
Intergenerational transfer of wealth from a comparative perspective. Different solutions to a complex problem

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1. Introduction

The transfer of wealth from one generation to the next one is a complex procedure which in many cases may turn out to be highly controversial between the persons involved. This is due to the conflicting interests of the stakeholders. The deceased person, when preparing the will, might have been interested in distributing the assets just based on his or her personal ideas without any restrictions imposed by law. The surviving spouse and the children of the deceased may be interested in acquiring as much of the assets as to what they consider to be their legitimate share. The creditors of the deceased person may doubt whether the heirs would be able and willing to pay for the debts. If the deceased person held shares of a company then even the interests of the company and the other shareholders might be affected: The shares of the deceased are passed on to the legal successor who could be an incompetent, unreliable and even quarrelsome person.

One can imagine easily how numerous and complex the legal problems are which may arise from transfer of an estate from the deceased to his or her successors. In my presentation, I will not be able to go into all of the problems one may think of. As I was told by the organizers of the conference, I will focus on enterprises or businesses being involved. As for the comparative perspective, my presentation will be based on the German and Austrian law. Even with all these restrictions, the presentation will be quite a challenge when there are only 30 minutes of time.

When we talk of enterprises being transferred from one generation to the next one we think of family businesses. There is no legal definition of a family business. In the common understanding of the word, a family business is an enterprise which is controlled by one natural person or by

a smaller number of natural persons who are spouses or who are related with each other. In some cases, the enterprise might be controlled by more than one family⁽¹⁾.

As a starting point, let us have a look at some economic figures. Family businesses are the backbone of the economy. In Germany, family businesses make up for 92% of all enterprises⁽²⁾; in Austria the respective figure is 80%⁽³⁾. In Germany, they provide for 26.2 millions of jobs⁽⁴⁾. You may find family businesses in any branch of the market. They act as producers of goods and deliverers of services, they may be wholesalers and retailers. You will find family businesses of any size. In Germany, about 94% of all enterprises employing less than 10 people are family businesses⁽⁵⁾. But even among enterprises providing more than 500 jobs, family businesses make up 27%⁽⁶⁾. Among the largest family businesses in Germany, you will find the car producer BMW where the Quandt family holds 46.6% of the shares; Metro which operates some of Germany's largest retailers and department stores, where more than 50% of the shares are held by two families. Aldi, one of Germany's largest chains of supermarkets, is wholly owned by members of the Albrecht family. Family business may operate in almost any legal form. They may be run by the entrepreneur himself in sole proprietorship, they may be organized as partnerships or as companies with limited liability or as joint stock companies, and they even may be listed at a stock exchange. In

(1) See also in more details EUROPEAN COMMISSION (ENTERPRISE AND INDUSTRY DIRECTORATE-GENERAL), *Final Report of the Expert Group, Overview of Family-Business-Relevant Issues: Research, Networks, Policy Measures and Existing Studies*, November 2009, available at http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/family-business/family_business_expert_group_report_en.pdf, consulted on 18th February 2013.

(2) STIFTUNG FAMILIENUNTERNEHMEN, *Die Volkswirtschaftliche Bedeutung der Familienunternehmen 1*, available at http://www.familienunternehmen.de/media/public/pdf/studien/Die_volkswirtschaftliche_Bedeutung_der_Familienunternehmen.pdf, consulted on 18th December 2012.

(3) FLENER in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 28 N. 1.

(4) STIFTUNG FAMILIENUNTERNEHMEN, *Die Volkswirtschaftliche Bedeutung der Familienunternehmen 13*, available at http://www.familienunternehmen.de/media/public/pdf/studien/Die_volkswirtschaftliche_Bedeutung_der_Familienunternehmen.pdf, consulted on 18th December 2012.

(5) STIFTUNG FAMILIENUNTERNEHMEN, *Die Volkswirtschaftliche Bedeutung der Familienunternehmen 18*, available at http://www.familienunternehmen.de/media/public/pdf/studien/Die_volkswirtschaftliche_Bedeutung_der_Familienunternehmen.pdf, consulted on 18th December 2012.

(6) STIFTUNG FAMILIENUNTERNEHMEN, *Die Volkswirtschaftliche Bedeutung der Familienunternehmen 18*, cit.

some family businesses the members of the family are also active in the management board, in other businesses managers from outside of the company are hired⁽⁷⁾.

In Germany, about 22.000 family businesses are transferred to the next generation every year⁽⁸⁾. In Austria, the respective number is 5.000⁽⁹⁾. The intergenerational transfer of an enterprise frequently is a challenge, not only from the economic point of view, but also from the legal perspective. In some cases, even the existence of the enterprise may be put at risk. So the process of transfer is something which has to be planned carefully and which generally requires sophisticated legal consulting provided by lawyer or notaries.

My presentation will consist of three chapters. In the first chapter I will deal with the legal aspects coming from succession law. Then, I will discuss the company law aspects. Finally, I will outline the use of a foundation as instrument to immunize the business from the dangers of an intergenerational transfer.

