QUESTIONNAIRE

LEGAL RULES REGARDING PATRIMONIAL INTERESTS, SUCCESSION AND DUTIES OF COUPLES LIVING TOGETHER BUT NOT BEING MARRIED

[A] Contractual arrangements

1. Does your system of law allow (i) heterosexual couples and (ii) same sex couples who are living together to enter into a contract governing their cohabitation, particularly as respects:
   - obligations of support or maintenance
   - ownership of property during cohabitation
   - financial claims on the cessation of the cohabitation?

   No.

2. If such contractual arrangements are permitted, is it common for cohabiting couples to conclude a cohabitation contract?

   See the above answer to question 1).

3. Are there any formal requirements (eg signature before witnesses, involvement of a notary) which require to be satisfied before a cohabitation contract is valid?

   See the above answer to question 1).

[B] Heterosexual couples: non contractual rules

This section of the questionnaire is concerned with the rules governing or affecting the relationship between a man and woman who are living together, unmarried, without having concluded any cohabitation contract as in [A].

1. Where a couple are co-habiting does your legal system recognise any mutual duty of aliment or maintenance during the period of co-habitation?

   In Austria co-habitation does not give rise to a duty of maintenance.
It is possible to enter into a contract regarding maintenance. Maintenance claims arising under law are not affected by contractual claims for maintenance.

2. Are there any particular rules regarding ownership of moveable property such as, for example, household furniture acquired during the time in which the couple are cohabiting?

No.

3. If the relationship breaks down and the parties separate, does your legal system enable one of the co-habitants to claim from the other (a) payment of maintenance or (b) payment of a capital sum? If so, are such claims determined on the same principles as would apply were the couple married or do different rules apply?

For non-marriage relationships there is no specific mechanism for the distribution of property equivalent to the procedure laid down in the Marriage Act for the distribution of property and savings. The courts do not apply these provisions to extra-marital relationships per analogiam.

4. Where the house in which the parties live together is either owned or tenanted by one of the parties, does your legal system give the other party any right to continue to occupy the house when the relationship breaks down?

In case one of the parties is principal tenant of the apartment jointly occupied by both parties, the Tenants Protection Act (Mietrechtsgesetz) authorizes the surviving spouse to accede to the rental agreement upon the other spouse’s death. This right requires that the spouses have lived together at least for a period of three years or have moved into the apartment together. It protects the surviving spouse from the hardship of a sudden loss of his or her place of living in case of the other spouse’s death and, as regards the right to accede to the rental agreement, places him on equal footing with other relatives such as husband or wife, children or siblings. However, the extra-marital spouse is only privileged in case of the other spouse’s death; it is not possible to transfer the position arising out of the rental agreement to the other spouse inter vivos.

The Supreme Court will decide in the near future whether the right to accede to the rental agreement upon a spouse’s death extends also to the survivor in a homosexual relationship.

According to the Condominium Act two natural persons, including spouses of the same or different sex, can form a so-
called ownership partnership which enables them to jointly own a condominium. If in case of the death of one partner the surviving partner does not acquire the interest held by the decedent by way of inheritance or bequest, generally the interest in the condominium held by the deceased by law immediately passes over to the surviving partner.

5. Where the cohabitation comes to an end by reason of the death of one of the cohabitants, what rights, if any, in the estate of the deceased cohabitant does your legal system give to the surviving cohabitant?

There is no statutory right to inherit all or part of the estate of the deceased cohabitant. Of course it is possible to make provisions for a cohabitant in a will. In this case, however, like in case of a donation inter vivos, for purposes of tax law it is immaterial whether or not the beneficiary is a cohabitant. For purposes of tax law, cohabitants are considered strangers and, consequently, the tax is determined according to the highest applicable tariff.

6. Does a cohabitant have any title to sue for damages in the event that his or her partner is killed through the fault or negligence of a third party?

Since a cohabitant does not have a statutory right to maintenance, he is not entitled to any damages in case the other cohabitant is killed, even if in fact the decedent had provided maintenance or had stipulated to provide maintenance in a contract.

7. In so far as your legal system does give rights to a cohabitant, does it also define what is necessary for the relationship to be treated as a "cohabitation"? Are different definitions of "cohabitation" used, depending on the right which is claimed? What factors are taken into account in the definition(s)?

There is no generally accepted definition of cohabitation. The Supreme Court has developed several criteria for the determination of whether a relationship is to be treated as "cohabitation." A characteristic feature is that persons of different sex live together like husband and wife. Particularly, three criteria are relevant here: 1) the similarity to a marriage, 2) the combination of the elements of cohabitation as well as economic community and sexual relationship. Therefore there has to be a relationship which resembles the typical character of marital cohabitation.

[C] Homosexual couples: non contractual rules
This section of the questionnaire is concerned with the rules governing or affecting the relationship between two people of the same sex who are co-habiting without having concluded a cohabitation contract as in [A].

1. In your country are couples of the same sex able to enter into a relationship which, following registration or some other public ceremony, will be legally recognised by the State?

No.

2. If so, what are the principal ways in which the rules governing the patrimonial aspects of that relationship differ from those applying in (heterosexual) marriage?

See the answer to question 1).

3. In the event that a same sex couple either cannot enter into a legally recognised relationship or have chosen not to do so, does their cohabitation give rise to the same rights and obligations which would result from cohabitation of a man and a woman? If not, what are the principal differences?

See the answer to question 1).

[D] Miscellaneous

1. Are there any proposals for reform of the law relating to cohabiting couples (homosexual and heterosexual)?

Yes. As to the details of such reform there is no consensus between the coalition partners of the conservative Austrian government.

2. What points would you wish to discuss in greater detail?

Item A).

3. What subject do you suggest for the next meeting?

The consequences of unfair trade practices.