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The Austrian legal frame of the agricultural land/holding succession and the acquisition by legal persons**

Abstract

This article introduces the Austrian legal frame of the agricultural land/holding succession and the acquisition by legal persons. Regarding Austrian legislation, different legal definitions are open to juridical interpretation. According to the provisions of the Law on Agriculture, the Minister for Agriculture, Regions and Tourism is responsible to collect and process data about the situation of Agriculture and Forestry in Austria. The result is to be published in the 'the 'Green Report'.

Keywords: Austria, agricultural land, legislation, agriculture

1. Introduction

Austria is a federal state.[1] The power of legislation and execution matters belongs – due to constitutional provisions ('Kompetenztatbestände') – either to the Federal or to the provinces. For some competences, a shared responsibility in legislation between the Federal and the provinces is stipulated in the Constitution.

According to the general clause of Art. 15 Federal Constitution Law, the competence of 'agriculture' falls under the sole responsibility of the provinces, but there are also regulations in federal laws relating to agriculture and forestry. In summary, this is a cross-sectional legal matter.

Depending on the aim of the different law provisions, e.g. land employment law, tax law, law relating to inheritance of farms and forestland, subsidy law, social law, land transaction law, different definitions are in use who are open to juridical interpretation.

Nevertheless is the most common definition in Austria for the Agricultural Holding in line with the EU definition, written in Article 4 of Regulation (EU) 1307/2013:[2] *"An agricultural holding, or holding or farm is a single unit, both technically and*

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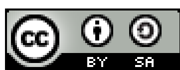
[1] Federal Constitution Law, Art. 2, Federal Law Gazette No. 1/1930.
All Austrian Laws that are named in this article are freely accessible under www.ris.bka.gv.at. Unfortunately, there is no English translation available for most of theme.

[2] Regulation (EU) No. 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes



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economically, operating under a single management and which undertakes economic activities in agriculture within the economic territory of the European Union, either as its primary or secondary activity. The holding may also provide other supplementary (non-agricultural) products and services.“ [3]

Under the provisions of the Law on Agriculture (Art. 9),[4] the Minister for Agriculture, Regions and Tourism is responsible to collect and process data about the situation of Agriculture and Forestry in Austria. The result is to be published in the 'Grüner Bericht' – the 'Green Report'.[5]

According to the Agricultural Structural Survey 2020 there are 155,754 agricultural and forestry holdings in Austria. Compared to the year 2016 3.9% and/or about 6,300 holdings discontinued their activities. Compared to the last full survey in 2010 (AS 2010) the number of holdings had declined by about 10%.[6] The share of family farms in the management of the land used was 86%.[7]

Broken down by legal status gives the following overview:[8] (a) Physical persons: 85.111 holdings or 80% of all holdings; (b) Marriage unions: 13.503 holdings or 13%; (c) Communities of persons: 5.858 or 5%; (d) Partnerschips: 870 or 1%; (e) Legal persons: 1.228 or 1%.

2. The rules of holding transfer between generations, generation change and succession

2.1. The rules of transfer of agricultural land/holdings

Getting access to an agricultural holding is possible with one of the following: (a) Buy it. (b) Get a donation. (c) Marry the farmer. (d) Inherit it.

2.1.1. Purchase of land

The purchase of agricultural land is possible under provisions by province law. The legal transaction is subject of approval by provincial authorities. The main goal is to keep the land in agricultural use, to ensure a healthy farmer community. Due to this, the provinces made regulations about the following provisions: (a) Preverence clause for farmers as buyers and (b) self management of the land.

These provisions are checked in an administrative process, which may end with an approval or disapproval. The approval is condition for the registry in the land register. With the successfull registry the buyer is finally the legal owner of the land (Principle of intabulation).

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within the framework of the common agricultural policy and repealing Council Regulation (EC) No. 637/2008 and Council Regulation (EC) No. 73/2009, Official Journal L 347, 20.12.2013, p. 608.

[3] Eurostat 2019.

[4] Federal Law Gazette No. 375/1992.

[5] Grüner Bericht 2022.

[6] Ibid. 7.

[7] Ibid. 302.

[8] Ibid. 73.

2.1.2. Donation/transfer of assets during lifetime

The succession can be anticipated by legal transactions between living persons. The precautionary transfer of assets is often chosen to preserve family assets, to avoid inheritance disputes or to save on taxes. In most cases, properties, i.e. houses, land, condominiums are transferred to the donee during their lifetime. All other assets can also be given away (e.g. annuities, vehicles, savings accounts or cash). It is strongly recommended that the donor agree on consideration or securities in the contract.

Inheritance and donation tax has not been levied in Austria since 1. August 2008. With regard to the levying of real estate transfer tax, a distinction must be made between two facts, namely the transfer of a farm to a farm and the donation or inheritance of an agricultural and forestry business.[9]

If the donor still lives in the house or apartment when a house or apartment is handed over, he can retain the easement of a lifelong free right to live in the form of a right of use in return. In most cases, it is agreed that the person entitled to live only has to bear the operating costs and the consumption-dependent costs (e.g. electricity, gas and telephone). The buyer has to bear the maintenance costs (e.g. a due roof repair). Since 1. August 2008, no inheritance or donation tax has been levied. In the case of inheritance or gratuitous transfers (donations) of real estate, real estate transfer tax must still be paid. From this point on, however, there is an obligation to notify donations to the tax authority.

