This project has received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration under grant agreement no. 290694.

TENLAW: Tenancy Law and Housing Policy in Multi-level Europe

Tenant's Rights Brochure for

AUSTRIA

Author: Mag. Raimund Hofmann

Team Leader: Prof. Dr. Christoph Schmid

National Supervisor: Univ. Prof. Mag. Dr. Brigitta Lurger, LL.M. (Harvard)

Summary of Contents

1. Introductory information

- Give a very brief introduction on the national rental market
    - Current supply and demand situation

In 2012, the number of dwellings (main residences) in Austria reached 3.678.100 units. 1.449.900 units (39,4% of the total stock) were occupied by home-owners, 379.200 (10,3 %) were possessed by owners of a dwelling in condominiums, 1.476.700 (40,1%) units were rented to main tenants, 38.200 units (1%) were rented to subtenants and 335.100 units (9,1%) were occupied on other legal grounds (use of dwellings on family ties, etc.).

Characteristic for Austria are the huge regional differences with respect to the legal basis for possession, especially between Vienna and the other eight states. Whereas in Vienna 75,4 % of the population are main tenants and only 7,9 % of the population live in home-ownership (excl. condominiums), in Burgenland 79,7 % of the population live in home-ownership (excl. condominiums) and only 13,2% as main tenant.

In 2012, a dwelling (main residence) in Austria on average had 99,6 m² of floor space. Home-owners lived in dwellings with an average floor space of 138,1 m², owners of dwellings in condominiums in dwellings with 83,3 m² and main tenants in dwellings with 69,3 m². On average, 2,27 people lived in one dwelling with an average floor space per person of 43,9 m². This is a raise of average floor space per person of almost 6 m² within the last 11 years (38 m² in 2001). This raise cannot only be explained with a general increase in size of dwellings, but also with a shrinking number of people living together in one dwelling (2,38 persons/dwelling in 2001). Again strong regional differences between Vienna and the other eight Austrian states have to be considered, as in Vienna in 2012 only 1,99 people lived in one dwelling

with only 37,9 m² floor space on average, in Burgenland e.g. 2,48 people/dwelling with 50 m² floor space.

In comparison to other European States the supply of housing in Austria in 2012 was indeed adequate. Per 1.000 inhabitants about 440 units were available, on average were 2,3 persons living together.

Recent forecasts show that the total Austrian population will increase from 8,43 million in 2012 up to 8,99 million in 2030 (+ 7%) and 9,37 million in 2060 (+11%). A severe change is predicted with respect to the demographic structure of the Austrian population, especially with respect to a significant increase of people aged 65 or older from 1,51 Mio. in 2012 (17,9 % of the total population) up to 2,16 Mio. in 2030 (24 %) and 2,70 Mio. in 2060 (28%). The number of households is expected to increase even stronger because of the upwards tendency to live in one-person households.

The Austrian legal system has two main sources of tenancy law: the "Allgemeine Bürgerliche Gesetzbuch 1811" (ABGB, General Civil Code), and the "Mietrechtsgesetz 1982" (MRG, Tenancy Statute). Judgements are rendered either according to the ABGB, the MRG or other special statutes. With regard to some rented premises or tenancy agreements, the freedom of contract is not (or almost not) limited at all, whereas with regard to other rented premises or tenancy agreements the almost exclusively mandatory norms of the MRG minimize the freedom of contract significantly in favour of the tenant.

In general, the most important differences exist between tenancy agreements where the MRG is fully, partially or not applicable. For tenancy agreements, where the MRG is

- fully applicable, the tenant is protected by strict rent limits ("Preisschutz") and against unwarranted eviction ("Beendingungs- bzw. Kündigungsschutz");
- partially applicable, the tenant is protected only against unwarranted eviction;
- not applicable the tenant neither is neither protected by strict rent limits nor against unwarranted eviction.

Therefore, also a tenant living in a rental dwelling owned by a private landlord can benefit from strict rent limits and protection against unwarranted eviction, if the MRG is fully applicable to the tenancy agreement.

