



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Austria: Real Estate (3rd edition)

This country-specific Q&A provides an overview of the legal framework and key issues surrounding real estate law in Austria.

This Q&A is part of the global guide to Real Estate.

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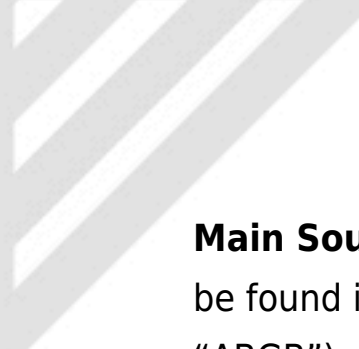


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1. Overview

Austria is a democratic republic consisting of nine federal states. Each of them is subject to individual state legislation in addition to the laws issued by the federal legislator, which are applicable in all federal states. As a consequence, real estate-related laws in Austria have different sources and may differ from state to state. However, the majority is passed by the federal legislator.



Main Sources of Law: While the basic real estate regulations can be found in the Civil Code (“Allgemeines Bürgerliches Gesetzbuch”, “ABGB”), several laws have been enacted to regulate specific areas of law. The most important of which are the Tenancy Act (“Mietrechtsgesetz”, “MRG”), which regulates wide areas of tenancy law, and the Condominium Ownership Act (“Wohnungseigentumsgesetz”, “WEG”), which contains specific rules for ownership of real estate in the legal form of condominium ownership. Beside this each federal state has its own building and land transfer laws.

Main Market Trends: In the international comparison of cities, the Austrian capital Vienna ranks in the top range. It offers a political and social stability, a dynamic innovative economy and a rich cultural program. However, the large volume of new supply in 2018 was followed by a marked decline in 2019. The availability of upscale office areas is expected to be reduced towards the end of the year.

Proposals for Reform: The legal environment for real estate transactions is very stable. There are no current significant proposals for reform that may have a substantial impact on real estate investments. The reform and deregulation of the Tenancy Act has been in discussion for the past few years but, taking into account the current political landscape, it is expected that a substantial reform will not be enacted in the next legislative period.

2. **How is ownership of real estate proved?**

Similar to other jurisdictions in Continental Europe, the acquisition of ownership requires title (e.g. a purchase agreement) and mode. In Austria, all land is registered in the (electronic) national land registry (“Grundbuch”). This registry is operated and administered by the Austrian district courts (depending on the location of the real estate). It is available to the public (except for certain privileged data) and can be accessed online. There are separate registers for properties concerning railways and superstructures.

Only upon registration in the relevant land registry is ownership transferred. The registration process takes between four to eight weeks. As long as a legal transaction involving real estate is not registered, it is not effective in front of third parties. Hence, before registration, the party to the contract has only a contractual claim for performance against the other contracting party, but has not yet become legal owner of the property. Furthermore, according to the principle of good faith, entries into the land registry can be relied on as accurate and valid.

3. **Are there any restrictions on who can own real estate?**

The possibility to transfer real estate is limited by the Land Transfer Acts. Each of the nine federal states has its own land transfer act regulating the transfer of agricultural and forestry land and the acquisition of real estate by foreigners. The terms and regulations of

every land transfer act are different, and whether an approval is necessary needs to be reviewed in every single case. EU/EEA citizens are treated equally to Austrian citizens. For others, however, the acquisition of real estate is subject to approval by the local land transfer authority. If applicable, the approval is a condition precedent by law and is necessary for the registration of ownership in the land register. This, in principle, applies both to share and asset deals.

In some areas of Austria, which are popular holiday destinations (e.g. Kitzbühel), there are further restrictions that prohibit the use of an acquired property as a holiday home and only allow the use as a main residence.

4. What types of proprietary interests in real estate can be created?

There is no full equivalent to the common law concept of “proprietary interest” in Austrian law. The main variants of property rights in Austria are as follows:

- ownership (“Eigentum”) of the entire property, including buildings;
- co-ownership (“Miteigentum”), i.e. a specific share in the respective property;
- condominium ownership (“Wohnungseigentum”), i.e. a specific share of the property with rights of use for specific areas;
- superstructure (“Superädifikat”), i.e. a building whose owner differs from the owner of the property); and
- building right (“Baurecht”), i.e. for a period between ten and 100 years a person is entitled to construct a building on land which does not belong to him, with an agreement regarding the building right to be registered in the land registry.

