, 6 Ob 30/00f.

¹⁸⁴ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 83.

¹⁸⁵ Higher Regional Court of Vienna, Judgement of 26.08.1996, 13 R 36/96a.

¹⁸⁶ Austrian Supreme Court, Judgement of 29.09.1999, 6 Ob 60/99p; Austrian Supreme Court, Judgement of 11.06.1981, 7 Ob 600/81.

associations or an average salary.¹⁸⁷ The limitation period for this claim is thirty years after the first possibility to exercise this right.¹⁸⁸

Moreover, if one partner suffered harm during the relationship, he/she may demand an indemnification according to the general rules on damages, S. 1295 et seq. General Austrian Civil Code. The limitation period for a claim for damages is three years after having obtained knowledge of the damage and the liable party.

E. Death

47. Does the surviving partner have rights of inheritance in the case of intestate succession? If yes, how does this right compare to that of a surviving spouse or a registered partner, in a marriage or registered partnership?

In contrast to spouses, partners do not have any rights of inheritance.¹⁸⁹ In the case of the death of one partner the surviving partner is neither entitled to inherit, nor does he/she have a right to a compulsory portion (*Pflichtteilsanteil*). Hence, if a partner wishes to appoint his/her partner as an heir, it is necessary to draft a last will.¹⁹⁰

48. Does the surviving partner have any other rights or claims on the estate (e.g. any claim based on dependency, compensation, or maintenance) in the case of intestate succession?

The only case which is explicitly governed by law concerns the rental property shared by the partners: Section 14 Austrian Tenancy Act stipulates that after the death of the tenant certain privileged persons are entitled to step into the tenancy agreement and become the contracting party in the agreement, if the following four requirements are fulfilled:

- the deceased partner was the main tenant of the dwelling,
- the existence of a 'privileged person' according to S. 14 para. 3 Austrian Tenancy Act,
- the 'privileged person' has lived together with the main tenant in the same household at the time of his/her death and
- the accommodation is urgently required.¹⁹¹

Besides spouses, relatives in the direct ascending line including adoptees and siblings, partners in an informal relationship belong to the persons entitled under S. 14 para. 3 Austrian Tenancy Act. According to this provision a partner in an informal

¹⁸⁷ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 407.

¹⁸⁸ Sections 1478, 1479 General Austrian Civil Code.

¹⁸⁹ U. AICHHORN, 'Vermögensaufteilung und Erbrecht bei nichtehelicher Lebensgemeinschaft', in: M. GRUBER et al. (eds.), *Erbrecht und Vermögensnachfolge*, Verlag Österreich, Vienna, 2010, at marg. No. 81.

¹⁹⁰ See A. DEIXLER-HÜBNER and H. SCHÄFFER, *Partnerschaft ohne Trauschein*, Linde, Vienna, 2014, at p. 43.

¹⁹¹ H. WÜRTH, 'section 14 Austrian Tenancy Act', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2003, at marg. No. 4.

relationship is a person who had lived in the dwelling with the main tenant until his/her death for at least three years.¹⁹² From an economic point of view the informal relationship has to be comparable with a marriage. The temporal requirement does not apply if the partners had already moved into the dwelling together.¹⁹³

If these requirements are fulfilled, the person in question automatically becomes the new contracting party, unless he/she declares within fourteen days after the death of the other person that he/she does not want to continue the rental agreement. In case of doubt, the person who wishes to become the contracting party bears the burden of proof that all four conditions are met.¹⁹⁴ This particular inheritance right even applies if another person is appointed as the heir.¹⁹⁵

Since the amendment of the Austrian Condominium Ownership Act in 2002 also partners in an informal relationship can jointly purchase a condominium.¹⁹⁶ Before the amendment this possibility was reserved to spouses, unless the partners in the informal relationship agreed to form a partnership.¹⁹⁷ In the case of death the share owned by the deceased person automatically becomes the property of the surviving partner, unless the person entitled waives his/her right or reaches another agreement with the heirs.¹⁹⁸ It should be noted, however, that this acquisition is not inheritance-related, but rather constitutes a particular form of accretion (*Anwachsung*).¹⁹⁹ As a result the surviving partner becomes the sole owner of the condominium, but has to pay the takeover price, which is half of the market value.²⁰⁰ There is no obligation to pay the takeover price if the decedent has so disposed of the property in his/her last will or donates his/her share to the other partner in the case of death.

Further, it should be noted that the surviving partner can, of course, direct all claims against the estate, which he/she could have claimed against his/her partner during his/her lifetime:

A partner may bring an unjust enrichment claim pursuant to S. 1435 General Austrian Civil Code, if he/she rendered a performance in expectation of a particular purpose, which was obvious to the beneficiary and could finally not be achieved.²⁰¹

¹⁹² H. WÜRTH, 'section 14 Austrian Tenancy Act', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2003, at marg. No. 7.

¹⁹³ Section 14 para. 3 Austrian Tenancy Act.

¹⁹⁴ Austrian Supreme Court, Judgement of 03.11.1999, 9 Ob 280/99p.