- Main current problems of the national rental market from the perspective of tenants

- increasing rents in urban areas, especially in Vienna
- wrong calculation of rents by landlords in disfavour of their tenants, although the rent regulated by law
- wrong calculation of operating expenses

- Significance of different forms of rental tenure

- Private renting

Private renting is characterized by the fact that the rented dwellings are owned by private landlords (for-profit corporations or for-profit cooperatives, limited or public limited companies or individual landlords).

- "Housing with a public task" (e.g. dwellings offered by housing associations, public bodies etc)

"Housing with a public task" means that the rented dwellings are owned by

- Limited-profit rental housing in dwellings owned by limited profit housing associations ("gemeinnützige Bauvereinigungen") or
- Municipal rental housing in dwellings owned by municipalities or non-profit municipal bodies ("Gemeindewohnungen").

With respect to a total amount of 1.474.700 rented units in 2012, 19 % of the total stock was owned by municipalities, 40,5 % by limited-profit housing associations and 40,5 % by private landlords.

- Some general recommendations to foreigners on how to find a rental home (including any specificities with respect to the position of foreigners on the national rental market)

In general, it is advisable for a non-German speaking foreigner to find a serious Austrian who can come along to the viewing of a dwelling and act as a translator, to avoid communication problems or misunderstandings. The German spoken in most parts of Austria also differs significantly from standard German.

Furthermore it is recommend to contact the following persons / institutions:
- the employer, if he can provide a you a dwelling or help you finding a dwelling;
- the municipality, to get information about free dwellings for rent and their criteria for allocation of a dwelling owned by them;
- (local) limited-profit housing associations, to get information about free dwellings for rent and their criteria for allocation of a dwelling owned by them;
- a practicing lawyer or tenant protection association before concluding any tenancy agreement, as Austrian tenancy law is rather complex and tricky.

- Main problems and "traps" (circa 5) in tenancy law from the perspective of tenants

- Unclear application of rules to the tenancy contract, especially with reference to freedom of contract vs. rent regulation; there exist various different systems of rent regulation applying even to dwellings rented out on the private rental market;
- Unreflecting use of standard contract by the private landlord or estate agent without prior check by a practising lawyer; especially an intensive check of of clauses on duties of maintenance is recommended;
- Operating costs invoices; they are often calculated incorrect;

- Use of the dwelling and house rules; foreigners should inform themselves in detail about “do's and don't's” to avoid quarrels with landlords or neighbours

- “*Important (legal) terms related to tenancy law*”

German	**Translation into English**
Angemessener Mietzins	Adequate rent, a specific form of rent control
außerordentliche Kündigung	extraordinary notice
befristeter Mietvertrag	tenancy contract limited in time
Betriebskosten	operating costs
Bezirksgericht	District court
Erhaltungsarbeiten	Maintenance works
Hauptmieter / Hauptmiete	Main tenant / main tenancy
Hausordnung	Rules of the house
Kategoriemietzins	Category rent, a specific form of rent control
Kaution	security deposit
Maklergebühr	brokerage fee
Miete / Mietzins	Tenancy / rent
ordentliche Kündigung	ordinary notice
Pacht / Pachtzins	usufructury lease / rent for usufructury lease

Richtwertmietzins	Standard value rent, a specific form of rent control
Schlichtungsstelle	arbitrational board
unbefristeter Mietvertrag	tenancy contract unlimited in time
Untermieter / Untermiete	Sub tenant / sub tenancy
Verbesserungsarbeiten	Improvement works
Wohnbauförderung	Subsidies for construction and modernisation

2. Looking for a place to live

2.1. Rights of the prospective tenant

- What bases for discrimination in the selection of tenants are allowed/prohibited? What about, for example, status as a foreigner, student, unmarried partner, or person with a short-term work contract?