5. Is ownership of real estate and the buildings on it separate?

See previous answer.

Unless agreed otherwise between the contracting parties or in certain cases defined by law, the principle *superficies solo cedit* does apply, i.e. the building is treated as an inseparable part of the land and thus "follows" the property in the case of transfer.

6. What are common ownership structures for ownership of commercial real estate?

In general, real estate assets can be acquired by individuals as well as any corporate or non-corporate entity permitted under Austria law; therefore a private limited liability company (Gesellschaft mit beschränkter Haftung - 'GmbH'), a partnership (Offene Gesellschaft - 'OG'), a limited partnership (Kommanditgesellschaft - 'KG') and foundations (Privatstiftungen) and funds (Fonds).

The GmbH and the KG are the most common form for ownership of commercial real estate.

The right choice of entity depends - among other facts - on size and development plans of the prospective real estate, as well as on tax planning and liability. More often we see the acquisition of shelf companies as well as double-storey corporate structures involving foreign companies as master companies or subsidiaries on the market as part of share deals.

7. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

Depending on the degree of commissioning, only red flags of a transaction or a comprehensive review can be carried out as Legal Due Diligence. The aim is to identify issues and solve by way of appropriate hedging in the contract, or to detect possible deal breakers.

For asset sales of commercial registered real estate a buyer's due diligence will cover

- Review of title documents and documents from the public land register (purchase contract, donation contracts, easements, real estate charges, etc)
- Review of lease agreements (depending on the type of property and the buyer's plans)
- Review of public law situation of the property with regard to zoning, permits, contamination, and
- Examination of other documents, such as contracts for construction of buildings, judicial or administrative disputes, insurance of the object, and all other legal issues that arise within the scope of the due diligence.

If a property is acquired through the acquisition of a company as a share deal, the company is also subject to due diligence. The duration of the legal due diligence depends on the scope and availability of the relevant documents.

8. What legal issues (if any) cannot be covered by usual legal due diligence?

Within the framework of a legal due diligence examination, the actual circumstances on site cannot be checked (or only to a very limited extent), e.g. building permits, border superstructures, technical defects. This is regularly checked by a technical due diligence examination or by the involvement of experts.

In addition, there may be restrictions on ownership and rights of use which may be not reflected in the public registers and directories and the documents disclosed.

9. What is the usual process for transfer of commercial real estate?

Step	Description	Comment
Heads of Term ("HoT")	At the beginning of a transaction, a Head of Terms (also referred to as "Letter of Intent") is concluded between the parties, which defines the essential economic agreement and timetable of the transaction. A HoT is generally not binding, with the exception of binding exclusivity and confidentiality clauses.	At this time, the access to data rooms and the necessary KYC documents of the parties are provided.
Due Diligence Examination	Depending on the scope and type of the property it is market standard to carry out a technical, economic, tax and legal due diligence. The aim is to identify issues and solve them or to detect possible deal breakers.	Depending on the degree of commissioning, only red flags of a transaction or a comprehensive review can be carried out.
Purchase Agreement	On the basis of the HoT and the results of the due diligence, a purchase contract is drafted. At the same time, the necessary contract attachments are drawn up and, with banks, the documents for the release or registration of mortgages are compiled. At this stage, the seller often issues a priority notice, which secures the potential buyer in the land register.	In order to secure seller and purchaser in the best possible way, a payment of the purchase price via a trust account is market standard.
Signing	The purchase contract must be signed by the buyer and seller in the presence of a notary.	In addition to the purchase price, additional costs, e.g. land registration fee, real estate transfer, typically accrue.
Public Legal Approvals	Depending on the transaction, it may be necessary to obtain public law approvals. Typical cases are property divisions and approval by the land traffic authority.	In such cases, the purchase contract is usually concluded subject to a condition precedent.

Closing

Once the contract has been signed and all conditions precedent have been met, the application for incorporation of the ownership can be filed with the Land or Commercial Register. As part of the post-closing obligations, the transfer of the property/company and the administrative documents is required.

The purchase price is paid standard market practice from the escrow account upon incorporation in the land register or in course of closing in case of a share deal. Outstanding loans are paid from the purchase price.

10. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

Yes, both the acquisition of real estate by way of an asset deal or as a share deal are very common. The advantage of a share deal construction may be tax savings (e.g. low real estate transfer tax and no registration fee, as the property owner remains unchanged).

11. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer

Leases that are registered in the land register automatically transfer to the buyer in any case. Usually only long-term leases that are not subject to the Austrian Tenancy Act ("MRG") are registered with the land register, but any lease (if signed in the required form) can be registered.

In Austria, lease agreements subject to the MRG are automatically transferred with the transfer of the ownership rights in the property. The buyer automatically enters into the lease agreement with the transfer and therefore the tenant is obligated, after he has been informed about the change of landlord, to pay the rent to the buyer.

This provision is mandatory and therefore cannot be waived by the parties.

In case the MRG is not applicable and only the provisions of the Austrian Civil Code ("ABGB") apply, both landlord and tenant may terminate the lease agreement if the lease is not registered in the land register. This right to terminate the lease agreement can be explicitly waived by the parties of the lease agreement. Otherwise the lease transfers automatically.

12. **What common rights, interests and burdens can be created or attach over real estate and how are these protected?**

The main burdens that can be attached are, of course, mortgages for financing. The registration fee for mortgages is 1.2% of the registered mortgage amount and is paid by the pledgee.

Further, easements are common burdens over real estate and are usually registered with the land register. The easements often regard electricity lines, piping rights, rights of way. Easements can either be granted free of charge or be paid. If easements are paid for, stamp duty incurs for the easement.

Real loads ("Reallasten") can be created over the real estate property in order to secure monthly payments for, e.g., building rights or to secure the delivery of certain amounts of energy.

13. **Are split of legal and beneficial ownership of real estate (i.e. trust structures) recognised?**

Splits of legal and beneficial ownership are very rare in Austria. Previously, RETT could be mitigated, if certain amounts of the shares in a company or in real estate were held by a trustee. After the RETT-Act has been modified, the holdings of the trustee will now be added to the beneficiaries' holdings and therefore RETT will incur.

Further, trust structures are being used in order to avoid land transfer restrictions. Non-EU buyers are subject to the approval of the municipal land transfer authority. Trust structures could therefore be used to avoid these approval requirements via holding of the shares in the property or the property holding company by an EU member state citizen or EU company.

14. **What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?**

Taxes Applicable to a Transaction

The applicable taxes for an asset deal are as follows:

- land transfer tax ("**Grunderwerbsteuer**"): 3.5% of purchase price;
- registration fee ("**Eintragungsgebühr**") for ownership: 1.1% of purchase price;
- registration fee for mortgage: 1.2% of registered amount.
- Property tax ("Grundsteuer"): very low amount, payable each quarter.

Share deals can invoke land transfer tax if at least 95% of shares of a corporation ("Kapitalgesellschaft") are acquired by one buyer (company or group company or escrow agent), or if at least 95% of shares of a private partnership ("Personengesellschaft") are acquired within a period of five years (also in case of different buyers), land transfer tax is triggered in the amount of 0.5% of the respective tax value of the real estate, which is normally below the asset value. It is customary that the aforementioned taxes (with the exception of the property gains tax) are borne by the buyer(s).

15. **What are common terms of commercial leases and are there regulatory controls on the terms of leases?**

Regulatory controls

Leases for residential and business purposes are in principle governed by the MRG, which applies either in full, in part or not at all, depending on the type of premise and date of the respective building permit. The Civil Code contains additional (and usually deviating) provisions for leases and constitutes the only legal framework in case the MRG does not apply; otherwise the provisions of the MRG prevail (the act is mandatory in favour of the tenant).

Increase of rent

The MRG contains, inter alia, mandatory provisions regarding the possibility of termination of the lease by landlord and, if fully applicable, on the maximum possible amount of rent. Further, in case the MRG is fully applicable and a change of tenant occurs,

landlord is entitled to increase rent to the maximum possible amount under MRG provision.

Length of lease term

With the exception of leases for living spaces with a minimum of three years, there are no restrictions on the term of the lease. Parties of commercial leases typically agree to a lease period of five to ten years. The length of the period depends on the economic background of the landlord and/or the tenant (e.g. if the landlord agreed to carry out construction works for the tenant, so that the premises satisfy the needs of the tenant, the landlord might want to have a lease period long enough so that the investment costs for the work is profitable).