¹⁹⁵ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 51.

¹⁹⁶ Section 13 Condominium Ownership Act.

¹⁹⁷ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 52.

¹⁹⁸ Section 14 Austrian Condominium Ownership Act.

¹⁹⁹ A. KLETEČKA, 'Die Eigentümerpartnerschaft nach dem WEG 2002', *immolex*, 2002, at p. 174 et seq.

²⁰⁰ E. GITSCHTHALER, 'Neuerungen im Recht der Lebensgemeinschaften', *AnwBl*, 2012, at p. 600.

²⁰¹ R. HOLZHAMMER and M. ROTH, *Bürgerliches Recht mit Internationalem Privatrecht*, LexisNexis ARD ORAC, Vienna, 2004, at p. 322 et seq.; E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 83.

The same is true for claims arising from service contracts pursuant to S. 1152 General Austrian Civil Code, which stipulates that in the absence of an agreement reasonable compensation is deemed to have been agreed. However, due to the fact that performances rendered within an informal relationship are considered to be complimentary, the person rendering the performance is entitled to payment only in exceptional circumstances, e.g. if it was rendered in expectation of a subsequent counter-performance (e.g. marriage).²⁰² Moreover, if one partner suffered harm during the relationship, he/she may demand indemnification according to the general rules on damages, S. 1295 et seq. General Austrian Civil Code.

49. Are there specific rules dealing with the home and/or household goods?

In Austria there are currently no specific rules dealing with the home and/or household goods in case of the death of one partner in an informal relationship.

50. Can a partner dispose of property by will in favour of the surviving partner:

a. In general?

Generally, the testator can avoid intestate succession by drafting his/her last will. Thus, a partner in an informal relationship has the possibility to appoint his/her partner as his/her heir. If the testator wishes to bequeath his/her partner a certain item or a certain amount of money without creating the status of an heir, he/she can do so by drafting a legacy.²⁰³ In contrast to the heir, the legatee merely becomes a single successor and has a claim against the heir.²⁰⁴

b. If the testator is married to or is the registered partner of another person?

c. If the testator has children?

Generally, the testator is free to appoint his/her heirs.²⁰⁵ However, this autonomy is subject to certain limitations: Due to the close relationship to the testator some family members should receive a compulsory share (*Pflichtteilsrecht*) of the testator's property.²⁰⁶ The right to a compulsory share ensures that the spouse and the children receive half of the statutory share.²⁰⁷ The same applies to registered partners.²⁰⁸ If, for example, the spouse would have inherited one third of the decedent's property according to intestate succession, he/she receives one-sixth as the compulsory share. The testator can even reduce the compulsory share by up to a half if the close relationship which usually exists between the testator and the person entitled to the

²⁰² Austrian Supreme Court, Judgement of 15.12.2009, 5Ob174/09p; Austrian Supreme Court, Judgement of 19.12.2001, 9 Ob 291/01m; R. HOLZHAMMER and M. ROTH, *Bürgerliches Recht mit Internationalem Privatrecht*, LexisNexis ARD ORAC, Vienna, 2004, at p. 323.

²⁰³ Section 535 General Austrian Civil Code.

²⁰⁴ C. WERKUSCH-CHRIST, 'section 535 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 1.

²⁰⁵ Section 552 et seq. General Austrian Civil Code.

²⁰⁶ Section 762 General Austrian Civil Code.

²⁰⁷ Section 765 General Austrian Civil Code.

²⁰⁸ Section 537a General Austrian Civil Code.

compulsory share had never in fact existed, unless the testator had expressly refused contact.²⁰⁹ Hence, one partner can dispose of his/her property by means of a last will in favour of the surviving partner, but his/her spouse and/or the children will still receive the compulsory share.

- 51. Can partners make a joint will disposing of property in favour of the surviving partner:**
- a. In general?**
 - b. If either testator is married to or is the registered partner of another person?**
 - c. If either testator has children?**

Under Austrian law joint wills are only binding as between spouses or registered partners.²¹⁰ It follows that partners in an informal relationship cannot validly dispose of property in favour of their surviving partner by drafting a joint will, regardless of whether one testator is married, lives in a registered partnership or has children; such a joint will would be void in any case.²¹¹ There are various reasons for the limited admissibility of joint wills: First, joint wills may be difficult to interpret; second, testators might influence each other;²¹² third, persons might be mistaken regarding the irrevocability of the joint wills; and fourth, the dependency of the dispositions.²¹³

- 52. Can partners make other dispositions of property upon death (e.g. agreements as to succession or gifts upon death) in favour of the surviving partner:**
- a. In general?**
 - b. If either partner is married to or is the registered partner of another person?**
 - c. If either partner has children?**

Contracts of inheritance can only be concluded between spouses or registered partners, but not between partners in an informal relationship.²¹⁴ However, a donation upon death – which is qualified as a contract between the decedent and the presentee – is not limited to spouses, but may also be concluded between partners in an informal relationship. The donation upon death is a legal institution which lies in between a pure donation and a legacy. For a valid donation upon death three conditions must be fulfilled:

- The presentee has to accept the promise.