The Anti-Discrimination Statute regulates nowadays that discrimination based on sex, ethnical background or civil standard is forbidden for the access to and the supply of goods and services which are available to the public, including housing. A violation of the equality principle offers the victim a claim for damages, consequently a tenant who is not considered in the choice-of-tenant-procedure because of discrimination can claim damages. Discrimination in the selection by status as a foreigner or as unmarried partner per se is prohibited, whereas discrimination in the selection by status as a student or person with a short-term work contract is exceptionally allowed for valid reasons.

- What kinds of questions by the landlord are allowed (e.g. on sexual orientation, intention to have children etc)? If a prohibited question is asked, does the tenant have the right to lie?

Information concerning the personal status or the solvency of the potential tenant can be gathered lawfully if the landlord can argue a legitimate interest. Questions on sexual orientation or intention to have children are prohibited and the tenant has a right to lie.

- Is a “reservation fee” usual and legal (i.e. money charged by the landlord to allow the prospective tenant to participate in the selection process)?

A “reservation fee” is unusual and illegal in Austria.

- What kinds of checks on the personal and financial status of the tenant are usual and legal (e.g. the landlord requiring an independent credit report)?

It is assumed that a landlord may ask any tenant for a salary statement, but the tenant can deny disclosing this information with reference to his right of protection of his or her personal data. Also a landlord may resort to a credit reference agency like the “Kreditschutzverband von 1870” (KSV 1870) or the „Alpenländischer Kreditorenverband für Kreditschutz und Betriebswirtschaft” (AKV) and ask for the degree of creditworthness of a prospective tenant, if the landlord can claim an overriding legitimate interest in the disclosure of this data. The tenant however has in many cases a right of withdrawal of such data without giving any reason.

- What is the role of estate agents in assisting the tenant in the search for housing? Are there other bodies or institutions assisting the tenant in the search for housing?

The practice of estate agents is limited to licensed estate agents that have to comply with regulatory law requirements. In Austria, the general services an estate agent provides in the area of rental housing are:

- Searching for current entries in the land registry, plans and data of the rent object
- Creating an exposé, advertising the rent object in newspapers and internet
- Finding out the personal needs and interests of prospective tenants, organizing showing dates and providing all relevant information of the object and its usage
- Consulting of both contractual parties about all legal and economical aspects of the tenancy, mediating the balancing interests of the landlord and the tenant, participating in the clearing and settlement of the tenancy agreement.

Furthermore municipalities or municipality bodies often assist tenants in the search for housing.

- Are there any accessible “blacklists” (or equivalent mechanisms) of bad landlords/tenants? Is there a system for rating and labelling preferred landlords/tenants?

No.

2.2. <u>The rental agreement</u>

- What are the requirements for a valid conclusion of a rental contract (is written form necessary; is registration necessary and if yes, what kinds of fees apply lawfully)?

An agreement will not be binding on the parties until one is able to identify either an offer by the landlord to let, and a convergent assent by the tenant to take, or an offer by the tenant to take and an acceptance by the landlord to let.

An offer by the tenant or landlord has to be substantially specified with the intention to enter into a legal binding relationship and this offer has to be received by the other negotiating party. There must be an offer capable of acceptance by one of the parties, i.e. a simple response to a request for information is not an offer but an invitation to treat ("invitatio ad offerendum").

Essentialia negotii of a tenancy agreement are rent object and rent. For the conclusion of the contract the transfer of the rented object is not necessary.

The written form of a tenancy agreement is not a formal requirement. A duty to register tenancy contracts in Austria only exists with reference to tax law.

- What is the mandatory content of a contract?
    - Which data and information must be contained in a contract?

There are no explicit rules for mandatory minimum requirements of what needs to be stated in a tenancy contract. Nevertheless, the rules for (general) contract law apply. Therefore as minimum requirements for the valid conclusion of a contract for example a statement about rent object and rent is required.

Mandatory provisions of the ABGB and MRG apply to the tenancy contract independently from the terms that are concluded by the parties in their individual agreement.

In almost every written tenancy agreement a detailed description of the dwelling and indication of the habitable surface is laid down within the first sections of a tenancy contract.