In the case of a handover without further consideration by donation during lifetime, the donation object is no longer part of the estate. So that a person who may be entitled to a compulsory portion does not 'fall over' entirely, they can request their compulsory portion (or the addition of their compulsory portion) from the donee: (a) If the recipient of the donation is one of the persons entitled to a compulsory portion, he must expect, without time limit, that another person entitled to a compulsory portion will demand the compulsory portion from him when the inheritance occurs. (b) However, if the donee does not belong to the circle of those entitled to a compulsory portion, then the compulsory portion or its supplement can only be demanded from him if the inheritance occurs within two years of the donation.

These regulations serve to limit the possibility of deliberate damage to those entitled to a compulsory portion. The donor has the option of agreeing consideration or securities in the donation contract.

The following contractual provisions can be included, for example: (a) Right of use: The right to live in the property handed over free of charge and to bear the operating and usage-related costs, but not the maintenance costs. (b) Usufruct: The right either to live in the property handed over or to rent it out and withhold the rent. (c) Ban on encumbrance or sale: Here, the donee may not encumber or sell the property without the consent of the donator. (d) Right of exit: The donator's right that the donee assumes certain obligations (e.g. to nurse and look after the donator in the event of illness, to run errands, to help with visits to the doctor or to buy medicines and to prepare meals).

[9] Urban 2009, 64–66.

If the donee fails to fulfill his obligations, the donator may hire a carer to do so and the costs are to be borne by the donee.

According to the legal situation since 1. January 2017, no more distinction is made between grants with a precautionary nature ('Vorempfang') and advanced payments ('Vorschüsse').[10]

Donations to a person who is not entitled to a compulsory portion at the request of a child entitled to a compulsory portion or of the spouse, donations to third parties (in this case only those made within two years before the deceased's death) are to be added to the estate as if the donation had not been made. Based on this 'increased inheritance', the claim of those entitled to a compulsory portion must be recalculated. This right applies only to donations made by the deceased at a time when he had a child entitled to a compulsory portion to the spouse or registered partner only for donations made during the marriage or during the registered partnership. At the request of a child entitled to a compulsory portion or an heir, donations to persons who belong to the group of persons entitled to a compulsory portion are to be added to the estate and offset against the compulsory portion of the person receiving the donation.

A legatee who would be liable to pay contributions can also demand credit. The crediting of donations to persons entitled to a compulsory portion can only be presented superficially in the following. If a donation is made to a person entitled to a compulsory portion during his/her lifetime, the donator can agree with the donee that the donation should or should not be offset against the donee's compulsory portion or inheritance portion. The donator can also subsequently waive this credit – for example in a will.

If donations were made during one´s lifetime, these can have an impact on the inheritance or compulsory portions. Such donations also have an impact on the compulsory portion of other persons entitled to a compulsory portion. For the specific calculation of inheritance or compulsory portions after the death of the donor, knowledge of the exact facts is absolutely necessary. If the existing legacy is not sufficient, the person entitled to a compulsory portion may request that the donee or legatee make up the rest of his or her compulsory portion. There are liabilities of the recipient of the donation.

The so-called 'contract of donation upon death' represents a middle ground between the drafting of a revocable will and a handover during one's lifetime. The donator promises to transfer certain assets to the donee in the event of his death. However, a contractual right of withdrawal is not permitted with this form of donation. The effect of the donation only comes into effect upon death. However, the donator is bound to this donation, he can no longer revoke it independently (because it is a bilaterally binding contract). The donation item is part of the estate and must therefore be included in the asset declaration or in the inventory of the estate on the assets and liabilities side. A deed of donation upon death must be concluded in the form of a notarial deed in order to be valid.

The obligation to notify only exists for donations between the living – i.e. not for donations in the event of death – and for donations made between the living (donations with a specific condition or a contractually agreed service in favor of a specific purpose),

[10] Art. 781 Austrian Civil Code.

namely for the following assets: (a) Cash, (b) Capital claims (e.g. savings accounts, bonds, loan claims), (c) Shares in corporations (public limited company, company with limited liability) and partnerships (open partnership, limited partnership), (d) Participations as a silent partner, (e) Businesses or sub-businesses to generate income from agriculture and forestry, self-employment or commercial operations and (f) Movable physical assets (e.g. motor vehicles, motor and sailing boats, jewelry, precious stones, etc.) and intangible assets (e.g. copyrights, concessions, usufruct rights, residential rights, goods vouchers).

The notification to the tax authority must be made within three months after receiving the donation. There is no obligation to notify under the Donation Notification Act[11] for inheritances or donations of real estate.

2.1.3. Marriage unions

About 13% of holdings are managed by marriage unions. In these cases, both partners are owner of the holding and share the management. To get married to a farmer (male or female), no special provisions (compared to the aquisition by purchase) are to be fulfilled.

