

## NATIONAL REPORT: GERMANY

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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.

Under German law marriage exists between a man and a woman, §§ 1303 et seq. German Civil Code (*Bürgerliches Gesetzbuch*; BGB). The Civil Code does not expressly state that a spouse must be of the opposite sex to their spouse. However, this requirement is accepted generally.<sup>1</sup>

There is no same-sex marriage in Germany; it is only possible to enter a registered partnership. The legal basis for registered homosexual unions is the German Act on Registered Life Partnerships (*Lebenspartnerschaftsgesetz*; LPartG) of 16 February 2001 as amended.<sup>2</sup> After an unsuccessful attempt by representatives of gay and lesbian groups to enter into a marriage under existing law, the Federal Constitutional Court declared that the legislature was nevertheless free to enact some kind of law in this regard.<sup>3</sup> The intention of the legislature was to abolish discrimination against same-sex relationships, for which the alternative of marriage was not available – that right being reserved for heterosexuals. This was also in line with developments in Community law, which does not allow discrimination based on ‘sexual orientation’ (now Art. 19 TFEU, former Art. 13 EC Treaty).<sup>4</sup> The German registered partner model closely followed the pattern of the Nordic partnership laws.

However, since there was a constitutional challenge to the Act, the legislature reserved marriage for partners of the opposite sex and avoided endowing partnership with the same meaning as marriage. Later the Federal Constitutional Court (*Bundesverfassungsgericht*; BVerfG) upheld the German Act on Registered Life

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<sup>1</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 3 No. 13.

<sup>2</sup> Act on Registered Life Partnerships introduced by Art. 3 § 25 of the Act to end discrimination of same-sex unions (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften) of 16 February 2001, Official Gazette (BGBl.) 2001 I, p. 266 (English translation in K. BOELE-WOELKI and A. FUCHS (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Intersentia, Antwerp, 2003, at p. 256 et seq.).

<sup>3</sup> BVerfG, 4.10.1993, *Neue Juristische Wochenschrift* (NJW), 1993, 3058. Cf. A. RÖTHEL, ‘Eingetragene Lebenspartnerschaft’, in: R. HAUSMANN and G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft – Handbuch*, E. Schmidt, Berlin, 2004, at p. 137 and 147 et seq.

<sup>4</sup> See N. WITZLEB, ‘The German ‘Registered Life Partnership’ – A Marriage That Dares Not Speak Its Name?’, *Australian Journal of Family Law* (Austr. J. Fam. L.), 2002, at p. 227 et seq.

Partnerships,<sup>5</sup> and after a later reform,<sup>6</sup> the civil law provisions on registered partnerships are in most respects nearly identical to marriage.<sup>7</sup>

Matrimonial law does not apply to informal relationships. A general application of matrimonial law by way of analogy is also not accepted (see Question 2).<sup>8</sup>

- 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?**

Despite growing social acceptance of unmarried cohabitation, there are no statutory rules in family law dealing with the effect of non-marital cohabitation between two parties.

The law gives only partial recognition to cohabitation in specified areas of the law (for example, a right to succeed to a tenancy upon the death of the tenant, § 563 para. 2 s. 4 of the German Civil Code). According to a special provision there can be a restriction or refusal of maintenance after divorce for gross inequity (§ 1579 German Civil Code). A maintenance claim is to be refused, reduced or restricted in time where the person entitled lives in a stable long-term relationship (*verfestigte Lebensgemeinschaft*; § 1579 No. 2 German Civil Code).

In social security law in general, a cohabitant does not hold the same position as a spouse. However, in the case of means-tested, family-based social security benefits, the resources of a cohabitant may be taken into account. The purpose of these provisions is mainly to equate an informal relationship and marriage within the framework of social security benefits. An unmarried applicant must not be in a better position than a married person.<sup>9</sup> This is especially the case if one of the cohabitants makes a social assistance claim. § 20 German Social Security Law (*Sozialgesetzbuch*) XII concerns a 'community similar to marriage' (*eheähnliche Gemeinschaft*).<sup>10</sup> In § 39 German Social Security Law XII there is a presumption that where the applicant lives together with another person, he or she will get benefits for his or her support according to the income and means of this person.

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<sup>5</sup> BVerfG, 17.7.2002, *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)*, 105, 313 = *NJW*, 2002, 2543, 2548 = *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2002, 1169, 1172 - 1173. See more in detail A. SANDERS, 'Marriage, Same-Sex Partnership, and the German Constitution', *German Law Journal*, 2012, at p. 911, 913 and 925 et seq.

<sup>6</sup> Laws of 15.12.2004, BGBl. 2004 I, p. 3396 and 6.2.2005, BGBl. 2005 I, p. 203.

<sup>7</sup> However, there are still problems in social security law, see Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg* [2011] ECR I-3591 = *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)*, 2011, 432; BVerfG, 7.7.2009, *NJW*, 2010, 1439 = *FamRZ*, 2009, 1977.

<sup>8</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 5.

<sup>9</sup> P. UDSCHING, 'Sozialrecht', in: R. HAUSMANN and G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, E. Schmidt, Berlin, 2004, at p. 639, No. 1 et seq.

<sup>10</sup> Former §§ 16, 122 Federal Social Assistance Act (*Bundessozialhilfegesetz*; BSHG).

Since 2006 there has been a general definition in § 7 para. 3 No. 3c German Social Security Law II in the framework of a 'community of needs' (*Bedarfsgemeinschaft*). This refers to a situation where the cohabitants live together in a common household in such a way that it can be reasonably assumed that there is a reciprocal will to be responsible for each other and to support the partner (*Verantwortungs- und Einstehensgemeinschaft*). This definition makes the application of the law easier for the social security authorities.<sup>11</sup>

As regards housing benefits, the household members (*Haushaltsmitglieder*) of the applicant are specifically defined. These include spouses and registered partners as well as persons who live together with the applicant such that it can be reasonably assumed that there is a reciprocal will to be responsible for and support each other, § 5 para. 1 No. 3 German Housing Benefits Law (*Wohngeldgesetz*).<sup>12</sup> Such a reciprocal commitment is presumed if at least one of the four requirements of § 7 para. 3 No. 3c German Social Security Law is met (§ 5 para. 2 German Housing Benefits Law).

There is no statutory provision clarifying whether an informal relationship or a *de facto* community exists where one of the involved partners is married to another person or is a registered partner of another person. Some authors argue that such a *de facto* community may also exist under these circumstances.<sup>13</sup> There is case law supporting this view; however, it originates from the field of social assistance where the income of a married partner has been taken into account for the receipt of social security benefits.<sup>14</sup> In these situations only the factual circumstances which affect the income are relevant.

In tax law, especially in income tax law, a cohabitant is in principle not recognised as a family member. However, particularly in cases of modest means, maintenance for the partner is recognised as an exceptional cost (*außergewöhnliche Belastung*) in the sense of § 33a German Income Tax Law (*Einkommensteuergesetz*; EStG).<sup>15</sup>

**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**

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<sup>11</sup> See M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 14, p. 269.

<sup>12</sup> Housing Benefits Law (*Wohngeldgesetz*) of 24.9.2008, BGBl. I, p. 1856, as amended.

<sup>13</sup> G. BRUDERMÜLLER, 'Einl. vor § 1297', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 11; M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 4.

<sup>14</sup> See for § 122 BSHG Administrative Court (Verwaltungsgerichtshof; VGH) Mannheim, 28.4.1993 NJW, 1993, 2886; Higher Administrative Court (Oberverwaltungsgericht; OVG) Hamburg, 23.8.1995, NJW, 1996, 1225.

<sup>15</sup> Federal Fiscal Court (Bundesfinanzhof; BFH), 17.12.2009, FamRZ, 2010, 902 = NJW, 2010, 1838.

Existing informal relationships between a couple are given legal effect in landlord and tenant law. A leading case of the Federal Constitutional Court paved the way by allowing the application of the precursor to § 563 German Civil Code in the 'Unmarried civil partner as tenant case'<sup>16</sup> (see Question 4).

Legal effects are mainly recognised after termination of the relationship. Under certain circumstances a former cohabitant's claims for compensation may be admitted. This is done with the help of the law of obligations. The leading case was a decision of the Federal Supreme Court of 1 April 1965.<sup>17</sup> In that case the cohabitants built a house together. Despite the fact that the house was registered to only one of the cohabitants, upon that cohabitant's death the non-registered cohabitant was able to file a claim for compensation against the registered cohabitant's heir. The legal basis for the claim was the law of civil partnerships (§§ 705 et seq. German Civil Code; see Question 46).

Proprietary aspects are assessed by application of the law of property (see Question 28).

A leading case in public law decided that the income of a cohabitant was to be taken into account for recipients of unemployment benefits<sup>18</sup> (see Question 5).

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

There are different definitions in various fields of law. On one occasion the Federal Constitutional Court has, in the context of social security law, given a definition for a 'community similar to marriage' (*eheähnliche Gemeinschaft*). According to this it is a 'community of life' (*Lebensgemeinschaft*) established with a 'permanent purpose' (*auf Dauer*) which does not allow for another coexisting 'community of life'. It is characterised by 'inner ties of commitment' with a reciprocal responsibility between the partners which is more than a pure accommodation and economic community.<sup>19</sup> This approach has been accepted by the Federal Supreme Courts in civil, administrative and social security matters.<sup>20</sup>

In the past it has sometimes been added to the definitions that a community of life exists between a man and a woman. Today, however, it is generally accepted that

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<sup>16</sup> For the former § 569a German Civil Code BVerfG, 3.4.1990, *BVerfGE*, 82, 6 = *NJW*, 1990, 1593. English translation in Federal Constitutional Court (ed.), *Decisions of the Bundesverfassungsgericht*, vol. 5,

Family-related decisions 1957 – 2010, Baden-Baden: Nomos, 2013, p. 311.