    - Duration: open-ended vs. time limited contracts (if legal, under what conditions?)

Tenancy contracts in Austria can be concluded either unlimited or limited in time. If the MRG is partial or full applicable, a landlord can only limit the duration of a tenancy agreement to three years and has to do that explicitly in written form.

    - Which indications regarding the rent payment must be contained in the contract?

If the parties have not agreed on any specific indications regarding the rent payment, the rules of the ABGB and MRG apply independently.

- Repairs, furnishings, and other usual content of importance to tenant
    - Is it legal for the landlord to shift the costs for certain kinds of repairs (if yes, which?) to the tenant?

If the MRG is not or partially applicable to the tenancy contract, the obligation to keep the rented dwelling in useable condition can be lawfully assigned to the tenant, if not general private law principles (bonos moros or laesio enormis) are at stake.

If the MRG is fully applicable, the shift of costs for repairs to the tenant is limited.

- Is the landlord or the tenant expected to provide furnishings and/or major appliances?

Neither the landlord, nor the tenant is expected to provide furnishings. Major appliances like access to water, electricity, heating etc. usually are provided by the landlord.

- Is the tenant advised to have an inventory made so as to avoid future liability for losses and deteriorations (especially in the case of a furnished dwelling)?

It is not required by law, but recommended as proof of evidence to have an inventory made so as to avoid future liability for losses and deteriorations.

- Parties to the contract
  - Which persons, though not mentioned in the contact, are allowed to move into the apartment together with the tenant (partner, children etc.)?

A specific legal norm, which persons are allowed to move in an apartment together with the tenant, does not exist in Austria. Apart from any express restriction the tenant may not be prevented from using the dwelling for any purpose which is lawful.

Anyhow, the provisions of the tenancy agreements and responsibilities according to family law (marriage, maintenance for children or other family members, etc.) have to be considered. In case of full- or partial applicability of the MRG, rules indicate that spouses, non-married partners, affinity and collateral relatives in direct line, adoptees and siblings are definitely allowed to move into the apartment together with the tenant, as they also have entry rights into the existing tenancy contract. In the author's opinion, the moving in of these benefitted persons cannot be restricted by any agreement.

- Is the tenant obligated to occupy the dwelling (i.e. to use as tenant's primary home)?

- Is a change of parties legal in the following cases?
  - divorce (and equivalents such as separation of non-married and same sex couples);

A landlord is obliged to enter into a tenancy agreement if a court order in post-divorce trials declares the transfer of the tenancy right to a spouse or a registered same sex partner. The tenancy right in question has to be part of the matrimonial property proceedings after divorce.

  - apartments shared among students (in particular: may a student moving out be replaced without permission of the landlord);

A student moving out of his rented dwelling in Austria may only be replaced by motion of the other students, if a right of representation has been explicitly included into the tenancy agreement.

- death of tenant;

In case the MRG is not applicable to the tenancy agreement, it is not annulled automatically on the death of a lessee, but can be terminated by the landlord and the tenants' heirs at particular dates for giving notice on a usually 4 weeks' notice.

In case the MRG is partially or fully applicable to the tenancy agreement, the tenancy agreement is also not annulled automatically on the death of a lessee. Furthermore it can only be terminated by the landlord if there are no entry rights of thirds into the contract.

The deceased lessee's spouse, registered or unregistered partner, relatives in direct ascending (e.g. parents) or descending lines (e.g. children) or his siblings enter ex lege into a rental contract, if they have been living in the rented dwelling at the time of the tenants' death and have an urgent need of accommodation.

The same provision excludes a succession of the tenancy rights of the deceased tenant to his legitimate heirs. For unregistered partners it is additionally required that they either have moved in together with the deceased tenant or have lived in the rented dwelling for at least the last three years before his death.

All these benefitted persons can declare within 14 days after the death of a tenant, not to enter into the existing tenancy agreement.