2.1.4. Inheritance

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The provisions of the inheritance are part of the Austrian Civil Code,[12] which is a Federal Law. It regulates the intestate and testate succession.

The GCC includes all regulations about the legal succession of the assets of a deceased person. But it also means the subjective right to claim all or a fraction of the assets of a deceased person. The heir becomes the universal legal successor of the deceased, he acquires his property or a part of it by deed. If only one person is appointed as heir, he becomes sole heir (so-called "universal heir"). If several persons are appointed as heirs, they form a community of heirs as joint heirs.

Hereditary are: (a) All assets of the deceased (e.g. real estate, savings, jewelry or claims against other persons). (b) The debts of the deceased. Therefore, if the deceased had or is expected to have major debts, great care should be taken when accepting the inheritance (declaration of inheritance). (c) Possibly rights of access and disposal over internet profiles, social media, e-mail accounts and the like. (d) Certain rights and obligations linked to the person of the beneficiary, such as personal easements (right of residence, trade licenses or maintenance claims), are not inheritable.

However, there may be continuation rights for the estate or close relatives. Vocation to heir someone becomes an heir either through legal succession or through a testamentary disposition (by will).

In principle, according to Austrian law, everyone can regulate for themselves what is to happen to their assets after their death (freedom of testament). Possible forms for this are an inheritance contract or a will. In the event that the deceased has not made any arrangement, the statutory succession comes into force. This is based on the will of an

[11] Federal Law Gazett No. 141/1955.
[12] Judicial Law Collection No. 946/1811.

average deceased person and allocates the inheritable assets to the spouse and the nearest relatives of the deceased.

A certain balance is created between these two fundamental systems (freedom of testament and legal succession) through the right to a compulsory portion. On the one hand, the deceased could make a testamentary arrangement during his lifetime, regardless of the statutory inheritance quota. On the other hand, the deceased must nevertheless give certain close relatives a quota of his or her property. If he fails to do so, the right to a compulsory portion grants these close relatives, as persons entitled to a compulsory portion, the right to demand payment of a corresponding amount from the heir in the will.

As a last resort, i.e. if there are no testamentary or legal heirs, no life partner entitled to inherit and no legatee, the Republic of Austria has to appropriate the estate. One then speaks of an appropriation by the federal government (previously 'the state's right to escheat').

The GCC has no special provisions about agricultural holdings. There are special provisions for agricultural holdings in the Law Relating to Inheritance of Farms and Forestland – LIFF, a Federal Law,[13] and in some province laws.[14]

2.2. Transfer and the effect on ownership/land use (leashold) rights

On average, an Austrian holding has about 34% of agricultural land leased.[15] In a lease agreement, an item that cannot be used (e.g. a business premises) is made available for use for a specific period of time. The tenent is also permitted to use the property economically and thus make a profit from its use. This is the difference between lease and rent. A tenant is the owner and therefore enjoys property protection.

The legal framework for agricultural land lease is the Tenancy Act,[16] a Federal law. It´s a protection law in favour of the tenant.

The main topics of the law are: (a) Extension of the duration of the land lease[17] and (b) Decision on the lease[18] under the authority of a civil court.

2.3. Transfer and the effect on the pension of the transferor

The Farmers Social Security Act[19] regulates the areas of: (a) Pensions insurance,[20] (b) Health insurance[21] and (c) Accident insurance.[22]

[13] Federal Law Gazette No. 106/1958.
[14] More to this, see section 2.4.1.
[15] Grüner Bericht 77.
[16] Federal Law Gazette No. 451/1969; Holzer 2014, 359–366; Norer 2012, 703–716.
[17] Federal Law Gazette No. 451/1969 Art. 6.
[18] Ibid. Art. 11.
[19] Federal Law Gazette No. 559/1978; Holzer 2014, 437–444; Norer 2012, 821–859.
[20] Federal Law Gazette No. 559/1978 Art. 102.
[21] Ibid. Art. 74.
[22] Ibid. Art. 148.

The amount of the pension depends on the contribution period.[23] The amount of the contribution payment for the insurance depends on the taxable value of the amount of land use.[24] Both contributions are capped at a certain level.

The Social Insurance Institution for the Self-Employed is the provider of health, accident and pension insurance according to the Farmers Social Security Act. The social insurance institution for the self-employed is represented by the board of directors.[25]

If one of the transferors is not yet retired at the time of the planned handover, the following options exist.[26]

2.3.1. No transfer of holding for the time being

The retiring partner leaves his share of the holding to the other for management. The full contribution basis for the pension insurance is credited to this.

The advantage is, that the insurance of the remaining partner is the basis for the full contribution.

The disadvantage is, that the buyer side has to wait to get transferee status.

2.3.2. Holding handover and retention of usufruct rights

The transferor who still needs insurance periods is granted a usufruct (usability) right to the entire holding in the transfer contract until retirement.

The advantage is, that the transferor is insured for the full contribution basis. The buyer side becomes the owner/transferee status and can apply for housing subsidies.