<sup>17</sup> Federal Supreme Court (Bundesgerichtshof; BGH), 1.4.1965, *FamRZ*, 1965, 368.

<sup>18</sup> BVerfG, 17.11.1992, *BVerfGE*, 87, 234 = *NJW*, 1993, S.643 = *FamRZ*, 1993, 164.

<sup>19</sup> BVerfG, 17.11.1992, *BVerfGE*, 87, 234, 264 = *NJW*, 1993, 643.

<sup>20</sup> For references see M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 3.

homosexual relationships are also covered.<sup>21</sup> Existing sexual relations between the partners are not a necessary element.<sup>22</sup> Living together at the same place and a common household are not necessary.<sup>23</sup> They are only indications of a *de facto* community.<sup>24</sup> A mutual commitment to a shared life is necessary.

There is no general statutory definition of cohabitation in civil law. A cohabitant has a right to succeed to a tenancy upon the death of the tenant with whom he resided (§ 563 para. 2 s. 4 German Civil Code). The statute mentions a person who maintains a joint household of a permanent nature with the tenant. The stable union (*verfestigte Lebensgemeinschaft*) of the claimant and a cohabitant which excludes maintenance claims after divorce (§ 1579 No. 2 German Civil Code) must exist mainly in the economic sphere.<sup>25</sup>

In succession law the heir has a duty to grant maintenance to 'family members' of the deceased in the first thirty days after the devolution of the inheritance (§ 1969 para. 1 German Civil Code, see Question 48). According to the dominant view, a cohabitant is also such a person entitled to maintenance.<sup>26</sup> Despite failing to be a family member in the narrow sense of the law, legal maintenance claims are not barred because it is the factual dependency which is decisive.

However, in social security law in particular there are definitions (see Question 2). Support of the other partner solely in the form of a loan is not enough.<sup>27</sup>

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

### a. When does the relevant relationship begin?

There is no statutory provision determining the exact point in time when an informal relationship begins. Since there is no precise definition of the informal relationship, it is also not possible to rely on only one element. Some indicators are proposed (see Question 4). Usually the partners live together. Therefore one indicator is the

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<sup>21</sup> M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 4.

<sup>22</sup> BVerfG, 17.11.1992, *BVerfGE*, 87, 234, 268 = *NJW*, 1993, 643; M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 15.

<sup>23</sup> BGH, 24.10.2001, *NJW*, 2002, 217 = *FamRZ*, 2002, 23 with note D. SCHWAB (maintenance after divorce).

<sup>24</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 6.

<sup>25</sup> See G. HOHLOCH, '§ 1579', in: W. ERMAN, *BGB Kommentar*, O. Schmidt, Cologne, 2014, at No. 18 et seq.

<sup>26</sup> Higher Regional Court (Oberlandesgericht; OLG) Düsseldorf, 14.12.1982, *NJW*, 1983, 1566; D. WEIDLICH, '§ 1969', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 1. For an application by way of an analogy, D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 980.

<sup>27</sup> Federal Administrative Court (Bundesverwaltungsgericht; BVerwG), 17.5.95, *Entscheidungen des Bundesverwaltungsgerichts (BVerwGE)*, 98, 195 = *NJW*, 1995, S.2802 = *FamRZ*, 1995, 1352 (social assistance).

establishment of a common household<sup>28</sup> or the official registration of a common residence.<sup>29</sup> However, a common household is not necessary in every case. According to the dominant view, the determinative element is subjective, namely whether the parties have accepted a reciprocal responsibility for one another (see Question 4).<sup>30</sup> In practice one will look for a certain stability of the union.

**b. When does the relevant relationship end?**

There is no statutory provision specifying the point in time when the informal relationship is terminated. An indicator will often be the voluntary establishment of separate residences.<sup>31</sup>

**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 most important constitutional provisions in this context are Article 6 para. 1 of the German Constitution (*Grundgesetz*; GG or Basic Law), granting special protection to marriage, and also, albeit to a lesser extent, Article 2 para. 1 of the German Basic Law, guaranteeing the right of self-determination.<sup>32</sup> Article 6 para. 1 German Basic Law is a 'guarantee of an institution' (*Institutsgarantie*) and states that marriage and family are to enjoy the special protection of the State. 'Family' includes the relationship between parents and their children, whether legitimate or illegitimate. This is understood not only as a constitutional guarantee of an institution and the expression of a basic value in the areas of public and private law, but also as a mandate to take action to benefit marriage and the family.<sup>33</sup> 'Marriage' is a freely entered, lasting legal relationship between a man and a woman.<sup>34</sup> Official participation in the marriage ceremony is an essential part of this conception of marriage. Cohabitation without a marriage ceremony is not a marriage in the constitutional sense.<sup>35</sup> However, according to the Federal Constitutional Court,

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<sup>28</sup> M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 3.

<sup>29</sup> M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 3.

<sup>30</sup> M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 3.

<sup>31</sup> M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 3.

<sup>32</sup> See for the guarantee of marriage and the family (Art. 6 Basic Law) N. WITZLEB, 'The German 'Registered Life Partnership' – A Marriage That Dares Not Speak Its Name?' *Austr. J. Fam. L.*, 2002, at p. 239 et seq.; K. VOGELSANG, 'Verfassungsrecht', in: R. HAUSMANN and G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, E. Schmidt, Berlin, 2004, at p. 193, 202 et seq. No. 13 et seq.

<sup>33</sup> See in more detail A. SANDERS, 'Marriage, Same-Sex Partnership, and the German Constitution', *German Law Journal*, 2012, at p. 911 and 913 et seq.

<sup>34</sup> BVerfG, 17.7.2002, *BVerfGE*, 105, 313, 345.

<sup>35</sup> BVerfG, 16.12.1958, *BVerfGE*, 9, 20, 34–35; BVerfG, 7.10.1970, *BVerfGE*, 29, 166, 166; BVerfG, 11.11.2004, *BVerfGE*, 112, 50, 65; K. VOGELSANG, 'Verfassungsrecht', in: R. HAUSMANN and G. HOHLOCH

Article 6 para. 1 does not prevent the legislature from granting certain benefits to cohabiting couples.<sup>36</sup>

According to the Federal Constitutional Court, non-marital cohabitation enjoys protection only under the general freedom of action clause (*allgemeine Handlungsfreiheit*) of Article 2 para. 1 German Basic Law.<sup>37</sup> Like any other human action that is not protected by a special constitutional right, cohabitation is protected by this provision, which guarantees that freedom can be restricted only by means of a proportionate law.

In the past, the debate in constitutional law very often dealt with the question whether the special protection granted to marriage in the Constitution meant that no other union should be even remotely granted protection and benefits like those afforded to marriage. It was argued that there should be a considerable distinction between marriage and other unions and that a 'distance rule' (*Abstandsgebot*)<sup>38</sup> was appropriate.<sup>39</sup> Accordingly, it was deemed not possible to give cohabitants the same legal rights as married couples.

However, a certain liberalisation was achieved in the context of civil partnerships. These partnerships are not marriages but legal relationships that do not compete with marriage. The Federal Constitutional Court rejected the claim that the wording of Article 6 para. 1 demanded that there remain a significant distinction between marriage and other relationships. It was held by the Court that while marriage should not be discriminated against, the Constitution did not require that other relationships be treated less favourably than marriage.<sup>40</sup> However, another constitutional argument which has been raised is that the Constitution also grants the freedom to decide whether or not to enter into a marriage and that this freedom would be infringed by codifying the consequences of cohabitation in the same way as in matrimonial law.<sup>41</sup>

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(eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, E. Schmidt, Berlin, 2004, at p. 193, 202 et seq. No. 13 et seq.

<sup>36</sup> BVerfG, 3.4.1990, *BVerfGE*, 82, 6, 15.

<sup>37</sup> BVerfG, 3. 4.1990, *BVerfGE*, 82, 6 (relating to the legislative protection of tenants' rights). Cf. also R. FRANK, 'The status of cohabitation in the legal systems of West Germany and other West European countries', *The American Journal of Comparative Law*, 1985, at p. 186; K. VOGELSANG, 'Verfassungsrecht', in: R. HAUSMANN and G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, E. Schmidt, Berlin, 2004, at p. 193, 210-211 No. 26 et seq.

<sup>38</sup> In literature, the terms 'duty to privilege marriage' (*Privilegierungsgebot*) and 'prohibition against opening marriage to other unions' (*Öffnungsverbot*) have been used, see W. PAULY, 'Sperrwirkungen des verfassungsrechtlichen Ehebegriffs', *NJW*, 1997, at p. 1956.

<sup>39</sup> For a discussion of the 'distance rule' (*Abstandsgebot*), see BVerfG, 17.7.2002, *BVerfGE*, 105, 313, 348; see also id. at 357-359 (Papier, dissenting); id. at 359-365 (Haas, dissenting).

<sup>40</sup> BVerfG, 17.7.2002, *BVerfGE*, 105, 313, 347 f. Cf. K. VOGELSANG, 'Verfassungsrecht', in: R. HAUSMANN and G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, E. Schmidt, Berlin, 2004, at p. 193, 213 et seq. No. 32 et seq.

<sup>41</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 20.

In some Constitutions of the States (the *Länder*) there are provisions which are more favourable in granting cohabiting couples legal protection. For example, Article 26 of the Constitution of the State of Brandenburg additionally recognises the protection of other permanent communities of life. Such provisions have, however, no influence on federal law.<sup>42</sup>

A certain degree of influence is to be found in Art. 6 para. 5 German Basic Law. Pursuant to this provision, legislation must provide children born outside marriage with the same opportunities for physical and mental development and for their position in society as are enjoyed by children born within marriage. Therefore discrimination against illegitimate children is prohibited under constitutional law and the parents' marital status is of only minor influence.