- bankruptcy of the landlord;

Foreclosure in general does not change the rights and duties of the tenant at all. If a liquidator has been appointed by court, he or she ex lege enters as landlord into the existing tenancy contract. The provisions about change of ownership according to public auctions apply. Therefore a termination of the tenancy agreement by the (new) landlord is just lawful in limited cases, where the MRG is not applicable and the tenancy agreement has not been registered into the land registry or – if registered - the tenancy agreement ranks subordinate to other incorporated charges (mortgages).

- Subletting: Under what conditions is subletting allowed? How can an abuse of subletting (when the tenant is offered not an ordinary lease contract but only a sublease contract) be counteracted?

In case the MRG is not applicable to the tenancy agreement, defacto the right of subletting of the main tenant without consent of the landlord is often prohibited. A main tenant, though, can sublet his rented dwelling (or parts of it) for any period less than his own term without the consent of the landlord

- in the absence of an agreement restricting his right and

- the subletting is not to the disadvantage of the landlord; this is e.g. indicated in case of an excessive wear and tear of the subrented object by the sub-tenant.

In case the MRG is partially or fully applicable to the tenancy agreement, the landlord not only has to conclude an agreement restricting the tenants right to sublet, but also needs to have an important reason for the prohibition. Important reasons would e.g. be a complete sublease of the rented object; a disproportionally high sub-rent in comparison to the main-rent; if the number of lodgers would exceed the number of available rooms or if there exists a threat that the new sub-tenant would disturb the household community.

- Does the contract bind the new owner in the case of sale of the premises?

The same rules as for main tenancy contracts apply, differentiating between full applicability of the MRG on the one hand and partial- and non applicability on the other side.

- Costs and Utility Charges
  - What is the relevant legal regulation of utilities (i.e. the supply of water, heating and electricity)? Must the landlord or the tenant conclude the contracts for provision of utilities?

If the MRG is non- or partially applicable to the tenancy agreement, it is assumed that the landlord in principle takes all general expenses and public charges into consideration for his calculations of the rent and consequently has to bear all expenses and public charges alone. Without special agreement between the parties, the rent is not divided into main rent, general expenses and public charges.

If the MRG is fully applicable to the tenancy agreement, rent is divided i.a. into main rent, general expenses and public charges. General expenses (“Betriebskosten”) are costs for water supply, official calibration, maintenance and control of measuring devices, e.g. electric or water meter reader, chimney sweep, canal dues, garbage collection and pest control, lights in common parts of the building, e.g. stairwell, floors, house entrance, fire insurance including insurance for demolition costs, third party liability insurance and tap water damage insurance including insurance for damages through corrosion, insurance for other kinds of damages, especially glass breakage or tornado, administration and facility management.

Public charges are taxes on land and buildings („Grundsteuer“) and taxes of the states (“Landesabgaben”), if they may be passed on to the tenant.

Additionally, extraordinary costs (“besondere Aufwendungen”) for common facilities like lifts, central heating, laundry room or green keeping have to be considered.

General expenses, public charges and extraordinary costs and their increase are also subject to prize control by court, so these expenses have to be comparable to local market prices.

Contracts for supply can usually be concluded either by the landlord or the tenant, if they are not connected directly to the whole building. Is this the case, the landlord concludes the contracts.

- Which utilities may be charged from the tenant by the landlord? What is the standard practice? Is it lawful to shift condominium costs, and if yes, which ones, onto the tenant (e.g. housekeeping costs)?

In case the MRG is non- or partially applicable to the tenancy agreement, individual agreements on a different allocation of costs to the disadvantage of the tenant are lawful and standing practice.

In case the MRG is fully applicable to the tenancy agreement, the above-mentioned general expenses, public charges and extraordinary costs are expenses of the landlord, for which he is liable towards third parties. Nevertheless the tenant has usually to bear all the above-numerated expenses. Individual agreements in favour of the tenant are possible, in disfavour unlawful.

- Is the tenant responsible for taxes levied by local municipalities for the provision of public services (e.g. for waste collection or road repair)?