²⁰⁹ Section 773a General Austrian Civil Code.

²¹⁰ Section 583 in connection with section 1248 General Austrian Civil Code; section 537a General Austrian Civil Code.

²¹¹ G. KNECHTEL, 'section 583 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 2; C. CACH, 'Ein Erbrecht für Lebensgefährten?', *SPRW*, 2014, at p. 427.

²¹² Austrian Supreme Court, Legal Proposition RS0012483, see e.g. Judgement of 06.10.1982, 6 Ob 762/82, *JBl*, 1983, at p. 647.

²¹³ G. KNECHTEL, 'section 583 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 3.

²¹⁴ Sections 602 et seq. in connection with section 1249 General Austrian Civil Code; R. FUCIK, 'section 1249 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 1; C. CACH, 'Ein Erbrecht für Lebensgefährten?', *SPRW*, 2014, at p. 427.

- The contract requires the notarial form and a copy thereof must be given to the presentee.
- The testator explicitly waives his/her right to revoke his/her promise.

The possibility of a donation upon death exists regardless of whether a partner is married, lives in a registered partnership or has children. Apart from a donation upon death the partners only have the right to unilaterally appoint the other partner as an heir or to favour the surviving partner by drafting a legacy.

53. Is the surviving partner entitled to a reserved share²¹⁵ or to any other rights or claims on the estate (e.g. any claim based on dependency, compensation, or maintenance) in the case of a disposition of property upon death (e.g. by will, joint will, or inheritance agreement) in favour of another person?

In contrast to spouses, who are entitled to a compulsory share which amounts to half of the statutory share, partners in an informal relationship have no equivalent right if the testator legally disposes in favour of another person. Due to the fact that partners in an informal relationship have no right to inheritance, the partners can only inherit if the other partner has made a respective disposition of property upon death. If, however, the partner has failed to do so, the other partner is neither entitled to a reserved share nor to any other similar rights. However, as has been explained in answer to Question 48 the partner in an informal relationship has the right to step into the tenancy agreement and become the contracting party in the agreement in case of the death of the other partner, even if the decedent has disposed of the property in favour of another person.²¹⁶

54. Are there any statistics or estimations on how often a relationship is terminated by the death of one of the partners?

Unfortunately, neither statistics nor estimations on this issue exist.²¹⁷

55. Are there any statistics or estimations on how common it is that partners in an informal relationship make a will in favour of the other partner?

Unfortunately, neither statistics nor estimations on this issue exist.²¹⁸

56. Are there any statistics or estimations on how common it is that a partner in an informal relationship is the beneficiary to the other partner's life insurance?

²¹⁵ See Regulation no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession [2012] OJ L 201/107.

²¹⁶ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 51.

²¹⁷ According to the information provided by Statistics Austria, the Austrian Institute for Family Studies and the Vienna Institute for Demography by e-mails dated 02.02.2015 and 03.02.2015.

²¹⁸ According to the information provided by Statistics Austria, the Austrian Institute for Family Studies and the Vienna Institute for Demography by e-mails dated 02.02.2015 and 03.02.2015.

Unfortunately, neither statistics nor estimations on this issue exist.²¹⁹ However, the legal literature refers to the fact that life insurances are 'often' concluded in favour of one partner in an informal relationship, because in case of the death of the other partner there is neither a right to inherit nor to have a maintenance claim.²²⁰

F. Agreements

57. Are there specific rules concerning agreements between partners in an informal relationship? Where relevant, please indicate these specific rules. If not, which general rules apply?

Although the validity of so-called partnership agreements is recognized in Austria, there are currently no specific rules dealing with this type of agreement. Therefore, partnership agreements are subject to the general rules which are applicable to contracts:²²¹ Section 863 General Austrian Civil Code stipulates that declarations of intent can be made implicitly or explicitly, S. 883 General Austrian Civil Code contains the principle of freedom of form and S. 917 et seq. General Austrian Civil Code regulates possible irregularities when it comes to performance.²²² One of the main principles of Austrian private law is party autonomy, which is particularly reflected in the principle of freedom of contract. This principle leaves it to the parties as to whether and, if so, with whom and with which content they reach an agreement. However, this freedom is subject to certain limitations: A contract which violates statutory provisions or public morals is void.²²³

With regard to partnership agreements clauses regulating the following issues would be contrary to public morals and would therefore be void²²⁴:

- prohibiting one partner in an informal relationship from engaging in a business activity;
- regulating the sexual relationship between the partners, e.g. the number of children, the frequency of sexual intercourse or sexual practices;
- containing the obligation of sexual loyalty or childlessness;
- the use of contraceptives;²²⁵
- ordering the submission of the woman.

²¹⁹ According to the information provided by the Austrian Insurance Federation, the Allianz Life Insurance, the Zürich Versicherungs-Aktiengesellschaft by e-mails dated 20.02.2015 and 26.02.2015.