The disadvantage is, that no real estate transfer tax exemption and no business start-up aid for young farmers might come to use. The transferee is not socially insured, except as a full-time employed child.

2.3.3. Handover of the holding and management contract

By concluding a management contract, joint management takes place with the transferee.

The advantage is that transferor and transferee are socially insured. The transferee can apply for housing subsidies and start-up subsidies.

The disadvantage is that no real estate transfer tax exemption come to use and there may be higher social security contributions than when the property is managed by a spouse.

2.3.4. Business handover and registration at the Social Insurance Institution for the Self-Employed

[23] Ibid. 106.
[24] Ibid. 23.
[25] Ibid. 16, 26.
[26] The following examples are taken from Lang 2020.

The transferor is insured at the Social Insurance Institution for the Self-Employed and the transferee gets as a full-time employee at a half of the insurance value.

The advantage is that the transferee is fully insured and the transferor is insured for half the insurance value. Housing subsidies, business start-up subsidies and real estate transfer tax exemption are generally possible.

The disadvantage ist that higher social security contributions are necessary.

2.4. The rules of succession of agricultural land/holding

2.4.1. Special provisions under Federal and provincial law

Although the Austrian Civil Code[27] regulates the intestate and testate succession on a general basis, it has no special provisions about the succession in agricultural holdings.

The special provisions for agricultural holdings are regulated in the Law Relating to Inheritance of Farms and Forestland – LIFF, a Federal Law.[28]

The main topic of the law ist the preservation of the medium-sized agricultural structure in the public interest by obtaining the holding. The principal heir is entitled to inherit the holding. It´s his duty to pay off the other heirs, under the provision, that the holding is still economically viable. In this case, splitting the holding (as heritage) to the numbers of persons, is not an option.

Additionally there are special provisions limited to the territory of provinces. For the province Tyrol, a Law on Special Relationships of Closed Holdings exists.[29]

For the province Carinthia, a Law Relating to Inheritance of Farms exists.[30]

Both laws are in common, that they regulate special provisions on the province level for the principal heir to ensure that the holding ist still enonomically viable.

For centuries, one of the most important instruments for the undivided maintenance of farms in generational change has been the so-called farm handover contract. With this contract, the farm is usually transferred to a child of the farm owner (transferor) by anticipated inheritance, in return for compensation for the departing children and granting of living and earnings rights (money and benefits in kind) to the transferor(s).

2.4.2. Handover contract

The handover contract is a so-called mixed contract, i.e. it contains elements of a donation contract as well as paid components, e.g. retirement condition like a cottage of estate reserved for use by parents.[31] The complex civil, tax and social law issues, including any consequences in the area of direct payments and subsidies, mean that appropriate

[27] Judicial Law Collection No. 946/1811.
[28] Federal Law Gazette, No. 106/1958.
[29] Law and Ordinance Gazette for the Princly County of Tyrol and the State of Vorarlberg, No. 47/1900; Holzer 2014, 209–215; Norer 2012, 717–734.
[30] Federal Law Gazette, No. 658/1999. Holzer 2014, 209–215; Norer 2012, 717–734.
[31] Lenoble 2009, 88–89.

professional advice is urgently needed before the conclusion of a transfer agreement. In Austria, such advice is offered in particular by the Chambers of Agriculture, which are legally established interest groups under province law.

2.4.3. Inheritance

During his lifetime, the deceased can largely freely dispose of what is to be done with his assets after his death. The right to a compulsory portion is an exception.

The will is a unilateral last will that can be revoked at any time and which a person appoints as an heir. It is the declaration of the deceased during his lifetime to whom the assets existing at the time of his death are to be transferred in full or proportionately. The heirs always have a share (e.g. in full, a third each or an equal share).

A legacy (codicil)[32] is a unilateral will that can be revoked at any time. Other dispositions can be, for example, the appointment of a guardian in the last will or the suspension of a legacy. In principle, the provisions on wills apply to codicils, unless the law provides otherwise.

One speaks of a legat (legacy) when someone should only receive certain things from the estate (e.g. the coin collection, vinyl records). The one who is so thoughtful is the legatee. The legacy is thus a testamentary donation without leaving an inheritance. A legacy can be arranged in a will, dispositions without appointment of an heir or an inheritance contract.

Forms of wills are: (a) Handwritten disposition (testament)[33], (b) third-party disposition (third-party will),[34] (c) oral will[35] and (d) public will.

Requirements for making a will: In principle, anyone over the age of 18 and of sound mind can make a will. The following groups of people can only testify in a so-called public will (i.e. orally in court or notarially), whereby the court or notary must satisfy themselves that they are capable of making a testament (i.e. a certain level of insight and maturity): Persons between 14 and 18 years of age.

The following groups of people cannot make a will: (a) Persons under 14 years of age, (b) mentally challenged, (c) mentally ill and (d) persons for whom the free formation of will is excluded for another reason (e.g. in the case of an acute intoxication).