2. Succession law

When we look at the basic principles, succession law in Germany and Austria are quite similar. However, when it comes to the details there are quite a lot differences. Let us just focus on the aspects of succession law which are relevant for the intergenerational transfer of family businesses.

First, as in many other jurisdictions, succession law in Germany and Austria is based on a compromise between colliding principles. On one side, the testator is free to set up a will and to distribute his or her assets freely. On the other side, the surviving spouse and his close relative, such as the children and – if there aren't any – his parents or even the grandparents have a privileged right to claim the estate. They are heirs by law if the deceased person did not set a will⁽¹⁰⁾, and if he did

(7) See HABIG, BERNINGHAUS, *Die Nachfolge im Familienunternehmen ganzheitlich regeln*³, 7.

(8) INSTITUT FÜR MITTELSTANDSFORSCHUNG, *Mittelstand in Deutschland 2011*, 4, available at http://www.ifm-bonn.org/assets/documents/Mittelstand_in_Deutschland_2011.pdf, consulted on 18th December 2012.

(9) BUNDESMINISTERIUM FÜR WIRTSCHAFT, FAMILIE UND JUGEND, *Mittelstands-bericht 2012, Bericht über die Situation der kleinen und mittleren Unternehmungen der gewerblichen Wirtschaft*, 72, available at http://www.bmwfj.gv.at/Unternehmen/versicherungsvermittler/Documents/Entwurf%20Mittelstandsbericht_%202012.pdf, consulted on 18th December 2012.

(10) §§ 727 et seq. ABGB (Austrian Civil Code); § 1294 et seq. BGB (German Civil Code).

they may claim a compulsory share (*quota di riserva*)⁽¹¹⁾. Generally, the compulsory share is 50% of what the person being entitled to it would have received if there had been no will and they had been heirs in intestacy⁽¹²⁾. So the share of the estate which is reserved for the spouse and the relative as *legittimari* will not exceed 50% of the estate. And we can also say that the share of the estate which is left to distribution by the will of the testator (*quota disponibile*) will not be less than 50%. There is, however, an important exception if the deceased person has made a gift to someone before his death⁽¹³⁾. Such a gift may lead to an increase of the compulsory share. It may even have the consequence that the donee (the recipient of the gift) is liable for the corresponding part of the compulsory share which is not covered by the estate⁽¹⁴⁾. When it comes to the question on whether or not a gift made by the deceased person will lead to an increase of the compulsory share and how to calculate the increase details are quite complicated, and there are some significant differences between German and Austrian law⁽¹⁵⁾ (see also in chapter IV).

When it comes to the legal position of the *legittimari* in Germany and Austria, there is another aspect which should be mentioned because it seems to impose a difference to Italian law. Generally, the testator is free in how to cover the compulsory shares of the *legittimari*⁽¹⁶⁾. He may appoint the spouse or the family relative as an heir and provide him or her with a share of the estate which is at least an equivalent of the compulsory share⁽¹⁷⁾. The testator may also provide the *legittimari* with a legacy (*legato*) the value of which at least corresponds to compulsory share⁽¹⁸⁾. If the testator does not, either by disinheriting one of his *legittimari* without a sufficient reason or by providing him with a portion of the estate or a legacy which does not fully correspond with the compulsory

(11) See § 764 ABGB; § 2303 BGB.

(12) See § 765 ABGB; § 2303 BGB.

(13) See § 785 ABGB; § 2325 BGB.

(14) See § 951 ABGB; § 2329 BGB.

(15) For Austrian law, see more detailed AICHBERGER-BEIG in GRUBER, KALSS, MÜLLER, SCHAUER, *Erbrecht und Vermögensnachfolge* (2010) § 4 N. 45 et seq.

(16) See § 774 ABGB; SCHEUBA in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 9 N. 25; APATHY in KOZIOL, BYDLINSKI, BOLLENBERGER, *ABGB*³ § 774 N. 1; WELSER in RUMMEL, *ABGB*³ § 774 N. 1.

(17) WELSER in RUMMEL, *ABGB*³ § 774 N. 1; SCHEUBA in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 9 N. 25.

(18) WELSER in RUMMEL, *ABGB*³ § 774 N. 1; SCHEUBA in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 9 N. 25.

share, then the person being entitled to it only has a monetary claim⁽¹⁹⁾. In such a case, the person being entitled to a compulsory share only has the legal position of a creditor of the estate⁽²⁰⁾, and he or she does not participate in the community of heirs (*comunione dei beni ereditari*)⁽²¹⁾.