²²⁰ U. AICHHORN, 'Vermögensaufteilung und Erbrecht bei nichtehelicher Lebensgemeinschaft', in: M. GRUBER et al. (eds.), *Erbrecht und Vermögensnachfolge*, Verlag Österreich, Vienna, 2010, at marg. No. 84.

²²¹ N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 13.

²²² See S. PERNER, M. SPITZER and E. KODEK, *Bürgerliches Recht*, Manz Verlag, Vienna, 2012, at p. 37.

²²³ Section 879 para. 1 General Austrian Civil Code.

²²⁴ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 38; A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis, Vienna, 2013, at marg. No. 252a; N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 13 et seq.

²²⁵ Austrian Supreme Court, Judgement of 27.01.1994, 2 Ob 557/93, *JBl*, 1994, at p. 687.

To sum up, agreements which unreasonably restrict personal freedom are contrary to public morals and are therefore void.²²⁶ Such obligations could also not be enforced by imposing penalties, because the validity of penalty clauses depends upon the validity of the underlying obligation.²²⁷ Whether compensation agreements are valid is disputed. If pecuniary damages suffered during the informal relationship should be compensated by the agreement, Deixler-Hübner and Schäffer argue for their validity and refer to the example where the partners in an informal relationship agree that one partner takes care of the child of the other partner resulting from a prior relationship, and can therefore only work part time. However, the partner is only willing to take care of the child if – in the case of separation – the other partner pays a certain amount of money. Such an agreement should be valid, because without the support of the other partner, the partner must have hired domestic help.²²⁸

Finally, it should be noted that the partners cannot simply refer to the rules regulating marriage and declare that these rules are applicable to their relationship. Provisions on marriage or registered partnerships cannot therefore be applied to informal relationships by analogy.²²⁹

58. Are partners in an informal relationship permitted to agree on the following issues:

a. The division of tasks as between the partners?

By concluding a partnership agreement the partners can lay down their property and/or personal relations. A partnership agreement may regulate the partners' life together during the relationship or may merely determine the consequences in case of separation.²³⁰ If mainly personal relations are governed by the partnership agreement, it should be noted that such an agreement is allowed as long as it does not interfere with the highly personal sphere of one of the partners, but it cannot be enforced. Accordingly, partners in an informal relationship can agree upon the household organization and a division of tasks, but should be aware of the fact that such an agreement is not enforceable.²³¹

²²⁶ A. DEIXLER-HÜBNER and H. SCHÄFFER, *Partnerschaft ohne Trauschein*, Linde, Vienna, 2014, at p. 105; S. FERRARI, 'Rechtsregeln für nichteheliches Zusammenleben in Österreich', in: I. KROPFENBERG et al. (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, Gieseking Verlag, Vienna, 2009, pp. 167-206, at p. 176 et seq.

²²⁷ A. DEIXLER-HÜBNER and H. SCHÄFFER, *Partnerschaft ohne Trauschein*, Linde, Vienna, 2014, at p. 103; N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 14.

²²⁸ See A. DEIXLER-HÜBNER and H. SCHÄFFER, *Partnerschaft ohne Trauschein*, Linde, Vienna, 2014, at p. 107.

²²⁹ E. GITSCHTHALER, 'Neuerungen im Recht der Lebensgemeinschaften', *AnwBl*, 2012, at p. 598 et seq.; Austrian Supreme Court, Judgement of 16.11.2007, 7 Ob 239/07h; Austrian Supreme Court, Judgement of 01.04.1998, 9 Ob 96/98b.

²³⁰ See A. DEIXLER-HÜBNER and H. SCHÄFFER, *Partnerschaft ohne Trauschein*, Linde, Vienna, 2014, at p. 102 et seq.

²³¹ A. DEIXLER-HÜBNER and H. SCHÄFFER, *Partnerschaft ohne Trauschein*, Linde, Vienna, 2014, at p. 103.

b. The contributions to the costs and expenses of the household?

The partners may, for example, agree that one partner is responsible for the daily expenses, e.g. paying the rent or telephone bill and purchasing the food, whereas the other partner repays a loan.²³² Hence, it is up to the parties how they distribute the household costs and expenses and who bears which share. In particular, it should be noted that – without a respective agreement on this issue – the partner bearing the costs caused by daily life is not entitled to claim unjust enrichment in the case of separation, because these costs are considered to be complimentary.²³³ In contrast, the partner making ‘long-term’ investments, such as paying the monthly instalments, may reclaim his/her costs.²³⁴ Since the application of the rules on unjust enrichment do not lead to a satisfactory result in this regard, an agreement on the contribution to the costs and expenses of the household seems to be vital.

c. Their property relationship?

The main purpose of concluding a partnership agreement is to regulate property relations as between the parties. It is recommended to maintain different lists of all movables, which provide information on the ownership of the items, e.g. that every partner remains the sole owner of ‘his/her’ items.²³⁵ Such a list needs to be updated regularly. If assets are jointly purchased, a community of goods can be agreed upon.²³⁶ A clause regarding community of goods – which is considered to be the main element of partnership agreements²³⁷ – secures a fair distribution of the assets in case of separation. Further, the partners may wish to agree with whom the assets should remain and how the other partner is compensated for them in case of separation.²³⁸ Moreover, the partners can reach an agreement on how they deal with financial investments.²³⁹ Hence, under Austrian law partners in an informal relationship are permitted to agree on comprehensive rules concerning their property relationship.