The following applies to testamentary dispositions before 1. January 2017:

Persons for whom a guardian has been appointed for certain, individual or all matters due to a disability can only testify verbally in court or notary if this is ordered by a court.

This provision no longer applies to testamentary dispositions after 1. January 2017.

The provisions on wills apply to dispositions without the appointment of an heir, unless the law provides otherwise.

The testamentary freedom finds limits where a condition interferes with the heir's personal freedom of decision and lifestyle. A condition that applies pressure and coercion

[32] Art. 552 Austrian Civil Code.
[33] Art. 577 Austrian Civil Code.
[34] Art. 579 Austrian Civil Code.
[35] Art. 577, 581 Austrian Civil Code.

is usually ineffective. If a condition is formulated in the will, its content must be sufficiently specific that there is no doubt.

If the condition is not met, the recipient loses the allowance. It makes sense to appoint an authorised person who can sue for the fulfillment of the condition. But there are also incomprehensible, illegal or immoral conditions, such as: (a) a specific person is not allowed to marry or (b) a specific person is only allowed to marry a specific partner.

Such terms shall be deemed not to have been incorporated, as shall terms which are wholly incomprehensible or meaningless. However, the will remains valid.

Wills are unilateral last wills and, in contrast to inheritance contracts, can be changed or revoked at any time. The amendment or revocation can be made as follows: (a) Expressly in the form of a will. (b) Tacitly through the establishment of a New Testament (without mentioning the old). (c) By destroying the document (e.g. tearing it up, burning it, crossing it out).

The safest way is the revocation in the form of a will. This is particularly recommended if the will to be revoked is in the hands of the heir who is now to be replaced by another. The revocation might be entered in the Central Register of Wills of the Austrian Chamber of Notaries[36] or in the Register of Wills of Austrian Lawyers of the Austrian Bar Association. An earlier will is also overridden by a later valid will in the other provisions, unless the deceased stipulates otherwise in the later testamentary disposition.

The last will should always be summarized in a single will. Problems in practice regularly arise when duplicates are drawn up that are handed over to other people, since it is easy to forget such a duplicate in the event of revocation. It is sufficient to create an original, which should be kept by a notary, a lawyer or in court and registered in the Central Register of Wills of the Austrian Chamber of Notaries or in the Register of Wills of the Austrian Lawyers of the Austrian Bar Association. In this way, the will is kept safe, cannot be embezzled and can easily be changed at any time.

There are costs involved in drawing up a will by a notary or a lawyer. A one-time fee is charged for advice, professional drafting, filing and registration of a simple will in the Central Register of Wills of the Austrian Chamber of Notaries. This depends on the respective effort and is around EUR 300 to 500 for a simple will. There is no ongoing fee for the duration of the deposit. In the case of complicated wills that require one or more detailed discussions beforehand, it is advisable to inquire about the costs beforehand. The cost of filing a will that is written by yourself without legal advice can be EUR 100 plus cash expenses and tax. In principle, the fee for such services provided by a lawyer can be freely agreed. A one-time fee is charged for the registration of a will in the Register of Wills of the Austrian Bar Association. There is no ongoing fee for the duration of the deposit.

2.4.4. The probate proceeding

Probate proceedings are court proceedings conducted by notaries as agents of the district court. Notaries in this function are also called 'court commissioners'. In every inheritance case there is a probate procedure. The purpose of this procedure is to hand

[36] Art. 140c Law on Notarial Regulations, Reichgesetzblatt No. 75/1871.

over the estate to the rightful heir under judicial supervision, to secure the rights of minors involved and to monitor the fulfillment of the last will.

The legal framework are the Law on Non-Contentious Legal Proceedings,[37] the Austrian Civil Code[38] and the Court Commissioners Act.[39]

The notary must involve those persons who have party status. These are the people who have a legal interest in being involved in probate negotiations. A mere economic interest is not sufficient for this. The probate procedure is carried out either by the competent notary or by an 'inheritor'. This is any other notary or lawyer that all heirs agree on and give power of attorney to. The ruler of the heirs then carries out the probate proceedings in writing directly with the court. Certain procedural steps specified in the law are reserved for the responsible notary for completion.

The registry office that issues the death certificate sends a copy of this death certificate to the competent district court where the deceased had his last place of residence. As court commissioners, notaries are not generally bound by deadlines, but are bound by the instructions of the respective probate court.

Probate proceedings can be difficult and extensive in individual cases, so that the probate court needs further surveys to end the proceedings. In this case, the court commissioner is dependent on the receipt of the necessary information or the completion of the inquiries. Typically, each probate court will ask the court commissioner to make a report as to why probate proceedings are exceeding a certain length of time. If the court commissioner has the impression that one of the heirs is delaying the proceedings without justification and to the detriment of the other parties involved, he can set deadlines for individual steps. As a rule, however, he will try to bring about an amicable agreement. In the meantime, some notaries with the additional qualification 'mediator' are working in the local notarial offices. These helps resolve conflicts between heirs.

Competent authorities are the registry office and the competent district court.

