the silent partner has only a limited right to receive information. However, in certain untypical silent partnerships the silent partner is given the right to object to or approve proposed actions of the management, and give instructions to the managers. Sometimes the silent partner is entrusted with management functions itself. An active partner in a silent partnership is only required to exercise the same degree of care as that which that partner would exercise in the conduct of its own affairs (see Civil Code, para 708). It is doubtful however whether this rule would apply where the silent partnership had the character of a large entity inviting subscriptions from the public, or Público empresas (see Kübler and Assman, op cit, p 114 in this sense).

A silent partnership has no assets of its own, and thus when it terminates there is no liquidation procedure. Once a ground for dissolution occurs according to the law, the silent partner is entitled to claim the credit balance due to him (or it), in accordance with the relevant balance sheet. The position of such a partner is different from that of a limited partner in this respect, because the silent partner is treated as a qualified creditor of the partnership. If insolvency proceedings are begun against the assets of a partner, the silent partnership is treated as dissolved. If the active partner becomes insolvent, paragraph 236f(1) of the Commercial Code provides that the silent partner may prove for his credit balance (which is likely to have been diminished through losses) in its insolvent, and that partner will have the same rank as the other creditors who do not have preferential claims and will be entitled to the same insolvency quota as such creditors.

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paragaphs 171 and 172 of the Commercial Code. It is irrelevant whether the existing firm is continued or a new one is set up. Such limited liability is, however, dependent upon the entry of the limited partner’s name in the Commercial Register. The Commercial Code does not contain any special provisions governing the withdrawal of a limited partner from the partnership. It is clear however, that if he has not made his contribution in full he is liable to the residue to the existing creditors: the limitation period in respect of such liability is a short one of five years. If such a partner who has made his contribution in full receives compensation out of the assets of the partnership in respect of such withdrawal, he is liable to the creditors of the limited partnership in respect of such compensation (Commercial Code, para 172(4)).

THE SILENT PARTNERSHIP

Nature, forms and significance

The nature of this entity has been explained briefly in the introduction. It used to be regulated by paragraphs 335-4 of the Commercial Code, but since the enactment of the Bilanzrichtliniengesetz in 1985, it has been dealt with in paragraphs 250-37 of that Code, which are of a dispositive rather than a mandatorv character and somewhat fragmentary. It is also subject to paragraphs 705 et seq of the Civil Code. German textwriters refer to it as an Innongründerhaft: this indicates that there are no legal provisions governing the external relations of such an entity because it does not engage in them. Such Innongrünungscoöperation, of which the silent partnership is the prime example, are governed by the law of obligations (Schuldhochdr), which regulates their internal affairs. As they have no external relations, such entities are not entered in the Commercial Register.

As mentioned above, a silent partnership is treated as a personalistic entity (Persongründerhaft). Such entities also include limited partnerships, ordinary commercial partnerships or private limited liability companies. A person or entity which binds himself or itself by a suitable contract may become a silent partner, which may be a natural person or a juridical person or an entity under the regime of collective ownership, for example a commercial partnership or a limited partnership. The other party to a silent partnership must carry on an undertaking, and thus be a capitalistic entity, such as a public company or a corporate, a personalistic entity, or a sole entrepreneur.

It is sometimes difficult to distinguish a silent partnership from a contractual arrangement involving the exchange of benefits (Leasinghochdr). However, if a natural person, a legal person or an entity which is collectively owned by its members participates in the profits or losses of the relevant undertaking, the arrangement will be treated as a silent partnership. A similar approach may be taken where the relevant person or entity is given extensive rights of supervision or control over, or the right to give assent to changes in the objects of, the undertaking. The relevant contract has to be considered as a whole in order to determine its nature.

A distinction is often made between typical and atypical silent partnerships. A typical silent partnership is thought of as having only two members, the undertaking or active partner and the silent partner. Such an arrangement only exists where the silent partner is entitled to take part in legal transactions. The silent partnership is used for the purpose of giving medium term loans to undertakings and as a useful facility for other purposes, for example that of making provision for family members, and for persons withdrawing from ordinary commercial and limited partnerships. In recent years, a considerable amount of use has been made of the GmbH & Stift. In such an entity, the silent partner and the GmbH (private limited liability company) combine together to form a single organisation. The silent partner may be a member of the GmbH. This type of silent partnership is used for the purpose of accumulating capital. It has tax advantages in addition to the limited liability enjoyed by the private company.

Rules governing the silent partnership

Since the silent partnership has no external relations it is not represented either by the silent or the active partner (Komplementar). However, the silent partner may be granted a power of commercial representation (Prokurist) to act on behalf of the active partner in the undertaking. The active partner, as opposed to the silent partner, is liable for the trade debts. A silent partnership in essence involves contractual relationships between the partners. It is required to make the promised contributions to the assets of the active partner. That partner is required to conduct the business in the general interest and to pay the silent partner an annual dividend (Commercial Code, para 231(1)), and when the partnership has terminated to pay the silent partner the appropriate credit balance (Commercial Code, para 231(4)). The silent partner must participate in the profits of the partnership, and in its losses, unless there is an agreement to the contrary.

The management of the partnership is entrusted to the active partner: according to paragraph 235 of the Code, will provide an important context in which to analyse the responses to our consultation exercise.

We are also indebted to HMRC and the Probate Service, whose statistical work has revealed significant differences in the median size of testate and intestate estates and allowed us to estimate the proportion of estates which pass in their entirety to a surviving spouse under the current laws of statutory legacy. This new empirical evidence has enabled us to put the “all to spouse” debate (which readers with long memories may recall from the Law Commission’s previous work in this area in the late 1980s) into a revealing context.