²³² U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 427.

²³³ B. LURGER, ‘section 1435 General Austrian Civil Code’, in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 8.

²³⁴ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 427.

²³⁵ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 429.

²³⁶ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 429.

²³⁷ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 36.

²³⁸ A. DEIXLER-HÜBNER, ‘Partnerschaftsverträge – Rechtliche Grenzen und möglicher Regelungsinhalt’, *iFamZ*, 2008, at p. 337; cf. U. AICHHORN, ‘Vermögensaufteilung und Erbrecht bei nichtehelicher Lebensgemeinschaft’, in: M. GRUBER et al. (eds.), *Erbrecht und Vermögensnachfolge*, Verlag Österreich, Vienna, 2010, at marg. No. 5.

²³⁹ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 37.

d. Maintenance?

Partners in an informal relationship are not entitled to claim maintenance, neither during their relationship nor after its termination. Therefore, partners may reach an agreement on maintenance during the relationship as well as for the period after their separation.²⁴⁰ In the case of separation a maintenance agreement is qualified as a promise to donate in the future and therefore requires a notarial deed in order to be valid. Moreover, it should be noted that maintenance agreements which unreasonably restrict the economic freedom of one partner, because e.g. the payments are life-threatening, are contrary to public morals pursuant to S. 879 para. 1 General Austrian Civil Code and are thus void.²⁴¹

e. The duration of the agreement?

Due to the principle of freedom of contract the parties can also agree on the duration of the agreement. Generally, the partnership agreement does not automatically end with concluding a marriage or the separation of the partners. The partners themselves can agree on the point in time when the partnership agreement should be terminated.²⁴² If the partners agree that the validity of the contract terminates in case of separation, it is recommended to confirm in writing the official end of the relationship in order to avoid problems in clarifying this point in time.²⁴³ Particularly with regard to clauses regulating maintenance in case of separation a temporal limitation of this obligation should be agreed upon.²⁴⁴ Further, since the property relations of the partners will change over the years, the partnership agreement should be revised from time to time – preferably by a lawyer or a notary – in order to reflect the current situation as best as possible.²⁴⁵

59. Are partners in an informal relationship permitted to agree on the legal consequences of their separation?

Partners in an informal relationship are allowed to reach an agreement on the legal consequences of their separation.²⁴⁶ This is not only permitted, but due to the

²⁴⁰ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p.426.

²⁴¹ A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2013, at marg. No. 252a.

²⁴² N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 17.

²⁴³ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 43.

²⁴⁴ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 36.

²⁴⁵ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 43.

²⁴⁶ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 423; N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 13; E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 36; A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2013, at marg. No. 252.

uncertainty caused by the lacking legal framework for informal relationships, it is highly advisable to conclude a partnership agreement for certain issues and particularly for the case of separation.²⁴⁷ Back in 2002 the Austrian Administrative Court qualified a partnership agreement, which was concluded in notarial form and contained a compensation clause, as a settlement agreement pursuant to S. 1380 General Austrian Civil Code.²⁴⁸

60. Are the agreements binding:

a. Between the partners?

Partnership agreements are binding as between the partners in an informal relationship.²⁴⁹ However, it should be noted that the partners neither have the possibility to deviate from rules on social or tax law, nor can they create any claims under public law by concluding a partnership agreement. In this regard the effect of a partnership agreement is restricted.²⁵⁰

b. In relation to third parties?

Generally, contracts create rights and duties only among the parties to the agreement (privity of contract). Accordingly, problems arising from relations between the partners in the informal relationship and third persons cannot be settled in partnership agreements.²⁵¹ Further, a partnership agreement must not infringe third party rights: A partner cannot, for example, contractually assure the other partner of a widow's pension.²⁵² However, under Austrian law contracts for the benefit of third parties are generally possible (e.g. a third party benefit insurance contract), whereas contracts imposing duties on third parties are not allowed. Due to the fact that nobody is obliged to accept any benefit, the third person can reject it.²⁵³

61. If agreements are not binding, what effect, if any, do they have?

Partnership agreements are binding as between the partners in an informal relationship.²⁵⁴

²⁴⁷ S. FERRARI, 'Rechtsregeln für nichteheliches Zusammenleben in Österreich', in: I. KROPFENBERG et al. (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, Gieseking Verlag, Vienna, 2009, pp. 167-206, at p. 176 et seq.

²⁴⁸ Austrian Administrative Court, Decision of 24.01.2002, 99/16/0147.

²⁴⁹ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 34.

²⁵⁰ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 42.

²⁵¹ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 42.

²⁵² U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 423; N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 13.

²⁵³ Section 882 General Austrian Civil Code.

²⁵⁴ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 34.

62. If specific legislative provisions regulate informal relationships, are the partners permitted to opt in or to opt out of this specific regulation?