The district court responsible for the death transmits a death notification to the notary public (also court commissioner) determined according to the distribution system. The notary now raises the family members (at a funeral home, at the death address or by consulting the municipality) and then sends (usually to the person who ordered the funeral) an invitation to record the death. This is issued to persons who might know about the personal and financial circumstances of the deceased. At the appointment, these conditions are recorded using a questionnaire and it is clarified which further measures are necessary. It is not necessary for all persons entitled to inherit to set up the death record. The court commissioner often only finds out who is party to the probate proceedings when the death is recorded.

When the death is recorded, further processing is discussed with the notary. The court commissioner also makes an electronic request to the Central Register of Wills or the Register of Wills of the Austrian Bar Association to find out whether there are testamentary instructions from the deceased. If a will has been registered, the notary or lawyer who will be in custody will be informed automatically. He sends the will to the court commissioner. If there are no assets at all and no dispositions are required, the

[37] Federal Law Gazette No. 111/2003.
[38] Judicial Law Collection No. 946/1811, Art. 531.
[39] Federal Law Gazette No. 343/1970.

probate proceedings are already over when the death is recorded. If a motor vehicle or trailer is registered in the name of the deceased, the person appointed to represent the estate must notify the registration office of the death of the registered owner. If the registration owner has died, the car insurance company must be consulted to ensure that the car can still be driven and that insurance cover is in place, even after the premium has been paid. To do this, the notary (as court commissioner in the specific probate proceedings) must be contacted so that any deregistration does not interfere with the rights of the other parties to the proceedings, mostly heirs or those entitled to a compulsory portion.

Upon completion of the probate proceedings, a declaration of inheritance will be issued. It records who is the heir and at what rate. The submission of a declaration of responsibility is necessary, for example, in the case of: (a) Entry in the land register if real estate assets (e.g. condominium) were present in the estate and (b) Liquidation due to the death of an entrepreneur or partner for termination at the tax authority and deletion from the commercial register.

As proof of universal succession, a declaration of responsibility with a final stamp must be submitted.

If the death record shows that the value of the estate does not exceed the liabilities, in particular the funeral costs, the probate proceedings are ended by a court order: So-called ´assets of the estate in lieu of payment´. The person who paid for the funeral is usually given the existing estate in lieu of payment, i.e. he or she is authorised by court order to dispose of the existing estate (regardless of whether the person concerned is also the heir).

If there are estate assets that exceed the liabilities, an inheritance procedure will be carried out. The court commissioner obtains the necessary information about the existing estate assets and thus gains an overview of the financial situation. The legal or testamentary heirs are invited to another appointment.

In order to be able to access the inheritance, a declaration of acceptance of the inheritance must be submitted. This is necessary because nobody can be forced to accept an inheritance. With the submission of a declaration of inheritance, however, one "inherits" not only the assets (property) of the estate, but also the debts.

There are basically two options for a declaration of inheritance:[40] (a) Submission of an unconditional declaration of inheritance. In the case of the unconditional declaration of inheritance, the heir is liable for all debts and also for the fulfillment of legacies with his own assets in an unlimited amount. The heir is liable even if he was unaware of the existence of these claims and even if the debts exceed the assets of the estate. Several heirs are jointly and severally liable for the debts, which means that the other heirs have to bear the loss if one of the heirs does not fulfill his obligations. The Advantage of an unconditional declaration of inheritance processing is that it is simple and inexpensive. In contrast to the conditional declaration of inheritance, there is no estimate of the movable estate assets here, instead of the inventory drawn up by the court commissioner, the so-called ‘assessment declaration’ occurs. This list of assets and liabilities drawn up by the notary forms the basis of the probate proceedings. The heir or heirs declare that, to the best of their knowledge, the list is complete and correct.

[40] Art. 799 Austrian Civil Code.

Real estate (immovable property) is generally valued at three times the assessed value. If a corresponding application is made, these will be evaluated according to the Property Valuation Act.[41] The submission of the unconditional declaration of inheritance is risky because of the threat of debt liability. It is recommended if you know the lifestyle and financial circumstances of the deceased and can be sure that no hidden debts come to light. (b) Submission of a conditional declaration of inheritance: By submitting a conditional declaration of inheritance, one can limit the risk of debt liability. The heir continues to be liable with his own assets, but only to a limited extent with the value of the assets of the estate and only proportionately according to his inheritance share. The value of the inheritance is determined by consulting experts and the court commissioner. An inventory drawn up by the notary takes the place of the declaration of assets. This type of inheritance is all the more to be recommended the less one knew about the circumstances of the deceased. If several heirs are involved, a so-called inheritance agreement can be made as part of the deed of inheritance.

This is especially necessary if there is a condominium in the estate. The condominium can only be shared equally by an individual or by two people forming an ownership partnership. Therefore, in the inheritance proceedings, a regulation must be made as to who should take over the apartment (possibly against payment of an advance payment to the other heirs). If minor heirs (under the age of 18 years) are involved, their share of the inheritance must be precisely calculated and secured. The competent guardianship court monitors this security. A waiver of the right of inheritance or the submission of an unconditional declaration of acceptance for minors is only possible with the consent of both parents and the approval of the guardianship court.

