Global Corporate Real Estate Guide - Austria

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# Authors

# Real Estate Law

## What is included in the term “real estate”?

Austrian civil law provides that the term “real estate” essentially comprises the following:

Land

Any buildings or other constructions firmly connected to the ground (following the superficies solo credit principle)

## What laws govern real estate transactions?

The following laws govern real estate transactions in Austria:

The Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch)

The Land Register Act (Grundbuchsgesetz)

The laws governing the acquisition of land by foreigners of the nine federal states (Grundverkehrsgesetze)

The Condominium Act (Wohnungseigentumsgesetz)

The Building Development Contract Act (Bauträgervertragsgesetz)

The building laws of the nine federal states (Bauordnungen)

The Real Estate Investment Fund Act (Immobilien-Investmentfondsgesetz)

The Austrian Tenancy Act (Mietrechtsgesetz)

The Austrian Energy Certificate Act (Energie-Ausweis-Vorlage Gesetz)

The Real Estate Transfer Act (Grunderwerbsteuergesetz)

The Building Right Act (Baurechtsgesetz)

The Spatial Planning Laws of the nine federal states (Raumordnungen)

Brokers Law (Maklerrecht)

Moreover, under Austrian tax law, particularly with regard to stamp duties (Rechtsgeschäftsgebühren), the rulings of the Austrian Administrative Court (especially in the field of tax and fiscal law) and the Austrian Supreme Court (for legal issues in the field of Austrian civil law) have to be taken into account in the handling of real estate transactions.

## What is the land registration system?

The Austrian land register is administered by the district courts (Bezirksgerichte). Each register contains a record of certain rights and encumbrances (e.g., ownership, mortgages, easements, etc.) as well as further information regarding the particular real property. The collection of deeds is also a part of the registration system where the respective documents corresponding with the register entries are gathered and open to the public.

The principle of publicity states that anyone can inspect the land register and request copies. The entries in the land register can be trusted as correct.

## Which authority manages the registration of titles?

The registration of titles is managed by the competent district court of the district in which the real property is located.

## What rights over real property are required to be registered?

The following rights or interests in rights regarding real estate can be subject to registration with the land register:

Ownership

Mortgages (Hypotheken)

Easements (Dienstbarkeiten)

Land charges/land rents (Reallasten)

Building or construction rights (Baurechte)

Leases (Mietrechte)

Right to repurchase (Wiederkaufsrecht)

Pre-emption right (Vorkaufsrecht)

Prohibitions of sale and encumbrance (Veräußerungs-und Belastungsverbote)

## What documents can landowners use to prove ownership over real property?

The land register is open to the public. Information on real estate ownership can also be accessed from an electronic register. Excerpts of the land register can be obtained at any district court or from certain institutions with access to the electronic register (such as lawyers or notary publics).

## Can a title search be conducted online?

Yes. The land register excerpts and the respective documents evidencing the respective entry into the register, such as a purchase agreement, have been available in the electronic register since 2005.

## Can foreigners own real property? Are there nationality restrictions on land ownership?

All nine Austrian federal states have different legal restrictions for the purchase of real estate by non-EU/EEA residents or entities. These restrictions are governed by the laws applicable to the acquisition of land by foreigners of the nine federal states. Additionally, some of the requirements for the purchase of real property in each of the nine Austrian federal states can differ from each other. In general, a foreign purchaser of real estate located in Austria must obtain a specific approval or permit that is issued by the appropriate authorities. This approval requirement only applies to purchasers that are not citizens of EU or EEA member states. Citizens of EU- or EEA-member states are generally exempted from the requirement to obtain such approval.

## Can the government expropriate real property?

In general, property can be expropriated by government and quasi-government authorities (see the Austrian Main Road Act [Bundesstraßengesetz] or the federal building laws).

In case of an expropriation, the government or the quasi-government authority usually has to pay appropriate compensation.