**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 European Court of Human Rights interprets the term 'family life' in Article 8 para. 1 European Convention on Human Rights (ECHR) autonomously. Where a man and a woman enjoyed a stable relationship which produced common children, the relationship between them amounts to family life even though they chose neither to marry nor to live together.<sup>43</sup> International instruments and European legislation are increasingly taken into account in determining the existence of informal relationships between a couple. There are, however, no cases of the European Court of Human Rights or the Court of Justice of the European Union that deal with informal relationships and have an influence on German law.

**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.**

After 1949, the year in which the Basic Law entered into force, there has been a continual discussion on informal relationships. Case law and the discussion in literature strongly stressed constitutional law arguments. Particularly in the reform debate of the 1990s, the protection of marriage was not seen as an insurmountable bar to a reform. However, it was widely accepted that an informal cohabitation should only grant protection of a lesser degree than that granted by marriage under matrimonial law (see Question 6). The position that an informal relationship is not

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<sup>42</sup> In more detail H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 4 No. 7 et seq.

<sup>43</sup> ECtHR, *Kroon and others v. the Netherlands*, No. 18535/91, 27.10.1994; ECtHR (Grand Chamber), *K and T v. Finland*, No. 25702/94, 12.7.2001 = *NJW*, 2003, 809.



recognised by civil law and does not deserve protection is now no longer defended.<sup>44</sup> The former argument of immorality is similarly no longer put forward.<sup>45</sup>

The possibility of introducing a comprehensive statute has been discussed. However, the opinion that there should be only reforms on individual matters has dominated. The main question is generally whether a different treatment of marriage and of informal cohabitation is justified. In the past the non-marital nature of cohabitation was discussed mainly under the heading of 'unmarried cohabitation' (*nichteheliches Zusammenleben* or *nichteheliche Lebensgemeinschaft*). Today increasingly more scholars prefer the more neutral *faktische Lebensgemeinschaft* ('*de facto* community of life') which places a greater stress on the existence of a *de facto* relationship.<sup>46</sup>

The reform of the law of parent and child relations had an indirect effect on the issue. This reform basically led to a uniform law for all children which was adopted as of 1 July 1998.<sup>47</sup> There is also a trend towards equal treatment of all parents.

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

The German reform debate is still in its early stages. A reform has to be in line with both Art. 6 para. 1 of the German Basic Law granting special protection by the state to marriage as well as Art. 2 para. 1 of the German Basic Law guaranteeing the right of self-determination. Despite the fact that the existing situation is far from satisfactory in practice, the necessity of fundamental reform is denied by many. Up until now there has also been no visibly clear structure for reform legislation. In 1988 the 57th German Lawyers' Conference (*Deutscher Juristentag*) was in favour of a reform featuring individual measures.<sup>48</sup> In 1997, the party Alliance '90/The Greens put forward a draft dealing with the formation and status of a community of life as well as with compensation claims after its dissolution.<sup>49</sup> This draft is, however, now outdated and was never debated in Parliament.

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<sup>44</sup> In more detail H. GRZIWOZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 5 No. 11.

<sup>45</sup> Cf. R. FRANK, 'The status of cohabitation in the legal systems of West Germany and other West European countries', *The American Journal of Comparative Law*, 1985, at p. 185 et seq.

<sup>46</sup> See N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at p. 239 et seq. § 8 No. 239 et seq.; M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 10.

<sup>47</sup> See N. DETHLOFF, 'Parental Rights and Responsibilities in Germany', *Family Law Quarterly*, 2005, at p. 315 et seq.

<sup>48</sup> Cf. M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 18 with references.

<sup>49</sup> Draft for a law on the regulation of the legal relations of non-marital communities of life (Entwurf eines Gesetzes zur Regelung der Rechtsverhältnisse nichtehelicher Lebensgemeinschaften; Nichteheliche-Lebensgemeinschaften-Gesetz - NeLgG) of the parliamentary group Bündnis 90/Die Grünen, BT- Drucksache 13/7228 of 14.3.1997. Cf. K. SCHUMACHER, 'Zum gesetzlichen Regelungsbedarf für nichteheliche Lebensgemeinschaften', *FamRZ*, 1994, at p. 857 et seq.; H. TRIMBACH and A. EL ALAMI, 'Die nichteheliche Lebensgemeinschaft - eine Herausforderung für den Gesetzgeber', *Neue Justiz*, 1996, at p. 57 et seq.

The idea of registration for non-marital cohabitation does not have much support since marriage or registered partnership is open for couples, and it does not make much sense to offer a second set of rules – which also may not be accepted by the parties.<sup>50</sup> There is also scepticism about the introduction of an obligatory formal agreement to be entered into by the parties. A realistic alternative could be rules which would be applicable where there is factual cohabitation of a certain duration. One of the problems is, however, the definition of such a union and the delimitation of the issues to be regulated. It is also not clear if comprehensive legislation on non-marital cohabitation is necessary or if a simple piecemeal approach is sufficient.<sup>51</sup> As regards an ongoing cohabitation, only a few provisions dealing with the internal relations of the partners seem to be necessary. In external relations, equal treatment with marriage seems in some respects to be appropriate.

## **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.**

In Germany in 2013 there were 373,655 marriages (in 2000: 418,550).<sup>52</sup> In 2013, there were 46.3 marriages per 10,000 inhabitants (2000: 51.0). This means that there has been a decline in marriage rates.

There are no federal statistics on how many registered partnerships have been concluded per year. In 2006 there were 12,000 registered partnerships in Germany (2010: 23,000).

The average marriage age is increasing. In 2012 it was 37.7 years for men (2000: 35.0) and 34.6 years for women (2000: 31.9).<sup>53</sup> In 2012, for the first marriage it was 33.5 for men (2000: 31.2) and 30.7 years for women (2000: 28.4).

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

In 2013 there were 2.83 million cohabiting couples in Germany. In 2010, 11.01% cent of all couples cohabited without getting married or registering a civil partnership.<sup>54</sup>

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<sup>50</sup> Cf. J. M. SCHERPE, 'Rechtsvergleichende Gesamtwürdigung – Empfehlungen zur Rechtsstellung nichtehelicher Lebensgemeinschaften', in: J. M. SCHERPE and N. YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften*, Mohr Siebeck, Tübingen, 2005, at p. 571, 580 et seq., and 603.

<sup>51</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 20 and 22.

<sup>52</sup> Federal Statistical Office (Statistisches Bundesamt), available at: [www.statistik-portal.de/Statistik-Portal/de\\_jb01\\_jahrta3a.asp](http://www.statistik-portal.de/Statistik-Portal/de_jb01_jahrta3a.asp).

<sup>53</sup> Statistisches Bundesamt, *Statistisches Jahrbuch Deutschland und Internationales 2014*, Statistisches Bundesamt, Wiesbaden, 2014, at p. 54.

There is a trend towards more informal unions, this having already started in West Germany already in the 1970s.

**Number of informal 'communities of life' (*Lebensgemeinschaften*) in Germany (1,000's):<sup>55</sup>**

	2000	2010	2011	2012	2013
Number of couples (total)	2,130	2,648	2,732	2,697	2,823
Number of couples of opposite sex	2,083	2,585	2,668	2,627	2,745

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

- 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?

People in informal relationships tend to be younger than people in marital relationships. The percentage of persons aged under 25 years for all cohabiting couples was 66% in 2010. For persons between 25-44 years of age it was 23%, between 45-64 years of age it was 10% and over 65 years of age it was 4%.<sup>56</sup>

**13. How many couples living in an informal relationship enter into a formal relationship with each other:**

- a. Where there is a common child?

The majority of the approximately 2.83 million unmarried couples living together are younger couples in a 'trial marriage' which often leads to a formal marriage or a registration of a life partnership. There is an identifiable pattern of behaviour whereby cohabitants often marry in connection with the birth of their first child. However, the impact of the birth of a child is decreasing in that the birth of a child no longer correlates as strongly to marriage as it did formerly.<sup>57</sup>

- b. Where there is no common child?

In the majority of informal relationships there are no children. Couples tend to abandon cohabitation when children are in the immediate future. They marry particularly when the female partner gets pregnant. It is not known, however, how

<sup>54</sup> Statistisches Bundesamt, Statistisches Jahrbuch Deutschland und Internationales tbl. 2.16 (2011), available at: [www.destatis.de/DE/Publikationen/StatistischesJahrbuch/Bevoelkerung.pdf?\\_\\_blob=publicationFile](http://www.destatis.de/DE/Publikationen/StatistischesJahrbuch/Bevoelkerung.pdf?__blob=publicationFile).

<sup>55</sup> Gesundheitsberichterstattung des Bundes, Rahmenbedingungen, Lebensgemeinschaften, available at: [www.gbe-bund.de](http://www.gbe-bund.de).

<sup>56</sup> N. SANCHEZ GASSEN and B. PERELLI-HARRIS, *The increase in cohabitation and the role of marital status in family policies: A comparison of 12 European countries*, ESRC Centre for Population Change, Southampton, 2014, at p. 9.

<sup>57</sup> K. KÖPPEN, *Marriage and Cohabitation in Western Germany and France*, Universität Rostock, Rostock, 2011, at p. 100 et seq. and 188.

many partners enter or stay in an informal relationship where there is no common child.

**14. How many informal relationships are terminated:**

- a. Through separation of the partners?
- b. Through the death of one of the partners?

There are no statistical data on this matter.

**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 which ended with a divorce was 14 years and 8 months. There is a trend toward a longer marriage duration before divorce. In 1983, for example, the average duration of a marriage ended was 11 years and 7 months.<sup>58</sup>

Informal relationships often occur at a stage of life before marriage, but many of these relationships subsequently dissolve. Stability in informal relationships is much less than in formal relationships. According to data from the 1990s, 20% of informal relationships terminated after two years and 50% had terminated after six years.<sup>59</sup> However, cohabitation is becoming more and more stable.<sup>60</sup> There are no specific statistical data available for the average duration of an informal relationship.