The inheritance proceedings are finally ended when the inheritance is handed over. The hearing court issues what is known as an injunction, which is a court order that includes the following: (a) Data of the deceased, (b) data of the heirs, (c) type of declaration of inheritance, (d) inheritance quota and (e) land registry arrangements (if real estate exists).

A disclaimer, to renounce the inheritance, is always possible. In particular, if the debts exceed the assets of the estate, a so-called waiver of inheritance should be declared. In this case, the assets are distributed. These will first be corrected by: (a) the costs of the procedure, (b) the rent accrued after death until eviction, (c) the cost of a simple funeral and (d) all other claims (possibly only with a quota).

If activities are necessary for the realization of the assets of the estate (e.g. clearing the apartment or selling a car), the court of hearings appoints an estate trustee who, with court approval, carries out these necessary activities. The purpose of the creditor's meeting is to provide the heir or trustee with an overview of the debt.

Creditors are requested by court order to register their claims within a certain period of time. The heir must satisfy claims that are registered in due time, although known claims do not have to be registered. Claims filed late are only to be taken into account to the extent that assets of the estate are still available despite the distribution. If you forget to indicate a part of the property to the notary, this can be assigned to one of the heirs at any time later by means of a supplementary treaty.

[41] Federal Law Gazett No. 150/1992.

Banks and credit institutes provide the notary with information at any time about inquiries regarding 'legitimate values', i.e. those that were in the name of the deceased (e.g. current or pension accounts, securities accounts in the name of a person, savings accounts in the name of a person, building loan contracts), as well as 'identified values' relating to the deceased (e.g. bearer savings accounts with password, provided that the deceased appears as an identified person). The banks are therefore obliged to provide the notary with comprehensive information about all legitimate and identified assets, regardless of whether they have been confirmed as part of the estate or not.

If the heirs are completely unknown, the court commissioner issues a so-called inheritance edict, in which the unknown heirs are requested to assert their claims within six months. The service is made by public notice in the edict file. If, despite all efforts, no heirs can be found, the Republic of Austria can ultimately apply for the transfer of the estate (escheat).[42]

If the heir is known, but not his whereabouts, a curator of heirs is appointed and an edict of heirs is also issued. If an heir cannot be traced within the six-month period, the procedure is continued with the other heirs and the heir trustee. The share due to the absentee will be kept for him after the end of the probate proceedings. However, the heir curator is obliged to carry out further investigations. His activity is only terminated when: (a) The heir could be found, (b) the existing assets were used up by the investigation costs, (c) it is established that the heir is deceased or (d) has been declared dead.

If a property is jointly owned by several people, they can do whatever they want with it as long as the co-owners agree. Each co-owner may independently pledge, bequeath or dispose of his share as long as he does not infringe the rights of the co-owners. If there are discrepancies between the co-owners, for example regarding the use of the property or even its sale, each co-owner can file a so-called divisional action with the court.

If the property is part of an agricultural holding to which the provisions of the Law Relating to Inheritance of Farms and Forestland – LIFF, a Federal Law[43] apply, a divisional action is not an option.

The notary performs his services in probate proceedings on behalf of a court. When it comes to the costs of probate proceedings, a distinction must be made between two fees: (a) The fee for the notary as a court commissioner is primarily based on the value of the estate assets and the scope of the proceedings. His fee entitlement is regulated in the Court Commission Tariff Act[44] and is determined by the probate court. (b) The court fee is 5 per mille of the pure estate assets, but at least EUR 77.

If there are properties in the estate, the right of ownership in favor of the heir or heirs must be recorded in the land register within one year of the end of the estate proceedings. If the heirs do not submit a corresponding application within one year, the court commissioner must submit the appropriate applications to the land register court in their place.

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[42] Art. 750 Austrian Civil Code.
[43] Federal Law Gazette No. 106/1958.
[44] Federal LaW Gazette, No. 108/1971.

2.5. Infringement proceedings in connection with the rules of land/holding succession

Austria had the chance to make some experiences about aspects of real estate traffic law under European law provisions, interpreted by the European Court of Justice - ECJ. In most of the province laws about real estate traffic, the requirement about 'Self management of the land' was a content which was interpreted literally. E.g. a person (physical or legal) that was not working with his/her own hands on the agricultural land, was not allowed to succeed.

Austria became a Member of the European Union in 1995. In the course of joining the EU, Austria became a five-year transitional period granted for land acquisition restrictions. The end of this period was at the same time the starting point for the ECJ-Jurisdiction to the Austrian provincial real estate traffic laws.[45]

One of the more remarkable judgments of the European Court of Justice was C-452/01.[46] The ECJ considered the approval criteria of self-management with regard to those pursued goals of the Law on Real Estate in Vorarlberg,[47] among other things, only as not required if the acquirer of the holding does not self-manage the necessary guarantees regarding the maintenance of agricultural use of these properties.