Secondly, I understand that Italian law is quite restrictive when it comes to legally binding contracts on succession rights and on estate of a person which is still alive. An agreement as to succession (*patto successorio*) is not allowed (Art 458 Cod.civ.) and the *patto di famiglia* seems to be the only exception. This is somehow different in German and Austrian law. German law has a very liberal approach to the agreement as to succession (*patto successorio*)⁽²²⁾. Such an agreement may be concluded between any two parties whether or not they are spouses or family relatives⁽²³⁾, such an agreement may cover the entire estate⁽²⁴⁾, and such an agreement may even be concluded in favour of a third party⁽²⁵⁾. The agreement as to succession seems to have some significance in Germany: The result of a survey in 2006 was that about 5% of the population have entered into such an agreement⁽²⁶⁾. There is, however, one problem which this kind of agreement cannot solve: It cannot do away with the compulsory shares. Austrian law is much more restrictive: Agreements as to succession are permitted⁽²⁷⁾. But they may only be concluded by spouses⁽²⁸⁾, they may not cover more

(19) BITTNER, HAWEL in KLETEČKA, SCHAUER, *ABGB-ON* 1.00 §§ 762, 763 N. 3; SCHEUBA in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 9 N. 6 et seq.; NEMETH in SCHWIMANN, *Taschenkomm ABGB* § 764 N. 1; ECCHER in *Schwimann*³ § 764 N. 1; WELSER in RUMMEL, *ABGB*³ Vor § 762 N. 3; für Deutschland: HAAS in STAUDINGER, *BGB* § 2303 N. 67; LANGE in *MünchKomm BGB*⁵ § 2303 N. 16; HOEREN in SCHULZE UA, *Handkomm BGB*⁷ § 2303 N. 13.

(20) KOZIOL, WELSER, *Bürgerliches Recht II*¹³ 545; for Germany HAAS in STAUDINGER, *BGB* § 2303 N. 67; LANGE in *MünchKomm BGB*⁵ § 2303 N. 16.

(21) WERNER in STAUDINGER, *BGB* § 2032 N. 1.

(22) § 1941, §§ 2274 et seq. BGB.

(23) HOEREN in SCHULZE UA, *Handkomm BGB*⁷ Vorbemerkungen zu §§ 2274-2303 N. 2.

(24) MUSIELAK in *MünchKomm BGB*⁵ § 2278 N. 7.

(25) § 1941 (2) BGB; MUSIELAK in *MünchKomm BGB*⁵ Vorbemerkungen §§ 2274-2303 N. 7; KANZLEITER in STAUDINGER, *BGB* § 2278 N. 5.

(26) HOMMERICH, HOMMERICH, *Erbrechtliche Vorsorge in Deutschland*, 4, available at <http://www.erbrecht.de/getasset.php?asid=579>, consulted on 18th December 2012.

(27) § 602, § 1249 ABGB.

(28) FISCHER, CZERMAK in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 20 N. 48; M. BYDLINSKI in RUMMEL, *ABGB*³ § 1249 N. 3; BRAUNEDER in SCHWIMANN, *ABGB*³ § 1249 N. 6.

than three quarters of the estate⁽²⁹⁾, and there is no binding agreement in favor of a third party⁽³⁰⁾. These seem to be the reasons why the *patto successorio* is of no practical relevance in Austria⁽³¹⁾. Furthermore, both German and Austrian law permit the *mortis causa* gift (*donazione mortis causa*), and there are no specific restrictions imposed⁽³²⁾. Finally, the testator and any other person may enter into a contract on renunciation of the inheritance⁽³³⁾. If they do, the person who renounced will not acquire the right of inheritance after the death of the testator⁽³⁴⁾. Depending on the results of the negotiations, the testator may pay some money or transfer some assets in exchange for the renunciation; but this is not a required element of the contract⁽³⁵⁾. Even more important, the compulsory share may be subject of a contract on renunciation⁽³⁶⁾. Since it is very difficult to disinherit someone who is entitled to a compulsory share⁽³⁷⁾, such a contract is the only reliable way to estate planning without the restrictions of a *quota di riserva*.

When it comes to the intergenerational transfer of a family business compulsory shares constitute for the fundamental problem. The reason is that in most of the cases the business owner will intend to concentrate the control of the enterprise in one person of the next generation. For instance, he will designate one of his children to be his successor whom he considers to be the most experienced or the smartest one. Compulsory shares have the opposite effect. They are focused on the division of the estate⁽³⁸⁾.

There is just a very specific area of business where by law the principle of the undivided continuation of the business prevails against the in-

(29) FISCHER, CZERMAK in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 20 N. 54 et seq.; M. BYDLINSKI in RUMMEL, *ABGB*³ § 1249 N. 2; KOCH in KOZIOL, BYDLINSKI, BOLLENBERGER, *ABGB*³ § 1249 N. 4.

(30) OGH (Austrian Supreme Court) 20.10.1999, 7 Ob 115/99h NZ 2000, 147; FISCHER, CZERMAK in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 20 N. 53; BRAUNEDER in SCHWIMANN, *ABGB*³ § 1249 N. 6; M. BYDLINSKI in RUMMEL, *ABGB*³ § 1249 N. 3; KOZIOL, WELSER, *Bürgerliches Recht* IP³, 522.

(31) FUCIK in KLETEČKA, SCHAUER, *ABGB-ON* 1.01 § 1249 N. 10.

(32) § 956 Satz 2 ABGB; § 2301 BGB; KOZIOL, WELSER, *Bürgerliches Recht* IP³, 541^o et seq.

(33) § 551 ABGB, § 2346 BGB; KOZIOL, WELSER, *Bürgerliches Recht* IP³, 462 et seq.