## How can real estate be held?

Generally, an interest in real estate is held by any of the following:

Ownership

Co-ownership (Miteigentum)

Condominium (Wohnungseigentum)

## What are the usual structures used in investing in real estate?

The most common corporate structures used to invest in real estate in Austria are the following:

Stock companies

Limited liability companies

Partnerships

Limited partnerships

Private foundations

## How are real estate transactions usually funded?

Generally, real estate financing in Austria is established through a loan agreement entered into between the lender and the borrower. Interest rates are calculated by adding the prime rate and the margin or spread (displayed as a percentage) plus certain costs (if any). The prime rate is based upon a rate periodically announced by the respective central bank (e.g., the three-month EURIBOR). In some cases, interest rate swaps and interest rate caps and floors are used to limit interest rate risks in long-term financing. Typically, it is the borrower’s responsibility to pay for all of the lender’s legal and other costs, such as commitment and processing fees, in arranging property financing. Lending institutions will usually require the borrower to execute certain security documents such as mortgages, charges, liens, pledges and assignments.

## Who usually produces the documentation in real estate transactions?

Usually, the buyer’s lawyer will prepare the initial draft of the purchase agreement. In urban areas, the documentation is generally prepared by a lawyer. In rural areas, it is common that both parties request an impartial notary to prepare the purchase agreement.

## Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

The applicable Austrian laws (e.g., the Waste Management Act [Abfallwirtschaftsgesetz] or the Water Management Act [Wasserrechtsgesetz]) follow the “polluter-pays principle.” The polluter remains liable, even if the property is subsequently sold. If the polluter cannot be determined or cannot remedy the situation, then the authorities can request that respective measures be taken by the owner of the land. These measures can be requested if such owner either consented to the storage of waste materials or tolerated the pollution by a third party without taking adequate measures to prevent it.

## Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

As pointed out, the buyer of a property may be liable for decontamination measures under public law if the buyer was aware of the contamination or could have been aware when the buyer took over the property. The parties might agree to limit the representations and the warranties of the seller in the purchase agreement. For leasehold properties, the tenant is generally not held liable for a previous tenant’s obligations.

# Acquisition of Real Property

## What are the usual documents involved in such transactions?

Sale and purchase agreement (Kaufvertrag)

Basically, the sale and purchase agreement contains all necessary terms and conditions of the transaction such as the description of the land (as stated in the Austrian land register), stipulation of the purchase price, allocation of taxes and additional costs. In addition, the agreement usually contains representations and warranties of the seller for the benefit of the buyer.

Formal approval of the seller (Aufsandungserklärung)

The seller must formally approve the registration of the buyer in the land register. For that purpose, the seller grants consent in the purchase agreement. This consent may also be granted in a separate document. In any case, the agreement must be made in writing and signatures must be certified by a district court or a notary public. These formal requirements are required for registration in the land register.

Escrow Documentation

A property transaction is usually carried out by way of a trusteeship. In a trusteeship, the contracting party and trustee must conclude a trust agreement with both parties and report and register the acceptance of the trusteeship with the competent bar (notary or lawyer).

Due diligence

In general, the buyer conducts extensive due diligence to evaluate the purchase price before the sale and purchase agreement is signed. In particular, lease agreements, construction materials, possible contamination of the property and other public legal duties can strongly influence the value of real estate.

## What are the warranties given by a seller to a buyer?

The scope of contractually agreed-upon warranties usually depends on the negotiation power of the parties and the type of property being sold. Generally, the seller tends to reduce warranties and representations to a minimum.

Austrian civil law establishes a rebuttable presumption that the purchaser agrees to the assumption of easements. However, that does not apply to the assumption of liens (mortgages). Therefore, unless agreed otherwise, the seller of a real property is obliged to sell the real property free from any encumbrances (Depurierungspflicht).

## When is the sale legally binding?

The parties are legally bound as soon as the parties agreed on the property to be purchased and the purchase price. In fact, an oral agreement can be legally binding. However, as the registration with the land register requires the sale and purchase agreement to be certified by a district court or a notary public, the agreement must be made in writing.