The acquiring non-farmer must therefore ensure that the holding is (still) cultivated by a farmer (to fulfill the management obligation). If the non-farmer does not place any corresponding guarantees, it would not violate the infringe of the free movement of capital if the traffic permit is denied.

In other judgments related to the Tyrolean[48] and the Salzburg[49] Law on Real Estate the ECJ referred to a principle that the regulation of real estate according to Art. 345 TFEU[50] falls within the competence of the Member States. Regulations in this area must nevertheless be based on the fundamental freedoms. These are the benchmarks. In the trend-setting Case Ospelt, the ECJ went on to justify land acquisition restrictions through agricultural policy goals, that the preservation of viable farms and the promotion of a reasonable use of the available areas are goals in the social interest. This he derived from the programmatic and objectives of the Common Agricultural Policy in Article 39 TFEU, which are fundamentally addressed to the Union institutions.

Due to this, a restriction of real estate traffic does not in itself represent anything out of the ordinary. In Austria, with the friendly help of the ECJ, since the end of the transitional period,[51] there has been a development towards a basic transaction law that conforms to the internal market.

[45] Leitner Ph 2018, 680–683.

[46] C-452/01, Ospelt and Schlössle Weissenberg Familienstiftung, preliminary ruling from the Austrian Administrative High Court, Judgment of the Court, 23 September 2003. Holzer 2014, 337–340; Norer 2012, 693–699; Kraft 2003, 959-963.

[47] Official Gazette, No. 61/1993.

[48] C-302/97, Konle, Judgment of the Court, 1 June 1999.

[49] C-515/99, Reisch et al, Judgment of the Court, 5 March 2002.

[50] Former Art. 222 EC-Treaty.

[51] In the course of joining the EU, Austria became a five-year-old Transitional period granted for land acquisition restrictions. The end of this period was at the same time the starting point for the ECJ-Jurisdiction to the Austrian provincial real estate traffic laws. Leitner 2018, 680–683.

3. The rules of acquisition (land/holding) by domestic and foreign legal persons

3.1. Legal conditions for the acquisition of land or a holding for a legal person

3.1.1. Purchase of land

The purchase of agricultural land is possible under provisions by province law. The legal transaction is subject of approval by provincial authorities. The main goal is to keep the land in agricultural use, to ensure a healthy farmer community. Due to this, the provinces made regulations about the following provisions: (a) Preverence clause for farmers as buyers and (b) self management of the land.

These provisions are checked in an administrative process, which may end with an approval or disapproval.

In principle, all province laws provide that certain property-related legal transactions in which foreigners are involved are too subject to approval. Such approval requirements relate to the transfer of ownership, the granting of building rights, the Granting of a usufruct, a right of use or an easement or the Granting of any other transfer, inventory (rent, lease) and the acquisition of company shares. The affected legal transactions are provisionally ineffective until the approval is granted. Entries in the land register are not possible without the approval being available, since this regularly constitutes a registration requirement. With the successfull registry the buyer is finally the legal owner of the land (Principle of intabulation).[52]

The legal framework of Austria for purchasing agricultural land apply in the same way to legal and physical persons. The constitutional provisions: (a) Freedom of property movement,[53] (b) inviolability of property[54] and (c) the principle of equality before the law[55] apply equally to both.

3.2. Experiences about the acquisition by legal persons

Real estate traffic for foreigners and leisure residences. The problem of leisure residences, e.g. foreign millionaires buy agricultural holdings in scenic areas like Kitzbühel/Tyrol, is not specific for foreignerrelated real estate traffic. The question of the admissibility or inadmissibility of the justification or use of leisure residences affects residents and non-residents alike, as the negative implications is located in the (unauthorized) use of the leisure residence as such and not in the person/company of the authorized user. Regardless of this, the province laws stipulate partly specific restrictions on the acquisition of leisure residences by foreigners to prevent evasion.

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[52] Walzel von Wiesentreu 2009, 100–107.
[53] Art. 6 Basic Law on the General Rights of Nationals, Reichsgesetzblatt No. 142/1867.
[54] Art. 5 Basic Law on the General Rights of Nationals, Reichsgesetzblatt No. 142/1867. Art. 17 Charter of Fundamental Rights of the European Union, Official Journal 2016 C202, 389.
[55] Art. 2 Basic Law on the General Rights of Nationals, Reichsgesetzblatt No. 142/1867. Art. 20 Charter of Fundamental Rights of the European Union, Official Journal 2016 C202, 389.

The richer people are, the more legal persons are used for their economic handling. The use of nested enterprise structures with the participation of off-shore companies might not be illegal per se but these circumstances and the obvious intransparency are handicaps for the provincial control authorities and their approval procedures.

3.3. Documentation about the chain of owners

The ownership of land is in Austria registered in the land register. The Law on Land Registry[56] provides the legal framework for all real estate transfer procedures. The land register consists of:[57] (a) The main records and (b) The documents collaborating the records (e.g. purchase or donation contract, court decision).

Only with registration the change of ownership is valid.[58]

[56] LLR, Federal Law Gazette No. 39/1955.
[57] LLR, Art. 1.
[58] LLR, Art. 4.

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