Generally, it can be said that partners in an informal relationship enjoy a wide margin of appreciation as regards the drafting of their partnership agreement. To a large extent the Austrian law on obligations is of an optional nature except for e.g. S. 879 General Austrian Civil Code (invalidity of contracts), which the partners in an informal relationship cannot exclude. Further, they cannot opt out of property law or provisions resulting from tenancy or social law.²⁵⁵ Many provisions which consider informal relationships to be equal to marriages are of public nature, e.g. Code of Criminal Procedure, and are therefore mandatory. Moreover, one has to keep in mind that the majority of these provisions is in favour of informal relationships and thus there is no need to derogate therefrom. Finally, it should be noted that by concluding a partnership agreement partners in an informal relationship cannot create any claims under public law.²⁵⁶

63. When can the agreement be made (before, during, or after the relationship)?

Due to the principle of freedom of contract partners in an informal relationship are permitted to conclude a partnership agreement.²⁵⁷ Partnership agreements are subject to the general rules which are applicable to contracts.²⁵⁸ Hence, everyone can determine on his/her own with whom and under what conditions and at which point in time a contract is agreed upon. From a practical point of view, however, partnership agreements are usually concluded during the relationship, after the partners have known each other for a certain length of time and have possibly moved in together. With regard to the point in time when the partnership agreement has to be concluded, two issues should be borne in mind: First, since relationships tend to become more complex over time, particularly concerning assets that are jointly purchased, partners should not wait too long before drafting an agreement.²⁵⁹ Second, although it is legally possible to reach an agreement on the consequences of the separation after the breakdown of the informal relationship, it is highly likely that a separation makes a settlement even more difficult. Apart from these practical considerations, no provisions regarding the point in time when the partnership agreement should be concluded have to be followed.

64. What formal requirements, if any, govern the validity of agreements:

a. As between the partners?

²⁵⁵ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 42.

²⁵⁶ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 42.

²⁵⁷ N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 13.

²⁵⁸ N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 13.

²⁵⁹ Cf. E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 34.

Although it is not mandatory, a partnership agreement should be drafted in writing for evidentiary purposes.²⁶⁰ It should be noted, however, that some clauses are subject to formal requirements²⁶¹: A maintenance agreement is qualified as a donation and therefore requires a notarial deed in order to be valid. Further, an advance directive (*Patientenverfügung*), which *inter alia* allows a person to appoint a person of trust who is informed about the health situation in the event of illness, requires that the decision is made in writing before a lawyer, a notary or a legally qualified person from patients' representatives.²⁶² Apart from these peculiarities no formal requirements have to be considered.

b. In relation to a third party?

Generally, contracts do not have any legal effect in relation to third parties, rather they are only binding as between the contracting parties.²⁶³ However, under Austrian law contracts for the benefit of a third party are allowed.²⁶⁴ A contract for the benefit of a third party can be concluded without considering any formal requirements, apart from the exceptional case where the underlying contract is qualified as e.g. a donation without simultaneous delivery, which requires a notarial form.²⁶⁵

65. Is independent legal advice required?

Although independent legal advice is not a mandatory requirement for drafting a partnership agreement, it is recommended to consult a lawyer or a notary when the partners have decided to conclude such an agreement.²⁶⁶

66. Are there any statistics or estimations on the frequency of agreements made between partners in an informal relationship?

Unfortunately, neither statistics nor estimations on this issue exist.²⁶⁷ However, the legal literature refers to the fact that partnership agreements are rarely concluded in

²⁶⁰ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 43.

²⁶¹ Cf. N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 13.

²⁶² Section 6 para. 1 Advance Decision Act (*Patientenverfügungsgesetz*).

²⁶³ See the answer to Question 60(b).

²⁶⁴ S. KALSS, 'section 881 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 1.

²⁶⁵ S. KALSS, 'section 881 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2014, at marg. No. 32; H. LÖCKER, 'section 943 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.02*, Manz Verlag, Vienna, 2013, at marg. No. 1.

²⁶⁶ Cf. U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 426; E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 34.

²⁶⁷ According to the information provided by Statistics Austria, the Austrian Institute for Family Studies and the Vienna Institute for Demography by e-mails dated 02.02.2015 and 03.02.2015.

Austria.²⁶⁸ It is stated that partners in an informal relationship hesitate to conclude partnership agreements due to the complexity and individuality inherent in such agreements.²⁶⁹

67. Are there any statistics or estimations regarding the content of agreements made between partners in an informal relationship?