## When is title transferred?

According to the Austrian Civil Code, there are two requirements to be met for the transfer of title: (i) proper title for the transaction (e.g., the sale and purchase agreement) and (ii) registration in the land register. Upon registration of the deed, the ownership of the real estate is transferred to the buyer.

## What are the costs usually shouldered by the parties?

In Austria, the buyer usually pays for the following:

Legal fees (including costs for the processing of the trusteeship)

Taxes and stamp duties

Registration fees

The seller is responsible for the taxes on the profit made on the sale of the real estate.

# Leases

## What are the usual forms of leases?

At the start, it should be noted that Austrian law provides that lease agreements concluded in writing trigger stamp duty tax. Therefore, written lease agreements must be filed with the tax authorities for stamp duties by the 15th of the second month following the execution of the lease and stamp duty has to be paid. Residential leases are exempt from these requirements.

The applicable tax rate is 1% of the assessment base. The assessment base is three times the annual lease payments (rents, operational costs, VAT, insurance, key money, etc.) if the term of the agreement is indefinite. If the lease is for a definite term, the assessment base is the amount of the annual lease payments multiplied by the term of the lease (multiplied up to maximum of 18 times).

If agreements that are subject to stamp duties are not filed on time and the duty is not paid, penalties of up to 100% of the unpaid duties might be triggered. Both parties to the agreement are liable for the stamp duties and the penalties irrespective of the contractual agreement between the parties.

Stamp duties can legally be avoided and/or reduced. If a lease has an indefinite term, the stamp duty assessment base will be reduced to three years if the lease provides for a termination right waiver for a specific period. Stamp duties can be fully avoided by offering lease conditions in writing and by the other party just accepting those terms implicitly (e.g., by paying the rent). Further, stamp duty can be fully avoided by so-called “lawyers correspondence” if the parties and their lawyers verbally agree on the lease terms and subsequently the lawyers draft a memorandum regarding these terms that is sent to their respective clients.

Austrian Tenancy Act (the “**Tenancy Act**”)

Most residential tenancies and most commercial leases are regulated by the Tenancy Act. The Tenancy Act distinguishes between leases that are entirely subject to this act (Vollanwendungsbereich, which provides for a wider scope of tenant-friendly provisions) and those that are partially subject to this act.

Hence, the Tenancy Act is either applicable, partly applicable, or not applicable at all. In general, the Tenancy Act is fully applicable on leases of residential properties and commercial premises built before 1945. However, several exceptions apply. If the Tenancy Act is fully applicable, the maximum rent payable is capped for residential tenancies. If the tenancy is for a definite term (minimum three years), the maximum rent provided for in the Tenancy Act is further reduced by 25%. The definite term of tenancies subject to the Tenancy Act must be in writing. Otherwise, the tenancy will be interpreted as a tenancy with an indefinite term. Key money payments are not permissible.

For leases that are fully or partially subject to the Tenancy Act, the landlord’s termination rights are restricted to termination for good cause. As a result, no termination for convenience is permissible. Also, the landlord’s termination of the tenancy must be declared in court.

Commercial leases

There are two types of commercial leases: (i) the “ordinary” commercial tenancy of space (Geschäftsraummiete), which is subject to the Tenancy Act; and (ii) the lease of a business unit/enterprise (so-called “Pacht”), which is not subject to the Tenancy Act and includes the right of usufruct.

The Tenancy Act applies to the “ordinary” commercial tenancy if the term of lease is at least six months. However, several provisions exclusively reserved for residential tenancies, such as the restrictions of rent, will not apply.

As for Pacht, if the tenant rents a business/enterprise that includes real property or if the leased premises are part of an enterprise (e.g., a shop in a shopping mall) or if it is a land lease, only the Austrian Civil Code applies. The Austrian Civil Code sets forth provisions considerably less favorable for tenants, e.g., no termination in court necessary, no restriction of termination rights, etc.