**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.**

In 2012 673,544 children were born (2010: 677,947; 2000: 766,999).<sup>61</sup> The parents of 232,383 children were not married (2010: 225,473; 2000: 179,574).<sup>62</sup> This means that in 2012, 34.8% of the children were born outside a formal relationship (2010: 33.3%; 2000: 23.4%). There is more non-marital childbearing in the east of Germany than in the west of the country. In some regions there are even more children born in an informal relationship than within a marriage. The percentage of children born in informal relationships is rising in all parts of Germany. The rise in informal relationships, a later age for getting married, and a growing tendency to remain

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<sup>58</sup> See Statistisches Bundesamt, available at: [www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Ehescheidungen/ScheidungenDeutschland.html](http://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Ehescheidungen/ScheidungenDeutschland.html).

<sup>59</sup> R. NAVE-HERZ, 'Die nichteheliche Lebensgemeinschaft : eine soziologische Analyse', *Familie Partnerschaft Recht*, 2001, at p. 3 and 5 with references.

<sup>60</sup> K. KÖPPEN, *Marriage and Cohabitation in Western Germany and France*, Universität Rostock, Rostock, 2011, at p. 141 et seq.

<sup>61</sup> Statistisches Bundesamt, *Statistisches Jahrbuch Deutschland und Internationales 2014*, Statistisches Bundesamt, Wiesbaden, 2014, at p. 33.

<sup>62</sup> Statistisches Bundesamt, *Statistisches Jahrbuch Deutschland und Internationales 2014*, Statistisches Bundesamt, Wiesbaden, 2014, at p. 33.

unmarried contribute to the increasing trend of non-marital childbearing. There are, however, no specific statistical data available which allow a differentiation to be made between children living within an informal relationship and those living with a lone parent.

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

The proportion of children living within an informal relationship who are not the couple's common children but who are marital or non-marital children of only one of the cohabitants cannot be quantified.

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

**a. By one partner only?**

In 2013 there were 3,793 adoptions (2000: 6,373).<sup>63</sup> Only a minority were adoptions by single persons. Step-child adoption is very common in Germany. Nearly two-thirds of all adoptions are step-child adoptions. However, an adoption by a cohabitant is not a step-child adoption in the legal sense. Official statistical data conceptualise married step-parents and 'life partners' together.<sup>64</sup> There are no statistical data giving more information on adoptions in informal relationships.

**b. Jointly by the couple?**

A joint adoption by an unmarried couple is not possible under German law.<sup>65</sup>

**c. Where one partner adopted the child of the other?**

If one partner adopts the child of the other partner, the parent-child-relationship between the biological parent and the child is terminated. Therefore such an adoption occurs only in rare cases.

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

Cohabitation is mainly a life arrangement of younger couples. However, as the age of the partners increases, there will be more partners who have previously lived in an informal relationship, who are divorced or separated.

**C. During the relationship**

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<sup>63</sup> Statistisches Bundesamt, *Statistiken der Kinder- und Jugendhilfe, Adoptionen 2013*, Statistisches Bundesamt, Wiesbaden, 2014, at p. 23.

<sup>64</sup> Statistisches Bundesamt, *Statistiken der Kinder- und Jugendhilfe, Adoptionen 2013*, Statistisches Bundesamt, Wiesbaden, 2014, at p. 7.

<sup>65</sup> I. GÖTZ, '§ 1741', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 8.

**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?**

There is no statutory duty to support each other (i.e. a duty of maintenance) either during cohabitation or after the breakdown of the relationship. The only exception is maintenance in the case of care for a common child (§ 1615l of the German Civil Code).

**b. Where there are common children in the household?**

The father must pay the mother maintenance for a period of six weeks before and eight weeks after the birth of a child (§ 1615l para. 1 s. 1 of the German Civil Code). To the extent that the mother is not engaged in gainful employment because she is incapable of doing so as a result of either the pregnancy or an illness caused by the pregnancy or the delivery, the father is obliged to pay her maintenance for a period exceeding this period of time (§ 1615l para. 2 s. 1 of the German Civil Code). A claim for maintenance can also be filed to the extent that the mother or the father cannot be expected to be engaged in gainful employment by reason of the care or upbringing of the child (§ 1615l para. 2 s. 2 of the German Civil Code). The obligation to maintain begins, at the earliest, four months before the birth and continues for at least three years after the birth (§ 1615l para. 2 s. 3 of the German Civil Code). It is extended as long as and to the extent that this is equitable. Here, particular account is to be taken of the concerns of the child and the existing possibilities of childcare (§ 1615l para. 2 s. 4 of the German Civil Code). However, the sole basis for such a maintenance obligation is parentage. It does not depend on the place of living of the partners or a common household of the partners or cohabitation.<sup>66</sup>

**c. Where there are other children in the household?**

Step-parents and step-children (despite their special status in some social security statutes) are not obliged to support one another.<sup>67</sup> Therefore, a child living in an informal relationship retains his maintenance claim against his biological parent. The *de facto* partner is not obliged to maintain the children of his or her partner.<sup>68</sup> However, the ability to pay can be deemed to increase if the debtor lives in an informal relationship which gives him or her economic advantages.<sup>69</sup>

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

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<sup>66</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 6; D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 998.

<sup>67</sup> BGH, 24.6.1969, NJW, 1969, 2007; G. BRUDERMÜLLER, '§ 1601', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 2.

<sup>68</sup> D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 851.

<sup>69</sup> See D. MARTINY, *Unterhaltsrang und -rückgriff I*, Mohr Siebeck, Tübingen, 2000, at p. 679 et seq.

The duty to contribute to the costs and expenses of the family household is regulated in §§ 1360-1360b German Civil Code. Pursuant to § 1360 s. 1 German Civil Code, both spouses are obliged to contribute through their work and their property to the reasonable maintenance of the family. However, the partners to an informal relationship are under no general duty to contribute to the costs and expenses of their household.<sup>70</sup> A partner normally cannot claim compensation for services after the cessation of cohabitation (see Question 46).

**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?**

A partner to an informal relationship does not have a right to remain in the home against the will of the partner who is the owner or the tenant of the home. A partner does not have a legal position (ownership) of his or her own against the other partner. The partner is a co-possessor in the sense of §§ 854 et seq. German Civil Code even if he or she is not a party to the tenancy (cf. Question 23).<sup>71</sup> This, however, gives the partner a claim for the protection of this co-possession and a claim against a forceful ejection, but not a right to stay.

**23. Are there specific rules on a partner's rights of occupancy of the home:**  
**a. In cases of domestic violence?**

There has been a special Protection against Violence Act (*Gewaltschutzgesetz; GewSchG*) from 11 December 2001. The statute allows spouses and cohabitants to have a violent partner removed from the common household. The cohabitant can obtain a temporary order vesting him or her with the sole right to use the home (§ 2 German Protection against Violence Act).

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

If a cohabitant lives in the home owned by the other partner, his or her legal position is determined by general rules. The same is true if he or she lives in a rented home. According to these rules the partner has possession and, if there is a tenancy, the position of a tenant.<sup>72</sup> However, if there is no contractual arrangement one cohabitant may ask the other to leave the home. This is possible even if a common child lives together with the caring parent in the home. The protecting provision found in matrimonial law (§ 1361b German Civil Code) is very often not applied by analogy,<sup>73</sup>

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<sup>70</sup> D. MARTINY, 'Rechtsprobleme der nichtehelichen Lebensgemeinschaft während ihres Bestehens nach deutschem Recht', in: J. M. SCHERPE and N. YASSARI (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften*, Mohr Siebeck, Tübingen, 2005, at p. 79 and 87 with references.

<sup>71</sup> G. BRUDERMÜLLER, 'Einl. vor § 1297', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 18.

<sup>72</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 188.

<sup>73</sup> But where there are common children, see for an analogous application of § 1361b German Civil Code, Regional Court (Landgericht; LG) München I, 1.6.1990, *NJW Rechtsprechungs-Report Zivilrecht (NJW-RR)*, 1991, 834; M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 207.

and there is no specific legal protection for informal cohabitation.<sup>74</sup> This lack of protection is regarded as unsatisfactory.<sup>75</sup> There are proposals to introduce a special provision,<sup>76</sup> but there has been no recent reform proposal.

However, if the other partner is the tenant, then the *de facto* partner is protected, against the landlord as a person who maintains a joint household of a permanent nature in the sense of § 563 para. 2 s. 4 German Civil Code.

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

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

Where the home is jointly owned by the partners the general rules of civil law apply. The partners are co-owners in equal proportions or unequal proportions (§ 1008 German Civil Code). Co-owners form a community (*Gemeinschaft*) in the sense of the law's obligations, § 741 German Civil Code (see as well Question 41). There is a common administration of the asset (§ 744 para. 1 German Civil Code). However, a co-owner may dispose separately of his share (§ 747 para. 1 s. 1 German Civil Code). Consent of the other co-owner is not necessary.

Regarding the common object as a whole, both co-owners can dispose jointly (§ 747 para. 1 s. 2 German Civil Code). This concerns dispositions in respect of the home and mortgaging.<sup>77</sup>

In the case of major transactions, such as the construction of a common family home, a compensation claim based on the statutory rules of (commercial) partnership law (§§ 705 et seq. of the German Civil Code) or the rules on unjust enrichment (§ 812 para. 1 s. 2 of the German Civil Code) may be made (see Question 46).<sup>78</sup>

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

Where the home is owned by only one of the partners the general rules apply. Only this partner is the owner. The other partner has no legal position to block transactions such as dispositions in respect of the home, mortgaging and subletting.

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

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<sup>74</sup> D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 986 and 991; G. BRUDERMÜLLER, '§ 1361b', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 5.

<sup>75</sup> G. BRUDERMÜLLER, '§ 1361b', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 5.

<sup>76</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 207.

<sup>77</sup> H. SPRAU, '§ 747', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 3.