Maintenance and repair of the real estate actually occupied by the tenant

If the MRG applies in full, maintenance and repair are regulated in section 3 of the MRG. This mandatory provision sets out an exhaustive list of the landlord's maintenance and repair obligations and cannot be altered to the detriment of the tenant.

Outside the full applicability of the MRG, maintenance and repair are regulated in section 1096 of the Civil Code, which states that the landlord is obliged to keep the leased premises in the state as agreed. These obligations to maintain and repair can be imposed on the tenant as this provision is not mandatory. Maintenance and repair obligations of the landlord are usually limited to material defects and roof and structure.

Frequency of rent payments

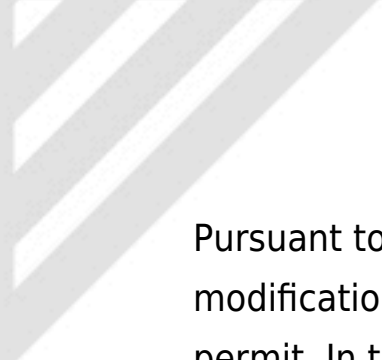
There are no specific statutory provisions regulating the frequency of rent payments, but rent is usually payable monthly, with one to five days of grace (mandatory under the MRG). Turnover-based rent is usually payable after the end of each year, after calculation of revenues by the tenant.

16. How are use, planning and zoning restrictions on real estate regulated?

Each of the nine Austrian states issues its own construction and zoning laws. The local communities issue zoning plans based on the regional laws. Any person can request a zoning confirmation for any parcel of land. Consequently, there is no uniform building and/or zoning law in Austria since all regions enact their own regulations in this regard.

The design, appearance and method of construction must comply with the building and zoning law applicable to the respective real estate. The building permit can only be granted, if the planned building project is in line with the provisions of the building and the zoning law.

The mayor (or the municipal authority in certain Austrian cities) acts as building authority, while the local council (or the town senate in certain Austrian cities or the Administrative Court in Vienna) acts as appellate instance.



Pursuant to the provisions of the building laws, the construction, modification or reconstruction of buildings requires a building permit. In the case of simple or small constructions, the building laws usually contain a provision that no formal building permit needs to be obtained. Instead, the builder has to file a notification of the planned construction works and is allowed to begin these works unless the Building Authority issues a prohibition decision within a certain period of time. Finally, the building laws contain provisions for minor constructions not requiring any consent from the Building Authority.

Under Austrian Law there are no terms and regulations for specific development agreements with the competent public authority, but it is possible to conclude such an agreement.

17. **Who can be liable for environmental contamination on real estate?**

The person/entity causing soil pollution or environmental contamination is responsible for removing such pollution or contamination. However, if this person/entity cannot be reached, the owner of the real estate will be held responsible. In addition, there is a factual assumption that the current owner caused the pollution or contamination, in particular if the owner held the property for a longer period of time. The owner may have warranty claims against the seller, depending on the agreed representations and warranties and the limitation period.

18. **Is expropriation of real estate possible?**

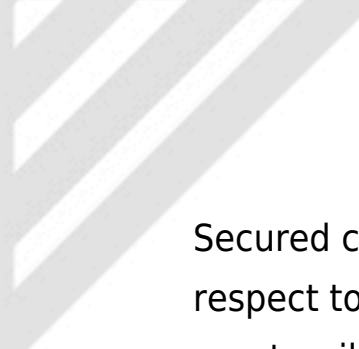
Expropriation is possible under Austrian Law, but the requirements are very strict and part of constitutional law. There are different procedures for the expropriation depending on the area of law (e.g., for the building of streets, the protection of nature, the building of railways, etc). The minimum requirement for every expropriation is that there is no other (i.e. less interfering) way and that the expropriation is therefore the only solution.

19. **Is it possible to create mortgages over real estate and how are these protected and enforced?**

Similar to the transfer of ownership, securities need title (e.g. a mortgage agreement) and mode (e.g. registration in the land register). Every registration receives a number, making subsequent registrations being subordinated (e.g. the second mortgage would be subordinated to the first mortgage).