## Are lease provisions regulated or freely negotiable?

The Austrian legal system has two main sources of tenancy law. The special regime of the Tenancy Act is, with very few exceptions, mandatory and cannot be modified by contract to the disadvantage of the tenant. If the Tenancy Act is not applicable, then the Austrian Civil Code applies. The Austrian Civil Code is applicable to commercial lease agreements for a period not exceeding six months, employee housing, or Pacht agreements. In these cases, lease provisions are basically not regulated and to a large extent are freely negotiable. The regulations become applicable if no arrangements have been agreed to between the parties.

## Is there a maximum term for leases? Can these be extended?

Austrian law does not provide for a maximum term for leases. However, in order for the lease agreement to be registered in the land registry, a time limit or at least a waiver of termination by the landlord is mandatory.

## What are the usual lease terms?

The parties may agree on an indefinite or fixed term. Usually, commercial and residential lease agreements are entered into for a fixed term. However, as for residential tenancies, the Tenancy Act provides for a minimum term of at least three years.

## Are there instances where tenants may demand an extension of the lease?

Austrian tenancy law does not provide any mandatory provisions that allow the tenant to renew its lease. However, tenancies subject to the Tenancy Act that are limited in time are automatically renewed by operations of law for three years if they are not renewed or terminated (e.g., if the tenant continues using the premises or pays the rent and the landlord does not object).

## On what grounds may a lease be terminated?

A lease contract is terminated under any of the following circumstances:

Termination declared by the landlord, provided that the landlord is relying upon one of the applicable grounds for termination stipulated in the Tenancy Act (including nonpayment of rent or lack of proper maintenance of the property)

Termination declared by the tenant

Destruction of the rental property

Lapse of time in case a specific termination date was initially agreed upon

Immediate termination declared by the tenant if the rental property has deteriorated to the extent that it is impossible for the tenant to use it

Immediate termination declared by the landlord in case the rental property is used in a way contrary to the lease agreement

The tenant is in default in payment of at least two months’ rent

## Must rents be paid in local currency?

Basically, there are no restrictions regarding the currency. However, arrangements for payment of rents in foreign currency are not common practice in Austria.

## Is rent paid on a monthly basis? Is it required to be paid in advance?

If not agreed otherwise, rent is due in advance on the fifth day of each month (if the Tenancy Act applies, no earlier day may be set). In business-to-business transactions, if the tenant negligently does not pay the rent on the due date, the landlord may charge default interest at the rate of 9.2% above the relevant base rate. Without negligence, only 4% default interest is due.

## How is rent reviewed? Are there limits to the increase in rent?

According to the Tenancy Act, the maximum amount of rent payable per month depends on the category and on the size of the rental property. However, these restrictions do not apply to building leases that are partially subject to the Tenancy Act, Pacht agreements, “ordinary” commercial tenancies, or lease agreements with a lease term of less than six months.

## What are the basic obligations of landlords and tenants?

The following duties are usually required of landlords:

Renovate and carry out emergency repairs of the structure of the property

Insure the property

Provide tenants with a valid notice of termination (in writing) if terminating the tenancy

The following duties are usually required of tenants:

Pay the rent on time

Maintain the property in good condition

Inform the landlord in case of damages

Allow the landlord access to the rental property for inspections

## What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

The transfer of the lease contract to a third party, such as by assignment of the agreement, is subject to landlord’s approval/consent.

With regard to subletting, tenants are generally allowed to sublet the premises or parts thereof unless the underlying lease contract states otherwise. Moreover, leases in which the Tenancy Act are fully applicable are subject to certain restrictions. For example, the Tenancy Act provides that the landlord may only invoke subletting prohibitions for important reasons.

Under applicable provisions of the Tenancy Act, the landlord is entitled to raise the rent to a fair market level if the legal and economic influence on a tenant – being a legal entity – changes and if the Tenancy Act is fully applicable to the lease. The landlord must be notified immediately of such change in entity to enable the landlord to exercise the right to increase the rent. The rent increase equals the difference between the current (and presumably lower) rent and the fair market rent payable for the premises. This applies to asset deals as well as lease-outs. The parties can further agree that this rule shall apply to leases that only partially fall under the Tenancy Act or to leases that are not subject to the Tenancy Act.