Unfortunately, neither statistics nor estimations on this issue exist.²⁷⁰

G. Disputes

68. Which authority is competent to decide disputes between partners in an informal relationship?

In Austria, the district courts (*Bezirksgerichte*) have jurisdiction in civil matters if they are specifically assigned to them by law, e.g. family matters, particularly matters between spouses or partners in a registered partnership, or the amount in dispute does not exceed EUR 15,000. Due to the fact that disputes between partners in an informal relationship have not yet been assigned to specific courts, the competent court in these matters has to be determined according to the amount in dispute: If the amount in dispute is below EUR 15,000 the district court is competent, whereas for all other matters exceeding this value the regional court (*Landesgericht*) is competent.²⁷¹ Local jurisdiction is determined according to the general rules, S. 65 et seq. Austrian Jurisdiction Act. Hence, the competent court is usually at the respondent's domicile.²⁷²

Further, it should be noted that in Austria a distinction is made between contentious and non-contentious proceedings, the latter being subject to a separate procedural law – the Austrian Non-Contentious Proceedings Act (*Außerstreitgesetz*). Claims arising from informal relationships can only be filed in contentious proceedings.²⁷³

²⁶⁸ U. AICHHORN, *Das Recht der Lebenspartnerschaften, Ehe und Lebensgemeinschaft*, Springer, Vienna, 2003, at p. 423; E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 34; A. DEIXLER-HÜBNER, *Scheidung, Ehe und Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2013, at marg. No. 252a; S. FERRARI, 'Rechtsregeln für nichteheliches Zusammenleben in Österreich', in: I. KROPFENBERG et al. (eds.), *Rechtsregeln für nichteheliches Zusammenleben*, Gieseking Verlag, Vienna, 2009, pp. 167-206, at p. 176.

²⁶⁹ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 34.

²⁷⁰ According to the information provided by Statistics Austria, the Austrian Institute for Family Studies and the Vienna Institute for Demography by e-mails dated 02.02.2015 and 03.02.2015.

²⁷¹ Cf. F. MEISSEL and J. JUNGWIRTH, in: E. GITSCHTHALER et al. (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1160.

²⁷² The special jurisdiction laid down in section 76 Austrian Jurisdiction Act for disputes arising from a marriage or a registered partnership does not apply to disputes from an informal relationship. F. MEISSEL and J. JUNGWIRTH, in: E. GITSCHTHALER et al. (eds.), *Kommentar zum Ehe- und Partnerschaftsrecht*, Springer, Vienna, 2011, at p. 1160.

²⁷³ Austrian Supreme Court, Legal Proposition RS0013615, see Judgement of 03.03.1982, 6 Ob 692/81; R. FUCIK, 'section 1 Austrian Jurisdiction Act', in: H. FASCHING and A. KONECNY (eds.), *Kommentar zu den Zivilprozessgesetzen*, Manz Verlag, Vienna, 2013, at marg. No. 278.

69. Is that the same authority as for spousal disputes?

According to S. 49 para. 2 No. 2a and 2b and 104a Austrian Jurisdiction Act the district courts have exclusive jurisdiction over all types of spousal disputes, regardless of the amount in dispute.²⁷⁴ The same court also decides upon disputes arising from registered partnerships.²⁷⁵

Hence, if in a dispute between partners in an informal relationship the amount in dispute is below EUR 15,000 the same authority as for spousal disputes has jurisdiction, namely the district court. If, however, the amount in dispute exceeds the value limit of EUR 15,000, the regional court is competent to decide the issue, whereas for spousal disputes the district court remains competent, independent of the amount in dispute.

70. Can the competent authority scrutinise an agreement made by the partners in an informal relationship? If yes, what is the scope of the scrutiny?

Partnership agreements are subject to the rules of contract law.²⁷⁶ Section 879 General Austrian Civil Code contains restrictions on party autonomy and stipulates – as a general clause – that a contract which violates statutory provisions or public morals is void. This provision applies to all contracts including partnership agreements.²⁷⁷ Hence, the courts can scrutinize partnership agreements in terms of their compliance with laws and public morals, whereby a judicial review will become particularly necessary, if the agreement is unfavourable for one partner.²⁷⁸ Whether public morals are violated has to be determined by the judge by evaluating whether the legally protected interests of one party have been seriously infringed or, in case of a conflict of interests, whether there is considerable disparity between the interests involved.²⁷⁹ All contractual clauses which unreasonably restrict the highly personal area or the personal freedom of one partner are considered to be contrary to public morals.²⁸⁰

71. Can the competent authority override or modify the agreement on account of fairness towards a partner, the rights of a third party, or on any other ground (e.g. a change of circumstances)?

If the partnership agreement is contrary to S. 879 para. 1 General Austrian Civil Code and therefore either violates a statutory prohibition or public morals, the agreement

²⁷⁴ M. ROTH, *Zivilprozessrecht*, Manz Verlag, Vienna, 2012, at p. 93.

²⁷⁵ Section 49 para. 2 No. 2c and 2d Austrian Jurisdiction Act.

²⁷⁶ N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 13.

²⁷⁷ H. KREJCI, 'section 879 General Austrian Civil Code', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2000, at marg. No. 4.

²⁷⁸ E. MÖSCHL, *Die nichteheliche Lebensgemeinschaft*, LexisNexis ARD ORAC, Vienna, 2007, at marg. No. 34.

²⁷⁹ H. KOZIOL and R. WELSER, *Grundriss des Bürgerlichen Rechts*, Manz Verlag, Vienna, 2006, at p. 179.