(34) WELSER in RUMMEL, *ABGB*³ § 551 N. 1; APATHY in KOZIOL, BYDLINSKI, BOLLENBERGER, *ABGB*³ § 551 N. 2; WERKUSCH in KLETEČKA, SCHAUER, *ABGB-ON* 1.01 § 551 N. 3.

(35) KOZIOL, WELSER, *Bürgerliches Recht* IP³, 463.

(36) WALL in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 21 N. 1; Mayer in *BeckOK BGB* § 2346 N. 13.

(37) See §§ 768-770, § 773; § 2333 BGB.

(38) See KREJCI, *Unternehmensnachfolge und Pflichtteilsrecht* 1 f.

terest of the *legittimari* to acquire a certain share of the estate⁽³⁹⁾. In the field of agriculture, a farm after the death of its owner will not be transferred to all of his legal successors but only to a single one who seems to be the most qualified one⁽⁴⁰⁾. The other heirs will not participate in the farm; they will just be compensated by a monetary claim the amount of which has to be measured by the profitability of the farm⁽⁴¹⁾. Generally, they will receive much less than their compulsory share. These provisions apply to farms only and they have historic reasons⁽⁴²⁾. I understand that in Italy a similar regime privileging farms (*masi chiusi*) exists in the province of Alto Adige where it perhaps may be considered as a legal heritage of the Austrian law.

As for any other business, the undivided continuation after the death of the business owner does not prevail against the compulsory shares. There are not many options which are left to the business owner when planning his estate. First, he may think of disinheriting his or her *legittimari*. For this purpose, very specific reasons are required, such as a severe crime⁽⁴³⁾. In everyday estate planning, disinheritance is hardly ever a way to do away with compulsory shares. Secondly, the business owner might think of appointing the *legittimari* as legatees (*legatari*) and providing them with some assets the value of which covers their compulsory share. This is a way out only when there are sufficient assets apart from the business to cover all these claims. If the business is the major asset of the estate then the testator might think of referring the *legittimari* to their monetary claim against the estate. This is an appropriate solution only if there is enough liquid capital in the estate to pay for all these claims. If the major asset of the estate is an enterprise or a share of a company and if the compulsory shares make up for 50% of the estate

(39) Bundesgesetz vom 21. Mai 1958 über besondere Vorschriften für die bäuerliche Erbteilung (Anerbengesetz), BGBl 1958/106 idF BGBl I 2008/2; Gesetz vom 12. Juni 1900, betreffend die besonderen Rechtsverhältnisse geschlossener Höfe, wirksam für die gefürstete Grafschaft Tirol, GVBlTirVbg. Nr. 47/1900 idF BGBl I 2003/112; Bundesgesetz vom 13. Dezember 1989 über die bäuerliche Erbteilung in Kärnten (Kärntner Erbhöfegesetz 1990) BGBl 1989/658 idF BGBl I 2003/112.

(40) See §§ 3, 4 und 4a AnerbenG; extensively PROBST in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 6 N. 40 et seq.

(41) OGH (Austrian Supreme Court) 5.04.1972, 1 Ob 55/72 SZ 45/40; 18.07.2011, 6 Ob 109/11i; extensively PROBST in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 6 N. 88 et seq.

(42) See PROBST in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 6 N. 9 et seq.

(43) Cf. KOZIOL, WELSER, *Bürgerliches Recht II*³, 560 et seq.; THOMA in *Münchener Anwaltshandbuch Erbrecht*³ § 29 N. 65 et seq.

then in most of the cases there will not be sufficient liquid money for satisfying all the *legittimari*⁽⁴⁴⁾. On the contrary, those monetary claims against the estate may even put the further existence of the enterprise at risk or the designed successor may be forced to sell the enterprise which has the effect that it is lost for the family for all times. The third way to deal with the problem would be that the business owner enters into a contract on renunciation of the compulsory shares with the *legittimari*. Trouble is that such a contract requires the consent of both parties⁽⁴⁵⁾. Some of the *legittimari* might be willing to agree, some of them are not or the business owner might have to pay a high price for their consent. Finally, the fourth way might be that the business owner sets up a foundation and transfers the enterprise of the company shares to the foundation. In some cases, this can really be a way to avoid compulsory shares. We will come back to that in the last part of my presentation (see below chapter IV).

Let me just add that in recent years legislation has become aware of this problem and a reform of the provisions dealing with compulsory shares is being discussed⁽⁴⁶⁾. One solution might be that when an enterprise or a company share is the major asset of the estate and when there is not enough liquidity to satisfy the monetary claims of the *legittimari* then the judge would be entitled to impose a moratorium on those payments or he might even decree that the monetary claims could be paid for in installments over a period of ten years⁽⁴⁷⁾. For the time being, this is just a subject of discussion, there is no draft or parliamentary bill.

3. Company law

When a shareholder of a company dies, his share generally would be part of his estate and be transferred to the legal heirs. But this transfer also affects the legitimate interests of the surviving members of the company because the successor of the deceased person might be someone whom – due to the lack of qualification or for some other reason – they

(44) KREJCI, *Unternehmensnachfolge und Pflichtteilsrecht* 1 f.