<sup>78</sup> A SANDERS, 'Cohabitants in Private Law: Trust, Frustration and Unjust Enrichment in England, Germany and Canada', *International & Comparative Law Quarterly*, 2013, at p. 641 et seq.; D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 1006 et seq. and 1015.



Where the home is jointly rented by the partners the general rules apply. The partners are joint tenants. Each partner has the position of a joint tenant and has to co-decide on subletting.<sup>79</sup>

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

Where the home is rented by only one of the partners the general rules apply. Only this partner is a tenant.<sup>80</sup> The other partner has no legal position to block transactions such as subletting. It is possible, however, for there to be a separate subletting contract between the partners.<sup>81</sup>

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

Each spouse is entitled to enter into transactions for the appropriate provision of the necessities of life for the family. Within these limits, each spouse possesses a 'power of the key' (*Schlüsselgewalt*), a special kind of statutory authority. The resulting obligations bind both spouses (§ 1357 German Civil Code). However, if the spouses are separated or if one of them wants to live separately, such a statutory authority does not exist (§ 1357 s. 2 German Civil Code).

Unlike the provision in § 1357 German Civil Code for spouses, there is no liability for debts incurred by the other cohabitant. § 1357 German Civil Code is not applied by analogy.<sup>82</sup> One cohabitant can act, however, as an agent (*Stellvertreter*) on behalf of the other under the rules of agency law (§§ 164 et seq. German Civil Code; compare also Question 27). An undisclosed agency is recognised in cases of 'appearance of authority' (*Anscheinsvollmacht*)<sup>83</sup> and 'authority by estoppel' (*Duldungsvollmacht*) where one cohabitant acts without explicit authorisation.

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

There are no specific rules dealing with the property of the partners; the general civil law rules of the German Civil Code apply. All property, real or personal, owned by one of the cohabitants remains the personal property of that cohabitant.<sup>84</sup> Each of the partners manages his or her property independently. Property acquired by the

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<sup>79</sup> F. STERNEL, 'Mietrecht', in: R. HAUSMANN and G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, E. Schmidt, Berlin, 2004, at p. 363 and 372 No. 12.

<sup>80</sup> G. BRUDERMÜLLER, 'Einl. vor § 1297', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 18.

<sup>81</sup> F. STERNEL, 'Mietrecht', in: R. HAUSMANN and G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, E. Schmidt, Berlin, 2004, at p. 363, 373, 378 et seq. No. 14, 30 et seq.

<sup>82</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 9; G. BRUDERMÜLLER, 'Einl. vor § 1297', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 23.

<sup>83</sup> D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 995.

<sup>84</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 52.

parties with joint resources and funds will be considered joint property only if there is an appropriate agreement.<sup>85</sup> However, in the case of major transactions (e.g. construction of a common family home), a compensation claim based on the statutory rules of partnership law (§§ 705 et seq. German Civil Code) or the rules on unjust enrichment (§ 812 para. 1 s. 2 German Civil Code) may be made (see Question 46).

**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.**

In matrimonial law, the term 'household goods' (*Haushaltsgegenstände*) covers all movable items (the definition of movable items can be found in § 90 German Civil Code) which are, according to the circumstances of the spouses and their children, designed to enable their cohabitation. However, the relevant provisions in matrimonial law (§ 1361a German Civil Code in the case of separation, § 1568b German Civil Code for divorce) do not apply to informal cohabitation.<sup>86</sup>

Since there are no special rules dealing with property, the general rules of civil law apply. Under the general rules either one or both of the cohabitants can acquire property. It is often assumed that both cohabitants acquire co-ownership and generally in equal half shares.<sup>87</sup> This is also possible if only one of the cohabitants enters into a sales agreement. There may be an explicit or implicit agreement of the cohabitants whereby one acts as an agent for the other cohabitant (see Question 25). The doctrine of 'transaction for whom it concerns' (*Geschäft für wen es angeht*) may also lead to joint property or even property of the other cohabitant.<sup>88</sup> According to one view, financing by one of the cohabitants generally leads to sole ownership of the financing cohabitant.<sup>89</sup> The opposite view argues that the mere fact that one of the cohabitants financed the transaction is not decisive.<sup>90</sup> The intention of the parties to a sales contract and its interpretation determine who will become owner.

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<sup>85</sup> OLG Hamm, 7.6.2002, *FamRZ*, 2003, 529 (co-ownership of a recreational vehicle deemed in equal parts despite being financed mainly by one of the cohabitants); M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 56.

<sup>86</sup> W. SCHULZ, 'Die vorläufige Verteilung der Haushaltsgegenstände nach § 1361a BGB', *Neue Zeitschrift für Familienrecht*, 2014, at p. 486; G. BRUDERMÜLLER, '§ 1361a', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 1.

<sup>87</sup> D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 994; G. BRUDERMÜLLER, 'Einl. vor § 1297', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 20. Cf. for spouses BGH, 13.3.1991, *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)*, 114, 74 = *NJW*, 1991, 2283 = *FamRZ*, 1991, 923.

<sup>88</sup> D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 994; G. WEINREICH, 'vor § 1297', in: H. PRÜTTING, G. WEGEN and G. WEINREICH (eds.), *BGB-Kommentar*, Luchterhand, Cologne, 2014, at No. 46.

<sup>89</sup> OLG Hamm, 28.09.1988, *NJW*, 1989, 909; P. BASSENGE, '§ 929', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 6.

<sup>90</sup> OLG Düsseldorf, 18.12.1991, *NJW*, 1992, 1706.

**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?**

There are no special rules dealing with property within an informal relationship; the general rules of the German Civil Code apply. Each cohabitant is owner of his or her own assets.<sup>91</sup> For immovable property the land register evidences ownership.<sup>92</sup> The title as such cannot be questioned. However, despite sole ownership of an asset, a compensation claim by the other cohabitant may be made after separation (see Question 46).

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

There is a rebuttable presumption as to ownership in marriage. In respect of movables intended for the exclusive personal use of either spouse, it is, between the spouses and in relation to creditors, presumed that they belong to the spouse for whose use they were intended (§ 1362 German Civil Code).

As to informal cohabitation, there are no special rules dealing with property. The general presumption of ownership of the possessor applies. It is presumed, in favour of the possessor of a movable, that he or she is the owner of that property (§ 1006 para. 1 German Civil Code). This will often mean co-ownership.<sup>93</sup> It is also presumed, in favour of a former possessor, that he or she was the owner of the thing during possession (§ 1006 para. 2 German Civil Code). After a break-up of the relationship, this will also often lead to the presumption of co-ownership (see Question 41).<sup>94</sup>

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

As regards married couples, it is presumed in favour of creditors of spouses that movables in the possession of one spouse or of both spouses belong to the debtor (§ 1362 para. 1 German Civil Code). There is, however, no such presumption of ownership for unmarried or unregistered couples. The legal provision for spouses cannot be applied by analogy to cohabitants.<sup>95</sup> A reform proposal which would have extended it to cohabiting couples failed in 1997.<sup>96</sup> The effect of the existing law is that a non-debt-owing cohabitant can rely on sole ownership or co-ownership of items and can block execution against him by way of a third-party action against the

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<sup>91</sup> D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 1001; M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 52.

<sup>92</sup> D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 1001.

<sup>93</sup> J. GERNHUBER and D. COESTER-WALTIJEN, *Familienrecht*, Beck, Munich, 2010, at p. 503.

<sup>94</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 89.

<sup>95</sup> BGH, 14.12.2006, BGHZ, 170, 187 = *FamRZ*, 2007, 457 = *NJW*, 2007, 992.

<sup>96</sup> For references see BGH, 14.12.2006, BGHZ, 170, 187 = *FamRZ*, 2007, 457 = *NJW*, 2007, 992.

execution (*Drittwiderspruchsklage*; § 771 para. 1 German Civil Code of Procedure (*Zivilprozessordnung*; ZPO)). Critics argue that the legal provision of § 1362 German Civil Code should be applied by analogy.<sup>97</sup> They argue that the existing law contains a gap because in such situations there is no protection for creditors, and wealthy partners can conceal or mingle property.

The presumption of ownership is supplemented by another presumption in the case of an execution of a judgment against one of the spouses. If it is presumed that one of the spouses is the owner of movables, then for the purpose of execution it is also presumed that only the debtor is in custody and possession of the movables. Therefore execution against this spouse is possible (§ 739 para. 1 German Code of Civil Procedure). This legal provision can also not be applied by analogy to cohabitants.<sup>98</sup>

According to the general rules of civil law there is a rebuttable presumption that the possessor of an asset is also its owner (§ 1006 German Civil Code). If, for example, two partners have possession in common of a car and use it together, it is presumed that they are co-owners.<sup>99</sup>

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

There are no special rules dealing with the joint liability of cohabitants. The general rules of civil law apply. This means that if there is a contractual obligation of both cohabitants owed to a third party, generally joint and several liability of the cohabitants is created by law (§ 427 German Civil Code).<sup>100</sup> Such a contractual obligation also remains valid after a termination of the informal relationship.<sup>101</sup>

Pursuant to § 1357 German Civil Code, spouses are attributed a factually implied agency, i.e. the authority to enter into transactions in order to meet the appropriate necessities of the family. As far as these transactions are concerned, the spouses are joint and several debtors (§§ 421-425 German Civil Code) and joint and several creditors (§ 428 German Civil Code). These provisions are, however, not applied to informal relationships.<sup>102</sup>

### **32. On which assets can creditors recover joint debts?**

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<sup>97</sup> M. LÖHNIG and M. WÜRDINGER, 'Eigentums- und Gewahrsamsvermutung bei nichtehelichen Lebensgemeinschaften', *FamRZ*, 2007, at p. 1856 et seq.; G. BRUDERMÜLLER, 'Einl. vor § 1297', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 26.