The local municipalities do not levy taxes for the provision of public services (e.g. for waste collection or road repair) directly from the tenant.

- Deposits and additional guarantees

Austrian tenancy law follows the legal concept of deposit as guarantee deposit. The deposit cannot be qualified as an advanced rent payment but can be used to cover loss of rent.

- What is the usual and lawful amount of a deposit?

In case the MRG is non- or partially applicable to the tenancy agreement, the contractual partners are in general free to agree on any amount of a deposit. Legal limits for extraordinarily high deposits only exist with reference to general provisions of private law.

In case the MRG is fully applicable to the tenancy agreement, the Supreme Court has declared in several decisions that the amount of deposit has to be in an adequate relation to the guarantee interests of the landlord, depending i.e. on the property value and the size of the dwelling. An amount of deposit up to 6 months' rents including utilities and taxes is for the Supreme Court acceptable anyhow.

- How does the landlord have to manage the deposit (e.g. special account; interests owed to the tenant)?

In case the MRG is non- or partially applicable to the tenancy agreement, management and allowed uses of the deposit are subject to the individual tenancy contract.

In case the MRG is fully applicable to the tenancy agreement and the deposit has been provided in cash, the landlord is obliged to invest the money on a savings account (bankbook) and inform the tenant notational by request about the investment. Other forms of investments are allowed, if these forms offer at least the same guarantees and interest for the invested money as a saving bank account and a separation of the property of the landlord is possible in case of bankruptcy.

- Are additional guarantees or a personal guarantor usual and lawful?

The MRG only refers to a deposit either paid in cash or in the form of a surrender of a bankbook and interestingly not to the - also legal and defacto quite often used - form of a bank guarantee.

- What kinds of expenses are covered by the guarantee/ the guarantor?

The deposit covers possible future claims of the landlord because of contractually prohibited or illegal use of the rented object (e.g. damages) or breach of contractual duties (e.g. loss of rent) by the tenant.

3. <u>During the tenancy</u>

3.1. <u>Tenant's rights</u>

- Defects and disturbances
  - Which defects and disturbances are legally relevant (e.g. mould and humidity in the dwelling; exposure to noise e.g. from a building site in front of the dwelling; noisy neighbours; occupation by third parties)?

A general definition of "defect" ("Mangel") does not exist in Austrian tenancy law. In a general private law context "defect" signifies a divergence in quality or quantity between actual performance and contractual obligation. The criterion for the assessment is the purpose of the tenancy contract.

A defect according established case law of the Supreme Court also includes any act or default of the landlord that prevents or disturbs the tenant from the use of the dwelling according to the purpose of the contract. This includes cases in which the

landlord does not prevent disturbances by third parties, even though they are not contracting parties of the landlord themselves.

Disturbances by noise can be one disturbance of the use of the dwelling according to the purpose of the contract. The exposure of the house to noise from a building site in front of the house or from neighbours has to be tolerated by the tenant, if the noise does not supersede the volume of noise that is usually expected for people living next to building sites. Also the occupation of the house by third parties such as squatters can be considered as a defect in the legal terms.

  - What are the tenant's remedies against the landlord and/or third parties in such situations (e.g. unilateral rent reduction vs. rent reduction to be allowed by court; damages; "right to cure" = the landlord's right to repair the defect; the tenant first repairs the defect and then claims the costs from the landlord)

The tenant has a right to unilateral rent reduction if the volume of noise is too high. Before reducing the rent, it is recommended to inform the landlord about the existing problems and ask him to take remedy actions.

- Repairs of the dwelling
  - Which kinds of repairs is the landlord obliged to carry out?

In case the MRG is non- or partially applicable to the tenancy agreement, the landlord has to keep the rented dwelling in useable condition. The rented dwelling remains in useable condition if the tenant can use it according to the purpose of the contract and according to accepted standards of use. Without any specific agreement, the landlord has to provide a condition for medium standard of use and the landlord is responsible for all kinds of maintenance works to keep the rented dwelling in useable condition.