(45) APATHY in KOZIOL, BYDLINSKI, BOLLENBERGER, ABGB³ § 551 N. 1; RUMMEL in RUMMEL, ABGB³ § 551 N. 1; WELSER, *Bürgerliches Recht II*³, 462.

(46) KREJCI, *Unternehmensnachfolge und Pflichtteilsrecht* (2006); see also WELSER, *Ein eigenes Pflichtteilsrecht für Unternehmer? - Zum Gesetzesvorschlag einer Arbeitsgruppe*, GesRZ 2008, 261.

(47) KREJCI, *Unternehmensnachfolge und Pflichtteilsrecht* 16 et seq.

would never have accepted when setting up the company. Therefore, the surviving members of the company may have a strong incentive to control who succeeds the deceased as a new member of the company.

There are various solutions to the problem. They depend on the legal form of the company. Let us start with the partnership (*società in nome collettivo*). If there is no special provision in the partnership agreement, in Germany the membership of deceased is terminated at the time of his death and the partnership will be continued by the surviving members of the partnership⁽⁴⁸⁾. In Austria the partnership is dissolved and liquidated⁽⁴⁹⁾, but the surviving members of the partnership are entitled to agree on the continuation of the partnership without the heirs of the deceased⁽⁵⁰⁾. Of course, there could be a clause in the partnership agreement as to automatic continuation of the partnership without the heirs of the deceased⁽⁵¹⁾. In every case, when the partnership is continued without the heirs of the deceased company member, the value of his share has to be paid by the partnership to his estate as a compensation for the loss of the membership⁽⁵²⁾. All that is quite clear and does not lead to any fundamental problems.

The tough question is the following: May there be a clause in the partnership agreement which reduces the claim of the estate to a lower amount which does not correspond with the true value of the share - we may think of the book value - or may the claim of the estate be eliminated completely with the effect that only the surviving members of the partnership would benefit from the death of the deceased? German and Austrian courts would approve both clauses, even the complete exclusion of the claim of the estate⁽⁵³⁾. If so, the next question would be whether the *legittimari* are protected against such an exclusion of the claim of the estate. German and Austrian courts hold that there is no protection which is quite a surprise. The result of this court practice is that a partnership

(48) § 131 (3) n. 1 dHGB (German Commercial Code).

(49) § 131 n. 4 UGB (Austrian Business Code).

(50) § 141 (1) UGB.

(51) See SCHAUER in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 31 N. 16, SCHAUER in KALSS, NOWOTNY, SCHAUER, *Österreichisches Gesellschaftsrecht* N. 2/618.

(52) § 137 (2) UGB; SCHAUER in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 31 N. 26.

(53) OGH (Austrian Supreme Court) 18.01.1950, 1 Ob 19/50 SZ 23/8; 11.02.1997, 10 Ob 34/97s, GesRZ 1997, 106; BGH (German Supreme Court) 22.11.1956 - II ZR 222/55, BGHZ 22, 186, 194 = NJW 1957, 180; see also BGH 14.07.1971 - III ZR 91/70, WM 1971, 1338.

may be used as an instrument to avoid compulsory shares. All you have to do is to set up a partnership with some other people and put a clause into the partnership agreement that after the death of a member his share will be terminated and any claim of his estate shall be eliminated. Then you transfer all your assets into the partnership and when you die there will be no estate. German and Austrian courts rely on the argument that partnership contracts cannot be considered as gifts (*donazione*)⁽⁵⁴⁾, but this is hardly convincing. Since the solution held by the courts is fiercely discussed in the doctrine⁽⁵⁵⁾, no serious legal consultant would recommend a partnership as an instrument to avoid compulsory shares. In its latest decision the Austrian Supreme Court indicates that it might reconsider this position⁽⁵⁶⁾.

Shares of a company with limited liability (*società a responsabilità limitata*) will always be part of estate of the deceased shareholder⁽⁵⁷⁾. The statutes of the company cannot provide for the automatic termination of the shares in the case of death⁽⁵⁸⁾. But in the statutes of the company the surviving shareholders may be granted a right to acquire the share of the deceased⁽⁵⁹⁾. Frequently, the statutes also provide for a purchase price which has to be paid by the surviving shareholders who wish to make use of this right, and again the purchase price in many cases is below the true value of the share⁽⁶⁰⁾.

If the family business is organized as a joint stock company (*società per azioni*) the statutes of the company may not provide for a preferred right of the shareholders to acquire the shares in the case of death of

(54) BGH (German Supreme Court) 22.11.1956 - II ZR 222/55, BGHZ 22, 186, 194 = NJW 1957, 180; OGH (Austrian Supreme Court) 18.01.1950, 1 Ob 19/50 SZ 23/8; 10.09.1992, 8 Ob 644/91, GesRZ 1993, 38.

(55) Extensively SCHAUER in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 31 N. 27 mwN; KOPPENSTEINER, AUER in STRAUBE, *UGB*⁴ §§ 137, 138 N. 21.

(56) OGH 11.02.1997, 10 Ob 34/97s, GesRZ 1997, 106.

(57) See KALSS in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 32 N. 4.