## What happens in the event of destruction of the leased premises?

Where real property is substantially damaged or destroyed by an act of God or in time of war, the lease agreement is terminated. In any other case, the landlord is obligated to repair or rebuild the property provided an insurance company covers the costs.

## Who is usually responsible for insuring the leased premises?

The landlord is responsible for insuring the real property where the leased premises is located. The landlord may recover such costs from the tenant in a lease. The tenant is responsible for insuring residential rental objects (household insurance).

## Will the lease survive if the owner sells the leased premises?

In cases where the Tenancy Act applies, the lease agreement is automatically assigned to the purchaser of the leased premises as the new landlord. The landlord does lose any further termination rights in this case. However, in cases where the Tenancy Act does not apply and where the lease agreement is not registered with the land register, the purchaser may terminate the lease agreement.

## Will the lease survive if the leased premises are foreclosed?

The provisions on the foreclosure of the leased premises correspond to those on the sale of the leased premises. If the tenancy has been registered in the land register, it is taken over by the purchaser without the possibility of termination. However, if it has not been registered, the purchaser may terminate the lease agreement in accordance with the legal possibilities. If the lease agreement is subject to the Tenancy Act, the termination rights are limited.

# Planning and Environmental Issues

## Who has authority over land development and environmental regulation?

In Austria, land development on a federal level (überörtliche Raumplanung) is regulated by the laws of the nine federal states. However, land development on a local level (e.g., the construction of new projects) is subject to municipal legislation and execution (örtliche Raumplanung).

The main source of environmental law in Austria is the legislation of the nine federal states. However, there are some subject matters reserved to federal legislation such as the Waste Management Act or the Water Management Act. An additional source of environmental legislation is legislation from the EU.

## What environmental laws affect the use and occupation of real estate?

The laws of the nine federal states (in particular, those concerning business and industrial activity and federal legislation like the Waste Management Act and the Water Management Act) affect the use and occupation of real estate in Austria.

## What main permits or licenses are required for building or occupying real estate?

Building regulations are subject to the legislation of the nine federal states. As a consequence, building regulations can differ from each other in each of the nine federal states. In general, before construction work can begin, planning permission (Baubewilligung) from the local authority must be obtained. Usually, occupancy permission (Benützungsbewilligung) is also required to be obtained by the applicant when construction is finished.

## Can an environmental cleanup be required?

An environmental cleanup may be required by law where authorities seek to reduce or mitigate potential dangers to human health (e.g., the Waste Management Act). In addition to certain federal laws, the Austrian civil law may impose liability on a party causing contamination.

## Are there minimum energy performance requirements for buildings?

The EU has adopted several directives regarding energy efficiency which were implemented in the Austrian building regulations (e.g., Directive 2010/31/EU). The building regulations are basically subject to the legislation of the nine federal states.

In addition, the Austrian Energy Certificate Act provides that in case of the purchase or lease of real property or rental property, the seller or landlord is obligated to provide the purchaser or the tenant with an Energy Performance Certificate (Energieausweis) not older than 10 years showing the energy efficiency of the building.

Furthermore, minimum standards of energy efficiency in buildings must be fulfilled. Therefore, existing and new buildings must be adapted to meet the new standards and all buildings built after 2020 must meet the requirements of zero-energy buildings.

## Are there other regulatory measures that aim to improve the sustainability of newly constructed and existing buildings?

Building regulations are subject to the legislation of the nine federal states. Some of them provide different kinds of regulatory measures that aim to improve the sustainability of newly constructed and existing buildings. For example, the Building Regulations of the City of Vienna (Wiener Bauordnung) deal with issues like heat insulation (Wärmeschutz) and energy saving (Energieeinsparung).

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