<sup>98</sup> G. HOHLOCH, 'Nichteheliche Lebensgemeinschaft', in: R. HAUSMANN and G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, E. Schmidt, Berlin, 2004, at p. 59, 109 et seq. No. 121 et seq. with references.

<sup>99</sup> BGH, 14.12.2006, *BGHZ*, 170, 187 = *FamRZ*, 2007, 457 = *NJW*, 2007, 992.

<sup>100</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 9.

<sup>101</sup> D. SCHWAB, *Familienrecht*, Beck, Munich, 2014, at No. 1018.

<sup>102</sup> J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, Beck, Munich, 2010, at p. 498 with references.

There are no special rules dealing with recovery of joint debts in cases of an informal relationship. Therefore the general rules of civil law apply, and the creditor has a claim against one or both cohabitants. Each cohabitant is owner of his or her assets. The creditor can therefore ask for payment. An execution affects only the assets of the liable cohabitant or, in cases of joint and separate liability, the assets of both cohabitants.

**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.**

There are no special rules dealing with the administration of assets of informal partners; the general rules of civil law apply. Where an asset is jointly owned by the partners they are co-owners (§ 1008 German Civil Code). Co-owners form a community (*Gemeinschaft*) in the sense of the law's obligations (§ 741 German Civil Code). There is a joint administration of the asset (§ 744 para. 1 German Civil Code). According to the general rule – which also applies in cases of more than two co-owners – it may be resolved by a majority of votes that there is to be a proper administration and use appropriate to the quality of the joint item (§ 745 para. 1 German Civil Code). Each part owner may, where administration and use is not regulated by agreement or by a majority vote, demand administration corresponding to the interests of all part owners according to their reasonably exercised discretion (§ 745 para. 2 German Civil Code). In the event of separation, the remaining cohabitant can be obligated to pay compensation to the other cohabitant for the continued use of a common home.<sup>103</sup> However, every co-owner is entitled to dispose of his share separately (§ 747 para. 1 s. 1 German Civil Code); as to the asset as a whole, both co-owners can only make dispositions acting together (§ 747 para. 1 s. 2 German Civil Code).

Where an asset is owned by only one of the partners, he or she alone is the owner. There are no restrictions on the administration of property.

**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?**

German law does not grant maintenance to a former partner of an informal relationship. However, if an unmarried couple has a common child according to § 1615l German Civil Code the father must not only pay for the costs related to the pregnancy and birth but also maintenance for a period of at least three years after the birth to the extent that the mother cannot be expected to be engaged in gainful employment by reason of the care or upbringing of the child (see Question 20). If the

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<sup>103</sup> OLG Koblenz, 8.9.2009, *FamRZ*, 2010, 1176.

father cares for the child he can claim maintenance. § 1615l applies whether or not the parents are partners to an informal relationship.<sup>104</sup>

- 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)?**

This question has no relevance in German legislation (see Question 34).

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

Not relevant (see Question 34).

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

Not relevant (see Question 34).

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

Not relevant (see Question 34).

- 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?**

Not relevant (see Question 34).

- 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?**

Not relevant (see Question 34).

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<sup>104</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 11 No. 83.

**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?**

There are no specific rules regarding the determination of ownership of the partners' assets after separation. Often the general rules of property law apply.

The partners may hold assets alone (sole ownership) or jointly. If at least two persons acquire assets jointly, they generally become co-owners by fractional shares (*Miteigentümer* as per §§ 1008–1011 German Civil Code). The co-ownership by fractional shares is a special form of co-ownership by defined shares (*Bruchteilsgemeinschaft* as per §§ 741–758 German Civil Code) and modifies the just mentioned general rules.<sup>105</sup>

Generally, neither entering into an informal relationship nor separation changes the assignment of assets to each partner.<sup>106</sup>

Assets that a partner acquires before entering into an informal partnership remain the property of that partner (sole ownership). Regarding assets which are acquired during the duration of the informal partnership, it must be analysed by interpretation whether the partners wanted to acquire as co-owners or whether a partner acquired alone.<sup>107</sup> Once the assignment of assets is defined as either sole ownership by one of the partners or co-ownership by both partners, this assignment remains the same even after separation. In the case of a plot of land sole or co-ownership must be entered into the land registry.

Regarding commonly used goods situated in the joint residence, which are not personal items, the partners are often co-possessors (§ 866 German Civil Code). Thus § 1006 German Civil Code applies according to which it is presumed in favour of the possessor of a movable thing that he or she is the owner of that thing. Therefore co-ownership of the partners is presumed.<sup>108</sup> The presumption may be rebutted if one partner is able to prove that he or she was sole proprietor before entering into the informal partnership or acquired the item as sole proprietor during the existence of the partnership.

**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?**

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<sup>105</sup> P. BASSENGE, '§ 1008', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 1.

<sup>106</sup> H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 20 No. 1.

<sup>107</sup> H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 20 No. 4.

<sup>108</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 11.

There are no specific rules which subject certain property to property division. Regarding assets that the partners hold as co-owners, the general rules are applicable.

According to § 749 German Civil Code, each partner may demand cancellation of the co-ownership at any time. If the object in question is capable of being divided without reducing its value, the cancellation of co-ownership occurs by division in kind (§ 752 German Civil Code). If division in kind is excluded, the cancellation of co-ownership is effected by sale of the joint object (§ 753 German Civil Code). If the partner does not agree to the demand it must be enforced by action for performance (*Leistungsklage*).<sup>109</sup>

**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)?**

There are no preferential rights regarding home or household goods. In particular, the rules concerning the use of the matrimonial home (§§ 1361b, 1568a German Civil Code) or the allocation of household goods (§§ 1361a, 1568b German Civil Code) after separation of spouses or the dissolution of a marriage cannot be applied by analogy.<sup>110</sup> This holds true even if the couple has children.<sup>111</sup> Only in cases of domestic violence can orders regarding the joint home be granted according to the provisions of the Protection against Violence Act.

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

In relation to third parties § 421 German Civil Code is decisive. Regarding joint debts the partners are joint and several debtors. The creditor may at his or her discretion demand full or part performance from each of the partners. The external liability is independent from any agreement which may exist between the joint and several debtors. Therefore the creditor may enforce his or her claim against either or both partners until extinction of the debt.<sup>112</sup>

As regards the internal relationship between joint and several debtors, § 426 German Civil Code applies. § 426 para. 1 German Civil Code states that joint and several debtors are obliged in equal proportions in relation to one another unless 'otherwise determined'. Insofar as informal relationships are concerned, it may be 'otherwise determined' with regard to compensation. It is well-established case law that in informal relationships partners make financial or other contributions to everyday

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<sup>109</sup> K. SCHMIDT, '§ 749', in: *Münchener Kommentar zum BGB*, Beck, Munich, 2013, at No. 40.

<sup>110</sup> H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 5 No. 22; regarding § 1568b German Civil Code: G. BRUDERMÜLLER, '§ 1568b', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 2.

<sup>111</sup> Regarding § 1361b German Civil Code: G. BRUDERMÜLLER, '§ 1361b', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 5 with further references for a critical view.

<sup>112</sup> M. GEHRLEIN, '§ 421', in: *Beck'scher Online-Kommentar BGB*, Beck, Munich, 2015, at No. 11.



expenses as the need arises and cannot seek compensation in the case of separation unless the partners have agreed otherwise.<sup>113</sup> This principle of non-compensation also applies if one of the partners settled joint debts. Therefore the general duty to adjust advancements (as per § 426 para. 1 German Civil Code) does not apply. Joint and several liability with the ensuing equal contributions is to a certain extent superimposed by the informal relationship.<sup>114</sup> Thus in the case of a joint debt that served for the partners' living expenses or the rent of their joint home the partner who paid the entire sum cannot claim any compensation.

However, compensation may be claimed if the debt arises or falls due only after separation and does not concern the joint living expenses or rent for the joint home.<sup>115</sup> Compensation may also be claimed if the joint debt did not concern daily living expenses but was a contribution to an asset of substantial economic importance (see Question 46 for the limits of the principle of non-compensation and potential claims for compensation in such cases).

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

**a. The assets?**

The decisive date for the determination and the valuation of the assets is either the death of one of the partners or the actual separation. The actual separation usually occurs when one partner permanently leaves the common residence (see Question 5).<sup>116</sup>

**b. The debts?**

See (a) above.

**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?**

Until its seminal decision in 2008,<sup>117</sup> the Federal Supreme Court in principle denied compensation claims after the dissolution of an informal partnership. The Court stated in several judgments that the personal relationship between the partners was of primary importance and thus influenced any economic activity between the partners as well. Therefore often there was no offsetting of personal services or financial contributions between partners to an informal relationship.<sup>118</sup> Only in

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<sup>113</sup> BGH, 06.10.2003, *FamRZ*, 2004, 94; BGH, 13.04.2005 *FamRZ*, 2005, 1151, 1152.

<sup>114</sup> BGH, 25.11.2009, *FamRZ*, 2010, 277, 279; N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 18.

<sup>115</sup> BGH, 03.02.2010, *NJW*, 2010, 868, 869; OLG Hamm, 19.10.1999 *FamRZ*, 2001, 95.

<sup>116</sup> H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 12 No. 101; cf. *BVerfGE*, 87, 234, 265 = *NJW*, 1993, 643, 646.

<sup>117</sup> BGH, 09.07.2008, *NJW*, 2008, 3277.

<sup>118</sup> BGH, 03.10.1983, *FamRZ*, 1983, 1213; BGH, 25.09.1997, *NJW*, 1997, 3371; BGH, 06.10.2003, *NJW*, 2004, 58.

exceptional cases did the Court grant compensation based on an analogous application of civil partnership law.<sup>119</sup> The rulings of the Court faced *inter alia* the criticism that partners to an informal partnership did not necessarily want to stand outside the realm of law in this regard.<sup>120</sup> Responding to the arguments raised by several scholars,<sup>121</sup> the Court held, in 2008, in a departure from its previously settled case law, that henceforth after the dissolution of an informal partnership, compensation may be claimed if the contributions made (financial contributions or work performances) appreciably exceed regular contributions made in the course of everyday life.<sup>122</sup> Thus, whereas regular contributions to the living expenses, the rent for the common residence or usual repair measures remain uncompensated, substantial financial contributions or work, i.e. on a building, may be compensated if certain conditions are fulfilled.