There are some minor securities with prior ranking, in particular, in favour of specific taxes and public charges of municipalities and costs of maintaining the relevant real estate.

In the event of judicial enforcement in the asset of the security provider, a mortgage ensures preferential allocation of proceeds to the secured creditor.

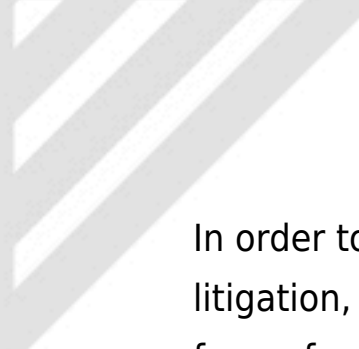


Secured creditors have priority in the settlement of the claims with respect to the assets in which they hold a security interest. These assets will be sold and the creditors will receive preferential payment of their claims; any proceeds remaining after the settlement of the secured creditors' claims will become part of the general estate and are distributed to the unsecured creditors pro rata.

Enforcement of mortgages is carried out by judicial enforcement. The enforcement of the mortgage will be effected by way of compulsory sale of the property and/or by compulsory administration of the property. In both cases, the court will be exclusively competent to auction or to administer the auction of the property, or to appoint an administrator.

This typically also involves the assessment of the value by an expert appointed by the court. After the court has issued an authorisation of enforcement, the opening of the enforcement proceedings will be registered in the land register and in the official online data base of Austrian bankruptcies maintained by the Austrian Ministry of Justice if the borrower is insolvent.

Legal literature takes the view that the parties may also agree on an out- of- court enforcement of real estate. This requires an assessment of the value of the real estate by an expert. However, in practical terms this also requires the consent of other parties having a security interest (even he has if they have a subordinated ranking), and such procedures are is not common.



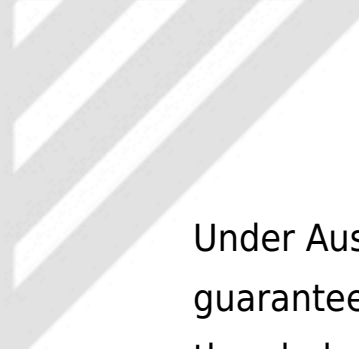
In order to enforce the mortgage immediately without prior litigation, the parties must agree on immediate enforcement in the form of a notarial deed ("Vollstreckbarer Notariatsakt"). The immediately enforceable notarial deed should be registered in the Austrian land register with the mortgage in order to preserve its enforceability also vis-à-vis subsequent proprietors of the real estate.

20. **Are there material registration costs associated with the creation of mortgages over real estate?**

Yes in some states. Some states and municipalities impose a mortgage recording tax which is calculated as a percentage of the face amount of the mortgage and is paid by the borrower (see Q15). In all cases, in addition to its own costs, a borrower will be responsible for the lender's title insurance, legal fees, and due diligence costs as well as a de minimis recording charge.

21. **Is it possible to create a trust structure for mortgage security over real estate?**

The concept of trust under Austrian law differs significantly from that under common law. Under the Austrian law concept (which follows the traditional Germanic law approach), a trustee holds legal title in the trust asset(s) and is only contractually bound to follow the instructions of the trustor(s).



Under Austrian law, all security interests (except for abstract guarantees) follow the principle of accessoriness. This means that the pledgee and the creditor of the secured claims have to be the same person. Therefore, such security interests cannot be held by third parties who do not also hold the secured claims. In order to allow a security trustee to hold Austrian law security validly and effectively for the commercial benefit of the other creditors it needs to have its own entitlement to the secured claims in its own name and on its own behalf. This is typically achieved by the creation of a "parallel debt" and/or a joint creditorship (*Gesamtgläubigerschaft*) in favour of the security trustee. Pursuant to the parallel debt concept, the security trustee becomes the holder of a claim equal to each amount payable by an obligor under the secured documents. The security interests provided under Austrian law will directly secure such parallel debt (rather than the "original" claims of the lenders). The parallel debt concept has not been tested under Austrian law. However, it is the structure typically applied in international finance transactions.

22. **What is the main legislation relating to commercial real estate ownership?**

The legal environment for real estate transactions is very stable and no current significant proposals for reform are being discussed that may have a substantial impact on real estate investments.