The obligation to keep the rented dwelling in useable condition can be lawfully assigned to the tenant, if not general private law principles (bonos moros or laesio enormis) are at stake. The assignment of this obligation to the tenant is also common practice.

In case the MRG is fully applicable to the tenancy agreement, maintenance works ("Erhaltungsarbeiten") and improvement works ("Verbesserungsarbeiten") of the landlord have to be distinguished. The landlord is obliged to carry out maintenance work and may carry out improvement works.

Maintenance works of the landlord are defined as works according to the legal, economic and technical conditions and possibilities that keep the condition of the building, the rented dwelling and the plants serving the common use of the residents of the building unchanged with respect to the local standard and to prevent severe damages of residents of the building. This includes e.g. the maintenance of common parts of the building; the maintenance of dwellings to rent, but only if these works are aimed to remove severe damages of the building or substantial risks to health or alternatively are necessary to handover the dwelling in usable condition; the economically justifiable maintenance of plants serving common use of the residence

e.g. central heating, lift or common laundry room; technical improvements or redesigns due to public law obligations, e.g. connection to water supply or waste water disposal system; economically justifiable technical improvements to reduce energy consumption and the installation of measuring devices, e.g. electric or water meter reader.

Improvement works of the landlord are works that lead to useful improvements of the building or the rented dwelling according to the legal, economic and technical conditions and possibilities and with respect to the general maintenance conditions of the building. Priority has to be given to useful improvements of the building and not of the rented dwelling. Improvement works of the landlord are e.g. new construction or redesign of water, gas, electricity or heating lines and sanitation; new construction or configuration of plants for the common use of the residents like lifts, central laundry room or panic room; technical measures for noise prevention like change of windows, doors, etc.; connection to long-distance heating; initial construction of water intakes or toilets in dwellings and technical redesign of one dwelling.

- Does a tenant have the right to make repairs at his own expense and then deduct the repair costs from the rent payment?

In general, the tenant does not have the right to make repairs at his own expense and then deduct the repair costs from the rent payment.

- Alterations of the dwelling
  - Is the tenant allowed to make other changes to the dwelling?

In case the MRG is non- or partially applicable to the tenancy agreement, the tenant is allowed to make changes or improvements on the dwelling within the limits of the individual tenancy agreement.

In case the MRG is fully applicable to the tenancy agreement, the tenant has the opportunity to make changes (“Veränderungen”) and improvements (“Verbesserungen”) on the dwelling.

For inessential (“unwesentliche”) changes or improvements like putting in new tiles, hanging wallpaper or painting rooms, no consent of the landlord is needed if the changes are small, insignificant and easy to remove. Furthermore, worthy interests of the landlord and the existence or value of the rented object do not have to be interfered.

For essential (“wesentliche”) changes or improvements that exceed the above-mentioned criteria certain requirements have to be fulfilled by the tenant.

The tenant has to inform the landlord about any proposed changes or improvements on the dwelling. If the landlord does not reject the proposed changes or improvements within two months, his consent is assumed. The landlord cannot refuse his consent, if the changes correspond to the respective technological

development; the changes are common and of important interest of the tenant; the perfect workmanship of the changes is guaranteed by the tenant; the tenant bears all costs for the changes; no worthy interests of the landlord or other tenants of the same building are affected by the changes; no damages to the building, especially to its outer appearance, are expected by the changes; the changes are no danger for the security of persons and goods. The above-cited requirements for changes are fulfilled in any case of new construction or changes of water pipes, branch circuits, gas pipes, heating or sanitary plants; changes of the dwelling to reduce energy consumption; changes of the dwelling that are public funded by the municipality ; installation of a telephone connection; installation of antennas or other facilities for radio, television and multimedia services, but only if a connection to an existing installation is not possible or not reasonable (fig. 6 leg. cit.).

The landlord has a right to link his consent to some changes on the dwelling with the condition that any changes have to be rebuilt by the tenant at the time of return of the dwelling.