For a compensation claim several legal grounds come into consideration. Even though they originate from the general law of obligations, all grounds have been interpreted by the courts in a way to accommodate the specifics of the personal nature of the relationship:

#### 1. Revocation of donation

According to § 530 para. 1 German Civil Code a donation may be revoked if the donee is guilty of gross ingratitude by doing serious wrong to the donor or a close relative of the donor. However, according to the established jurisprudence, contributions related to the informal partnership in a sense that they serve to maintain the partnership are not considered to be donations as per § 530 para. 1 German Civil Code. In the view of the Federal Supreme Court donations are made gratuitously whereas contributions related to informal partnerships are made in order to participate in such contributions in the long term.<sup>123</sup> They are deemed to be reciprocal, even if both partners' contributions are not equal in kind or in amount. Only personal gifts would be considered as donations and could therefore be revoked. However, a revocation of a donation usually fails due to the condition of 'gross ingratitude' as the mere separation cannot be interpreted as such.

#### 2. Civil law partnership

The German Federal Supreme Court assumes that partners to an informal relationship may conclude an implied partnership agreement (civil law partnership) if they act in pursuit of a goal which exceeds the object to merely maintain the informal partnership.<sup>124</sup> The specific object might be that the partners acquire real

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<sup>119</sup> BGH, 12.07.1982, *NJW*, 1982, 2863; BGH, 04.11.1991, *NJW*, 1992, 906.

<sup>120</sup> BGH, 31.10.2007, *LMK*, 2008, 251355 with a comment by M. WELLENHOFER.

<sup>121</sup> Including A. LÜDERITZ and N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 19 et seq.; W. SCHULZ, 'Vermögensauseinandersetzung der nichtehelichen Lebensgemeinschaft', *FamRZ*, 2007, at p. 593; H.-W. STRÄTZ, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *BGB*, Sellier-de-Gruyter, Berlin, 2000, at No. 100 et seq.

<sup>122</sup> BGH, 09.07.2008, *NJW*, 2008, 3277.

<sup>123</sup> BGH, 09.07.2008, *NJW*, 2008, 3277, 3278.

<sup>124</sup> BGH, 09.07.2008, *NJW*, 2008, 3277, 3280.

estate as common investment and common property.<sup>125</sup> To apply those principles the specific object, according to general company law, must be identifiable. As an informal relationship is in principle a relationship without any legal intention, the partners must have a noticeable legal intention to build up a civil law partnership apart from their informal partnership. The Federal Supreme Court granted compensation based on a civil law partnership, for example, for the support provided for the establishment and the operation of a business.<sup>126</sup> Compensation was also granted where the partners for investment purposes jointly built several houses which were legally owned by one partner.<sup>127</sup>

### 3. Unjust enrichment

Compensation based on the ground of unjust enrichment (§ 812 para. 1 s. 2 alt. 2 German Civil Code) may be claimed if a partner made a contribution and the result intended to be achieved by those efforts in accordance with the contents of the legal transaction did not occur. Compensation may be granted if assets of considerable value are concerned, e.g. the construction of a house.<sup>128</sup> However, a claim pursuant to § 812 para. 1 s. 2 alt. 2 German Civil Code requires that both partners have agreed upon the object of the performance. According to case law a tacit agreement can be assumed if one partner performed in order to achieve a certain object, the other partner recognised this purpose and accepted the performance without objection.<sup>129</sup> The specific result intended to be achieved could have been that the partners wanted to live together in the foreseeable future in the house which was built and maintained by contributions made by one or both partners. If they split up shortly after the house has been built, the intended result did not occur and compensation may be claimed. If, on the contrary the couple only separates after some time has passed, the intended object to share the house for living might have been achieved and no compensation be granted.

### 4. Frustration of contract

Moreover, compensation for contributions which created assets of considerable commercial importance can be based on the ground of frustration of contract (§ 313 German Civil Code). The frustration of contract comes into consideration if a partner made the contributions based on the expectation that the informal relationship would last.<sup>130</sup> However, it will only be granted if upholding the contract would be unreasonable, thereby limiting compensation to cases of substantial contributions and allowing the purpose of the contribution and whether this has already been (partially) accomplished, to be taken into consideration. The specific demarcation between § 812 para. 1 s. 2 alt. 2 German Civil Code and § 313 German Civil Code is, however, difficult to draw and case specific. Generally § 313 applies, if there is no explicit agreement regarding the object of the performance of one partner.

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<sup>125</sup> N. DETHLOFF, *Familienrecht*, Beck, Munich, 2012, at § 8 No. 25; BGH, 06.07.2011, *NJW*, 2011, 2880.

<sup>126</sup> BGH, 12.07.1982, *NJW*, 1982, 2863.

<sup>127</sup> BGH, 24.06.1985, *NJW*, 1986, 51.

<sup>128</sup> BGH, 09.07.2008, *NJW*, 2008, 3277, 3280.

<sup>129</sup> H. SPRAU, '§ 812', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 30; BGH, 06.07.2011, *NJW*, 2011, 2880.

<sup>130</sup> BGH, 09.07.2008, *NJW*, 2008, 3277, 3281; BGH, 06.07.2011, *NJW*, 2011, 2880.

## **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?**

The surviving partner does not have any rights of inheritance in case of intestate succession.

### **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?**

According to § 1969 para. 1 German Civil Code the heir has a duty, in the first thirty days after the occurrence of the devolution of the inheritance, to grant maintenance to the same extent as the deceased did to family members of the deceased, if they belong to the household of the deceased and have been receiving maintenance from him or her at the time of his or her death and to permit them to use the home and the household objects (see Question 4). The surviving partner meets the conditions to count as a family member within the meaning of the provision if both partners shared an residence and the surviving partner actually received maintenance.<sup>131</sup>

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

According to § 1932 German Civil Code the surviving spouse under certain conditions has a right to the objects belonging to the marital household. However, this rule cannot be applied by analogy to informal partnerships (see Question 1).<sup>132</sup> Regarding § 1969 German Civil Code see Question 48.

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

#### **a. In general?**

According to § 1937 German Civil Code any person may appoint an heir by a unilateral disposition mortis causa (will, testamentary disposition). § 1937 reflects the principle of freedom to dispose of property upon death.<sup>133</sup> Therefore the deceased is free to choose the surviving partner as heir by testamentary succession.

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

The existence of a marriage or registered partnership does not restrict the freedom to dispose of property upon death. In this case to dispose of property by will in favour

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<sup>131</sup> See for this prevailing view: D. WEIDLICH, '§ 1969', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 1; W. KÜPPER, '§ 1969', in: *Münchener Kommentar zum BGB*, Beck, Munich, 2013, at No. 2.

<sup>132</sup> D. LEIPOLD, '§ 1932', in: *Münchener Kommentar zum BGB*, Beck, Munich, 2013, at No. 3.

<sup>133</sup> D. WEIDLICH, '§ 1969', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 3.

of the surviving partner is, in principle, no longer contrary to public policy as per § 138 para. 1 German Civil Code. A violation occurs only in the rare case in which the partner is solely rewarded for the sexual relationship.<sup>134</sup> But according to § 2303 para. 2 German Civil Code the testator's spouse may demand a compulsory share from the heir. The compulsory share consists of one-half of the value of the share of the inheritance on intestacy (§ 2303 para. 1 s. 2 German Civil Code). The same holds true for registered partners, § 10 para. 6 German Act on Registered Life Partnerships.

**c. If the testator has children?**

According to § 2303 para. 1 s. 1 descendants of the testator who are excluded from succession by disposition mortis causa may demand a compulsory share of the estate from the heir.

**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?

The German Civil Code does not contain provisions to permit partners in an informal relationship to make joint wills. § 2265 German Civil Code states explicitly that a joint will may only be made by spouses.

**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?

According to § 1941 German Civil Code partners in an informal relationship, just as any other persons, may conclude a contract of inheritance. Thus one partner may appoint the other as heir or grant legacies and/or impose testamentary burdens.

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

A marriage or registered partnership does not affect the capacity to conclude a contract of inheritance.

- c. If either partner has children?

The existence of children of one or the other partner does not affect the capacity to conclude a contract of inheritance.

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<sup>134</sup> BGH, 31.3.1970, *NJW*, 1970, 1273; BGH, 10.11.1982, *NJW*, 1983, 674.

**53. Is the surviving partner entitled to a reserved share<sup>135</sup> 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?**

The surviving partner is not entitled to a reserved share or any other rights or claims on the estate in the case of a disposition of property upon death in favour of another person.

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

No such statistics exist.

**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?**

No such statistics exist.

**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?**

No such statistics exist.

## **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?**

There are no specific rules concerning agreements between partners to an informal relationship. The general law of obligations applies (§§ 241 et seq. German Civil Code). Thus, according to § 134 German Civil Code partnership agreements must not be contrary to statutory prohibitions (e.g. German Adoption Law or the German Embryo Protection Act) or public policy (§ 138 German Civil Code).<sup>136</sup> If the partners agree on the purchase of a plot of land, the law of property applies.

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

**a. The division of tasks as between the partners?**

As there is no case law in this regard, the views in legal literature differ. Some scholars are of the opinion that agreements concerning the division of tasks between

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<sup>135</sup> 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.