(58) OGH 5.09.1990, 2 Ob 593, 594/90 ecolex 1990, 765 (*Reich-Rohrwig*); 15.02.2000, 5 Ob 110/99h NZ 2000, 280; OGH 07.08.2008, 6 Ob 150/08i; OLG Wien (Higher Regional Court Vienna) 17.05.2005, 28 R 68/05h GeS 2005, 371; KALSS in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 32 N. 8; different view by KOPPENSTEINER, RÜFFLER, *GmbHG*³ § 76 N. 14.

(59) NOWOTNY in KALSS, NOWOTNY, SCHAUER, *Österreichisches Gesellschaftsrecht* N. 4/309.

(60) NOWOTNY in KALSS, NOWOTNY, SCHAUER, *Österreichisches Gesellschaftsrecht* N. 4/309.

one shareholder⁽⁶¹⁾. However, the shareholders may enter into an agreement by which they grant preferred rights of acquisition to each other in the case of death or if one of the shareholders is willing to sell his shares. Since such an agreement is not part of statutes of a company, it is binding only for those shareholders who took part in the formation of the agreement, but not, for instance, for a purchaser of the shares⁽⁶²⁾.

4. Foundation

A business owner might consider it a good idea to set up a trust or a foundation and transfer his enterprise or his company shares to it before his death. By doing so, he might pursue a threefold strategy: first, to make sure that his intentions on the future development of the enterprise will be respected even after his death; secondly, to protect the enterprise from conflicts among family members after his death, thirdly, to avoid compulsory shares of the *legittimari*.

Let us now take a look on German and Austrian law to find out whether these objectives can be realized. In Germany and Austria, the trust as a legal form does not exist. Opposite to Italy, Germany and Austria have not signed the Hague Convention on the Law Applicable to Trusts and on their Recognition. The qualification of trusts in international private law in Germany and Austria is quite unclear⁽⁶³⁾. This seems to be one of the reasons why the trust is of no relevance in Germany and Austria.

However, foundations play an important role in economic and social life in Germany and Austria. But when we talk of foundations we should take into consideration that a foundation in Germany and Austria is somehow different from what is in Italy. I understand that in Italy a *fondazione* may be set up for a charitable (or a public benefit) purpose only (*utilità sociale*). In Germany and Austria, there is no such restriction. A foundation may have any purpose which is not illegal⁽⁶⁴⁾. This is why a foundation in Germany and Austria may have private purposes, such as

(61) KALSS in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 32 N. 9.

(62) KALSS in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 32 N. 55.

(63) WOLFF in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 43 N. 38 et seq.

(64) For Austria § 1 (1) PSG (Privatstiftungsgesetz; law on private foundations); ARNOLD, *Privatstiftungsgesetz*² (2007) § 1 N. 15; KALSS in KALSS, NOWOTNY, SCHAUER, *Österreichisches Gesellschaftsrecht* N. 7/13. For Germany § 80 (2) BGB; BACKERT in *BeckOK BGB* § 80 N. 5.

providing the maintenance of the founder's family members. Especially in Austria, this kind of family foundation is commonplace⁽⁶⁵⁾.

However, German and Austrian law is restrictive when it comes to the question whether a foundation as such may run an enterprise. In Austria, a foundation may operate a business only in exceptional cases⁽⁶⁶⁾. In Germany, where there is no clear provision in the law, the question is debated in a very controversial way because foundation law does not provide for a sufficient protection of the creditors of the enterprise and because - opposite to a company - there is no control by owners or shareholders. On the other hand, it is not considered to be a fundamental problem if the foundation holds shares of a company⁽⁶⁷⁾. It even may be the single shareholder of a company. Both in Germany and in Austria we find many examples for foundations acting like holding companies.

When it comes to the freedom of the founder as to organize the foundation, Austrian law is much more liberal than German law. For that reason, I will focus on the legal situation in Austria for the rest of my presentation.

In Austria, the law on so called private foundation was adopted in 1993. Private foundations have become a huge success story since⁽⁶⁸⁾. There are about 3.300 private foundations in Austria⁽⁶⁹⁾. Although there are no precise figures, the total amount of the assets being held by private foundations is said to be between 50 and 100 billion Euro⁽⁷⁰⁾. Austria even was successful to attract capital from abroad, such as from the German tycoon Karl Flick. What are the reasons for this success? There may be two. The first is that the private foundation was privileged by taxation. Things have changes meanwhile, some of the privileges were abolished. Since I am not an expert on taxation, I will not go more into details.

The second reason is that foundation law allows much freedom to the founder when he or she sets up the foundation. Let me just give you two exam-

(65) MÜLLER in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 26 N. 5.

(66) See § 1 (2) PSG; ARNOLD, *Privatstiftungsgesetz* § 1 N. 16 et seq.; KALSS in KALSS, NOWOTNY, SCHAUER, *Österreichisches Gesellschaftsrecht* N. 7/14.

(67) KALSS, MÜLLER in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 55 N. 41; KALSS in KALSS, NOWOTNY, SCHAUER, *Österreichisches Gesellschaftsrecht* N. 7/14.

(68) So auch LUDWIG in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 45 N. 1.