²⁸⁰ For examples see the answer to Question 57.

is void. Whether the entire agreement or only the respective clause is void depends on the underlying aim of the statute;²⁸¹ generally, it should be attempted to uphold the remainder of the contract.²⁸² If a clause is contrary to public morals due to its temporal, spatial or extensive dimension, it does not entail the nullity of the contract, rather the judge has to reduce the content of the respective clause to an acceptable extent, unless there are compelling reasons to refrain from doing so.²⁸³

Usually the nullity of a single clause causes a gap in the contract which needs to be filled by a supplementary interpretation of the contract. In this regard – besides considering objective elements, such as the purpose of the contract – the hypothetical intention of the parties has to be taken into account. However, if the nullity results from a breach of S. 879 para. 1 General Austrian Civil Code, a supplementary interpretation of the contract may be incompatible with the purpose of the provision.²⁸⁴ Hence, the competent authority can only under very limited circumstances interpret the contract on a supplementary basis if a contractual gap needs to be filled. Other reasons which authorize the competent authority to override or modify the agreement are not provided for.

72. What alternative dispute-solving mechanisms (e.g. mediation or counselling), if any, are offered or required with regard to disputes arising out of informal relationships?

The parties in a partnership agreement can include a clause providing for some kind of alternative dispute resolution, e.g. mediation, before resorting to the courts.²⁸⁵ In respect of family matters mediation has become increasingly popular in Austria in recent years.²⁸⁶ The Federal Minister of Justice maintains a list of mediators which is published electronically.²⁸⁷ However, alternative dispute-solving mechanisms are not a mandatory prerequisite before submitting a claim.

73. What are the procedural effects of an agreement on ADR between partners in an informal relationship? Can any partner seize the competent authority in breach of the ADR clause?

²⁸¹ H. KREJCI, 'section 879 General Austrian Civil Code', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2000, at marg. No. 250.

²⁸² H. KOZIOL and R. WELSER, *Grundriss des Bürgerlichen Rechts*, Manz Verlag, Vienna, 2006, at p. 182.

²⁸³ H. KREJCI, 'section 879 General Austrian Civil Code', in: P. RUMMEL (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Manz Verlag, Vienna, 2000, at marg. No. 250.

²⁸⁴ G. GRAF, 'section 878 General Austrian Civil Code', in: A. KLETEČKA and M. SCHAUER, *ABGB-ON 1.01*, Manz Verlag, Vienna, 2013, at marg. No. 16.

²⁸⁵ N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 17.

²⁸⁶ See M. ROTH and M. STEGNER, 'Mediation in Austria', in: M. GEISTLINGER and M. ROTH (eds.), *Yearbook on International Arbitration*, Intersentia, Antwerp, 2013, pp. 367-378, at p. 378.

²⁸⁷ Available at: www.mediatorenliste.justiz.gv.at/mediatoren/mediatorenliste.nsf/docs/home.

Whether an ADR clause is binding on the parties or merely constitutes a declaration of intent is disputed.²⁸⁸ Currently the Austrian Code of Civil Procedure does not provide for any consequences for non-compliance with a mediation clause.²⁸⁹ In terms of mediation the Austrian Supreme Court has held that mediation cannot be ordered against the will of one party.²⁹⁰ Along these lines S. 1 para. 1 Austrian Mediation Act stipulates that mediation is voluntary. The principle of voluntariness also applies if the parties have included a mediation clause in their contract.²⁹¹ Thus, a party can directly resort to the courts, even if this party has not complied with the ADR clause, because such clauses are based on the voluntary willingness of the parties involved to reach an amicable settlement.²⁹²

74. Are there any statistics or estimations on how common it is that partners in an informal relationship include an ADR clause in their agreement?

Unfortunately, neither statistics nor estimations on this issue exist.²⁹³

²⁸⁸ N. OSWALD and A. SCHMALLEGGER, 'Partnerschaftsvertrag zwischen nichtehelichen Lebensgefährten', *EF-Z*, 2013, at p. 17.

²⁸⁹ M. ROTH and D. GHERDANE, 'Mediation in Österreich', in: K.J. HOPT and F. STEFFEK (eds.), *Mediation: Rechtstatsachen, Rechtsvergleich, Regelungen*, Mohr Siebeck, Tübingen, 2008, at p. 127.

²⁹⁰ Austrian Supreme Court, Judgement of 15.07.1997, 1 Ob161/97a.

²⁹¹ M. ROTH and M. STEGNER, 'Mediation in Austria', in: M. GEISTLINGER and M. ROTH (eds.), *Yearbook on International Arbitration*, Intersentia, Antwerp, 2013, pp. 367-378, at p. 378.

²⁹² Cf. M. ROTH and M. STEGNER, 'Mediation in Austria', in: M. GEISTLINGER and M. ROTH (eds.), *Yearbook on International Arbitration*, Intersentia, Antwerp, 2013, pp. 367-378, at p. 369.

²⁹³ According to the information provided by Statistics Austria, the Austrian Institute for Family Studies and the Vienna Institute for Demography by e-mails dated 02.02.2015 and 03.02.2015.