<sup>136</sup> H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 8 No. 6 et seq.

the partners do not have any legal effect.<sup>137</sup> Others argue that as long as the aforementioned rules (Question 57) are respected, the partners to an informal relationship can make a legally binding agreement on the division of tasks (e.g. shared housekeeping).<sup>138</sup>

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

The contributions to costs and expenses of the household can be agreed upon in a partnership agreement.<sup>139</sup>

**c. Their property relationship?**

Partners to an informal relationship may agree upon their property relationship in accordance with the general rules. Agreements may contain for example provisions concerning the contribution or acquisition of assets and therefore specify if the partners want to acquire alone or as co-owners (see Question 41). Furthermore, the partners may decide to use the mechanisms of partnership law (§§ 705 et seq., §§ 718 et seq. German Civil Code) to create joint rights of participation.

**d. Maintenance?**

Partners to an informal relationship may agree upon maintenance. A partnership agreement may contain maintenance obligations for the existing partnership as well as maintenance obligations after separation.<sup>140</sup> However, the amount of the maintenance obligation after separation must be appropriate and may not function as a contractual penalty (see also Question 58e).<sup>141</sup>

**e. The duration of the agreement?**

The informal partnership may be terminated at any time. This principle cannot be undermined by an agreement. Therefore it is expressly prohibited to agree upon a contractual penalty in the case of the dissolution of the partnership.<sup>142</sup> A contractual penalty was, for instance, assumed in a case where one partner to an informal relationship was forced to pay a certain amount of money upon the dissolution of the relationship and the payment could not explained on the grounds of compensation for disadvantages suffered during the relationship.<sup>143</sup>

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<sup>137</sup> M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 48; R. HAUSMANN, *Nichteheliche Lebensgemeinschaft und Vermögensausgleich*, Beck, Munich, 1989, at p. 90.

<sup>138</sup> H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 16 No. 2.

<sup>139</sup> H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 16 No. 13 et seq.

<sup>140</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 33.

<sup>141</sup> OLG Hamm, 24.03.1987, NJW, 1988, 2474; OLG Köln, 22.11.2000, FamRZ, 2001, 1608.

<sup>142</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 31.

<sup>143</sup> OLG Hamm, 24.03.1987, NJW, 1988, 2474.

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

Partners to an informal relationship are permitted to agree on the legal consequences of their separation (e.g. maintenance or compensation), as long as they do not agree upon a contractual penalty which would force the partners to continue the partnership (see Question 58).<sup>144</sup>

**60. Are the agreements binding:**

**a. Between the partners?**

The agreements are binding between the partners.

**b. In relation to third parties?**

As agreements under the law of obligation they are in general not binding in relation to third parties.<sup>145</sup>

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

This question has no relevance in German legislation (see Question 60).

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

There are no provisions which regulate informal relationships.

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

The agreement can be made at any time.

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

**a. As between the partners?**

There are no specific formal requirements which govern the validity of partnership agreements. The general rules apply. Thus in particular those agreements which concern the transfer or acquisition of a plot of land must be notarised, § 311b German Civil Code. Moreover, notarisation is, for instance, required where a leasehold or the ownership of a condominium are concerned;<sup>146</sup> according to § 2276 German Civil Code a contract of inheritance may only be made by being recorded before a notary in the simultaneous presence of both parties.

**b. In relation to a third party?**

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<sup>144</sup> M. LÖHNIG, 'Anh. zu §§ 1297 et seq.', in: J. VON STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch*, Sellier-de-Gruyter, Berlin, 2012, at No. 34.

<sup>145</sup> C. GRÜNEBERG, 'Einl. vor § 241', in: O. PALANDT, *Bürgerliches Gesetzbuch*, Beck, Munich, 2015, at No. 5.

<sup>146</sup> H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, Beck, Munich, 2014, at § 9 No. 27.



This question has no relevance in German legislation.

**65. Is independent legal advice required?**

Independent legal advice is only required if notarisation is obligatory (see Question 64).

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

No such statistics exist.

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

No such statistics exist.

**G. Disputes**

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

The competent authority to decide disputes between partners to an informal relationship is either the Local Court (*Amtsgericht*) or the Regional Court (*Landgericht*).<sup>147</sup> The jurisdiction depends on the subject matter in dispute. The jurisdiction of the Local Courts encompasses, insofar as they have not been assigned to the Regional Courts, disputes concerning claims involving an amount or with a monetary value not exceeding the sum of five thousand euros as per § 23 No. 1 German Courts Constitution Act (*Gerichtsverfassungsgesetz; GVG*). Irrespective of the value of the matter in dispute, the jurisdiction of the Local Courts also encompasses disputes concerning claims arising out of a lease of living accommodation as per § 23 No. 2 sub. a German Courts Constitution Act. For other claims the Regional Courts are competent.

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

According to § 23b German Courts Constitution Act divisions for family matters (Family Courts) are established at the Local Courts. Those Family Courts are competent to decide disputes concerning matrimonial matters, § 111 No.1, § 121 German Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der Freiwilligen Gerichtsbarkeit; FamFG*). Therefore the authorities which are competent to

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<sup>147</sup> M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 86.

decide disputes between partners to an informal relationship are different from the authorities which deal with spousal disputes.

**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?**

The competent Local or Regional Court can scrutinise a partnership agreement just like any other civil law agreement (for more details see Question 71).

**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)?**

The Federal Supreme Court has developed specific principles for the judicial review of marriage contracts which are based on the general clauses in § 138 and § 242 German Civil Code. It is settled case law that the validity of marriage contracts and their enforceability may be controlled.<sup>148</sup> So far there is no case law concerning informal partnerships in this regard; thus it remains unclear if these principles can be applied to informal partnerships as well.<sup>149</sup>

Any control must respect the fundamental principle of freedom of contract. However, the agreements must not be contrary to § 134 German Civil Code (statutory prohibition) and public policy in the sense of § 138 German Civil Code (see Question 57).<sup>150</sup> The mere fact that one of the partners is still married to a third person does not make the agreement contrary to public policy.<sup>151</sup>

**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?**

An alternative non-mandatory way to solve disputes arising out of informal relationships is mediation. Mediation was already practiced some time before the German Law on Mediation<sup>152</sup> was passed in 2012, but since then the German Law on Mediation has served as a legal framework. It applies to disputes between family members as well as informal partners but does not contain any specific provisions concerning disputes between partners.

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<sup>148</sup> For more detail see: L. BERGSCHNEIDER, *Richterliche Inhaltskontrolle von Eheverträgen und Schiedsvereinbarungen*, Beck, Munich, 2008; N. DETHLOFF and D. MARTINY, *Property Relationship between Spouses-GERMANY*, CEFL Country Report 2008, p. 46.

<sup>149</sup> H. GRZIWOTZ, '§ 29', in: *Münchener AnwaltsHandbuch Familienrecht*, Beck, Munich, 2014, at No. 25a.

<sup>150</sup> H. GRZIWOTZ, '§ 29', in: *Münchener AnwaltsHandbuch Familienrecht*, Beck, Munich, 2014, at No. 25.

<sup>151</sup> OLG Hamm, 20.04.1999, *FamRZ*, 2000, 95; M. WELLENHOFER, 'Anh. zu § 1302', in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Beck, Munich, 2013, at No. 48.

<sup>152</sup> German Law on Mediation (Mediationsgesetz), 21.07.2012, BGBl. 2012 I 1577.

If parties do not want to take legal action they can choose independent mediators. Mediation is for example offered by lawyers or psychologists,<sup>153</sup> but the expression 'mediator' is not legally protected. Another form of mediation is practised during pending lawsuits. The court may refer the parties, for a conciliation hearing as well as for further attempts at resolving the dispute, to a conciliation judge (*Güterichter*) delegated for this purpose, who is not authorised to take decisions. The conciliation judge may avail himself or herself of all methods of conflict resolution, including mediation (§ 278 para. 5 German Code of Civil Procedure).

Apart from recourse to mediation, it is possible to solve disputes by arbitration tribunals. In such a case §§ 1025-1066 German Code of Civil Procedure are decisive. According to § 1030 German Code of Civil Procedure any claim under property law may become the subject matter of an arbitration agreement. An arbitration agreement regarding non-pecuniary claims has legal effects insofar as the parties to the dispute are entitled to conclude a settlement regarding the subject matter of the dispute. Arbitration tribunals which deal with spousal disputes are often competent to decide disputes between partners to an informal relationship as well.<sup>154</sup>

**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?**

The procedural effects of an ADR agreement depend on its subject matter. Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court must dismiss the complaint as inadmissible provided that the defendant has raised the corresponding objection prior to the commencement of the hearing on the merits of the case, unless the court determines the arbitration agreement to be null and void, invalid or impossible to implement (§ 1032 German Code of Civil Procedure).

Mediation clauses differ widely in their procedural effects. They can comprise a dilatory waiver of an action (*dilatorischer Klageverzicht*). In such a case the parties must raise the objection that a mediation clause exists and thus the court must dismiss the action as inadmissible.<sup>155</sup> Interim legal protection remains unaffected by the mediation clause.<sup>156</sup>

**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?**

No such statistics exist.

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<sup>153</sup> H. FRIEDRICHSMEIER, E. KEMPE, H. BERNHARDT, B. WINOGRAD, R. WALZ and J. VON BARGEN, 'Kapitel. Berufsbilder', in: F. HAFT and K. VON SCHLIEFFEN (eds.), *Handbuch Mediation*, Beck, Munich, 2009.

<sup>154</sup> E.g. *Schiedsordnung des Süddeutschen Familienschiedsgerichts vom 1. 1. 2011*, I. 2.

<sup>155</sup> H. UNBERATH, 'Mediationsklauseln in der Vertragsgestaltung, Prozessuale Wirkungen und Wirksamkeit', *NJW*, 2011, at p. 3121.

<sup>156</sup> B. HESS, 'Rechtsgrundlagen der Mediation', in: F. HAFT and K. VON SCHLIEFFEN (eds.), *Handbuch Mediation*, Beck, Munich, 2009, at No. 72.