(69) FELTL, *Übersicht der Unternehmensformen*, GES 2012, 111.

(70) JÄKLE, *Über eine Stiftung kann man Kapital auf lange Frist erhalten*, Wirtschaftsblatt vom 23.11.2009, available at <http://wirtschaftsblatt.at/archiv/1122855/index>, consulted on 18th December 2012.

ples: The founder may appoint any beneficiary, even himself⁽⁷¹⁾. The founder also may reserve the right to change the statutes⁽⁷²⁾, including the purpose of the foundation, and he may even reserve the right to revoke the foundation⁽⁷³⁾. There is just one restriction: These rights of the founder may not be assigned to another person⁽⁷⁴⁾ and they will come to end when the founder dies⁽⁷⁵⁾. A foundation also may have more than one founder⁽⁷⁶⁾. In such a case, the right to change the statutes or to revoke the foundation may link to the life of the founder who will be the last one to die⁽⁷⁷⁾. This is the reason why sometimes very young persons, even children, act as co-founders.

From the comparative point of view, and by taking a functional approach, we can see that the Austrian private foundation is not only a foundation in the traditional sense, but it may also serve as a functional equivalent of the trust. There is even a rule against perpetuity: If the sole or the prevailing purpose of a private foundation is to provide maintenance to natural persons, the duration of the foundation is restricted to 100 years. However, those beneficiaries who after 100 years would receive the proceeds of the liquidation may decide to renew the foundation up to another 100 years⁽⁷⁸⁾.

Let us now take a look at the governance of the foundation. What are the legal instruments to ensure that the member of the board respect the purpose of the foundation and act in its best interest? To begin with, there is no permanent monitoring by a supervision authority. Foundation governance is based on a combination of internal and external elements. First, there must be at least three members of the board⁽⁷⁹⁾. The idea is that there shall be some kind of mutual control⁽⁸⁰⁾. Furthermore, mem-

(71) KALSS in KALSS, NOWOTNY, SCHAUER, *Österreichisches Gesellschaftsrecht* N. 7/16; ARNOLD, LUDWIG, *Stiftungshandbuch* N. 13/2.

(72) § 33 PSG.

(73) § 34 PSG.

(74) ARNOLD, *Privatstiftungsgesetz*² § 3 N. 44; KALSS, MÜLLER in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 55 N. 127.

(75) § 3(3) PSG; ARNOLD, *Privatstiftungsgesetz*² § 3 N. 44; KALSS, MÜLLER in GRUBER, KALSS, SCHAUER, MÜLLER, *Erbrecht und Vermögensnachfolge* (2010) § 55 N. 127.

(76) § 3(1) PSG.

(77) Beachte aber OGH 18.09.2009, 6 Ob 136/09g, GesRZ 2010, 59 = JEV 2010, 102; ARNOLD, *Privatstiftungsgesetz*² § 3 N. 50.

(78) § 35(2) n 3 PSG; ARNOLD, LUDWIG, *Stiftungshandbuch* N. 2/44.

(79) § 15 (1) PSG.

(80) ARNOLD, *Privatstiftungsgesetz*² § 15 N. 9;

bers of the board are liable in case of breach of their duties⁽⁸¹⁾. Secondly, the members of the board are responsible for the accounting⁽⁸²⁾ which is reviewed by an auditor every year⁽⁸³⁾. The auditor is appointed by court and the process of auditing is similar to the auditing of a joint stock company. There is just one significant difference: The annual accounts of the foundations do not have to be made public⁽⁸⁴⁾. Thirdly, and perhaps most important, the beneficiaries have access to information⁽⁸⁵⁾. They may claim to get access to all documents of the foundation, the annual accounts and even the business correspondence⁽⁸⁶⁾. Finally, any member of an organ of the foundation, any beneficiary and the auditor may turn to court if they suspect a breach of duty of the board members or any member of another organ of the foundation. The court may take the appropriate measures, such as imposing a special audit⁽⁸⁷⁾ or removing the board members and eventually appointing new ones⁽⁸⁸⁾.

We should now deal with the question whether a private foundation is an appropriate instrument to do away with compulsory shares which otherwise would come into being after the death of the founder. The legal situation is quite complicated and may be summarized like this: The transfer of assets to a foundation is deemed to be a gift or a donation because the founder does not receive anything in return⁽⁸⁹⁾. This is why the *legittimari* may ask for an increase of their compulsory share which takes the assets transferred to the foundation by the founder into consideration. If there are not sufficient assets in the estate of the founder to provide for the total of the claims of the *legittimari*, then the foundation would be liable for the missing sum⁽⁹⁰⁾.

(81) § 29 PSG; ARNOLD, LUDWIG, *Stiftungshandbuch* N. 7/87 et seq.

(82) § 18 PSG.

(83) § 21 PSG.

(84) ARNOLD, *Privatstiftungsgesetz*² § 18 N. 15.

(85) § 30 PSG.

(86) ARNOLD, *Privatstiftungsgesetz*² § 30 N. 9; ARNOLD, LUDWIG, *Stiftungshandbuch* N. 13/8.

(87) § 31 PSG.

(88) § 27 PSG.

(89) SCHAUER, *Privatstiftung und Erbrecht* in GASSNER, GÖTH, GRÖHS, LANG, *Privatstiftungen Gestaltungsmöglichkeiten in der Praxis*, 30; WELSER in RUMMEL, *ABGB*³ § 785; OGH 05.06.2007, 10 Ob 45/07a SZ 2007/92 = JBl 2007, 780 = JEV 2007/34, 106.

(90) OGH 05.06.2007, 10 Ob 45/07a SZ 2007/92 = JBl 2007, 780 = JEV 2007/34, 106; AICHBERGER-BEIG in GRUBER, KALSS, MÜLLER, SCHAUER, *Erbrecht und Vermögensnachfolge* (2010) § 4 N. 81; SCHAUER, *Privatstiftung und Pflichtteilsrecht*, NZ 1993, 251 (254).

But there is a special provision in Austrian law which causes some problems: If the donee (the recipient of the gift) is not one of the *legittimari* himself, then the *legittimari* may rely only on a gift which the deceased person has made within the last two years before his or her death⁽⁹¹⁾. For instance: If the deceased person has given 100.000 Euros to a friend three years before he died, then this gift will not increase of the claims of the claims of the *legittimari*. Based on this provision, setting up a foundation looks like paradise for someone who would like to avoid compulsory shares. Since a foundation never is one of the *legittimari*⁽⁹²⁾, the founder may transfer his assets to the foundation hoping he will be alive more than two years. If he does, then the *legittimari* are not in the position to rely on these assets for the amount of their claims. This solution seems to be too good to be true. In fact, there is a backdoor in order to protect the *legittimari*. Whenever the founder reserves the right to revoke the foundation or to fundamental changes of the statutes then the prevailing opinion in the legal literature holds that the two years term will not begin⁽⁹³⁾. The reason is that in such a case the gift which the founder has made by transferring his assets to the foundation cannot be considered as final⁽⁹⁴⁾. The Supreme Court in 2007 has confirmed this view⁽⁹⁵⁾. But if the founder really accepts giving up his assets by transferring them to the foundation without reserving the right of changes and the right to revoke the foundation then it is true that the *legittimari* may not rely on the transfer for the amount of their claims.

(91) § 785 (3) ABGB; APATHY in KOZIOL, BYDLINSKI, BOLLENBERGER, ABGB³ § 785 N. 5.

(92) SCHAUER, *Privatstiftung und Pflichtteilsrecht*, NZ 1993, 251 (252); BITTNER, HAWEL in KLETEČKA, SCHAUER, ABGB-ON 1.00 § 785 N. 8; RIEDMANN, *Privatstiftung und Schutz der Gläubiger des Stifters*, 31; ECCHER in *Schwimann*³ § 785 N. 3; AICHBERGER-BEIG in GRUBER, KALSS, MÜLLER, SCHAUER, *Erbrecht und Vermögensnachfolge* (2010) § 4 N. 76.

(93) SCHAUER, *Privatstiftung und Pflichtteilsrecht*, NZ 1993, 251 (253); SCHAUER, *Erbrechtliche Probleme der Privatstiftung*, in CSOKLICH, MÜLLER, GRÖHS, HELBICH, *Handbuch zum Privatstiftungsgesetz*, 131; SCHAUER, *Schutz der Pflichtteilsberechtigten gegenüber der Privatstiftung*; JEV 2007, 90 (91 f); AICHBERGER-BEIG in GRUBER, KALSS, MÜLLER, SCHAUER, *Erbrecht und Vermögensnachfolge* (2010) § 4 N. 81; BITTNER, HAWEL in KLETEČKA, SCHAUER, ABGB-ON 1.00 § 785 N. 8; recently UMLAUFT, *Vermögensopfertheorie- Replik auf Kletečka*, PSR 2012/32 (105 et seq.); WELSER, *Widerrufsrecht, unbeschränktes Änderungsrecht und Schenkungsanrechnung bei der Privatstiftung*, in *Festschrift Aicher*, 865 (874).

(94) SCHAUER, *Privatstiftung und Pflichtteilsrecht*, NZ 1993, 251 (253); BITTNER, HAWEL in KLETEČKA, SCHAUER, ABGB-ON 1.00 § 785 N. 8.

(95) OGH 05.06.2007, 10 Ob 45/07a SZ 2007/92 = JBl 2007, 780 = JEV 2007/34, 106.

5. *Final remarks*

In my presentation I could give you just a small overview about the intergenerational transfer of businesses. As we have seen the major problem is the conflict between the undivided control of the enterprises on one hand and the compulsory shares which are directed at the division of the estate on the other hand. There is no sure formula how to deal with the problems. Solutions have to be found based on the individual case.

German and Austrian law provide for some instruments: The testator and some or all of his *legittimari* may agree on a renunciation of the compulsory shares. In some cases, the transfer of the enterprise to a foundation which in Austria may serve as a functional equivalent to the trust can be a way out. Perhaps, in the near future legislation will provide for a remedy by allowing courts to grant a moratorium or by imposing instalments when the *legittimari* raise their claims.