- In particular, adaptations for disability (e.g. building an elevator, ensuring access for wheelchairs etc.)

In general, the tenant is not entitled to do such adaptations without consent of the landlord.

- Affixing antennas and dishes

The tenant may install antennas or other facilities for radio, television and multimedia services, but only if a connection to an existing installation is not possible or not reasonable

- Repainting and drilling the walls (to hang pictures etc.)

As above mentioned, inessential changes or improvements like putting in new tiles, hanging wallpaper or painting rooms does not need the consent of the landlord, if the changes are small, insignificant and easy to remove.

- Uses of the dwelling

In general, the tenant has the right to use the dwelling ad libitum. This general rule does not apply, if

- a specific use of the dwelling has been prohibited in the tenancy agreement or
- the use of the dwelling compromises rights of third parties such as neighbours or
- the use of the dwelling does damages to the substance of the dwelling.

  - Are the following uses allowed or prohibited?

- keeping domestic animals

In Austria, no special statutory rules exist for the keeping of animals in dwellings. Case law of the Supreme Court rules that the landlord on one hand cannot prohibit the tenant from keeping small animals like goldfish, hamsters or turtles that live in cages, aquariums or terrariums at all, if the above mentioned other criteria are fulfilled. On the other hand, the landlord can prohibit the keeping of middle-sized and large animals like cats and dogs in the tenancy agreement. In case it is laid down in the tenancy agreement that keeping animals needs the consent of the landlord, he cannot disallow the keeping arbitrarily. Keeping dangerous or wild animals like crocodiles, poisonous snakes or lions without explicit consent of the landlord is in any case unlawful.

- producing smells

The tenant cannot produce smells that exceed the local conditions and fundamentally interfere with the local common usage.

- receiving guests over night

The right to receive guests by the tenant can in general not be limited by the landlord.

- fixing pamphlets outside

The right to fix pamphlets depends on the content of the pamphlets and the rules of the house.

- small-scale commercial activity

Commercial uses of dwellings are allowed, if the above cited-criteria for uses of the dwelling are fulfilled.

3.2. Landlord's rights

- Is there any form of rent control (restrictions of the rent a landlord may charge)?

Attention: The author strictly recommends that foreigners who do have questions and quarries about rent control and rent increase in Austria should contact a practicing lawyer specialised in tenancy law or a tenant protection association, as within this brochure the Austrian system of rent regulation can only be presented in a very general and simplified way!

A good balance between freedom of contract and rent control with reference to rent payment does not exist in Austria.

Various different factors are relevant to determine the applicable rules of law for one specific rent agreement ("Mietzinsvereinbarung"), i.a. date of conclusion of the rent agreement; size of the dwelling; standard of the dwelling; owner of the dwelling; number of dwellings within a building; date of construction permit of the building; location within the building (attic) or subsequent separation of one dwelling into several separate units.

The rent is either

- strictly limited by provisions of the MRG, if the MRG is fully applicable or
- unlimited by any provisions of the MRG, if the MRG is partially or non-applicable.

In the latter case rent control is only enforced by general restrictions for contracts in the ABGB, laesio enormis or usury.

In case the MRG is fully applicable to the tenancy agreement, three different system of rent regulations are relevant today (not considering other intertemporal rules):

(i) „Angemessener Mietzins" (adequate rent):

The adequate rent is a normative rent control system that limits free market rents depending on size, type, location, maintenance condition and furniture of a dwelling. In pending court cases first of all a property valuer as court expert evaluates the common rent by comparison of the dwelling to other dwellings of similar kind, type and location. Then surcharges or discharges for maintenance condition and furniture will also be listed by the court expert and the adequate rent will determined by the judge (eventually by exercising discretion).

(ii) „Kategoriemietzins" (category rent):

The „Kategoriemietzins" (category rent) limits free market rents through classification of dwellings according to their equipment level (standard). 4 categories ranging from A (best category) to D (worst category, sub-standard) are relevant:

For each category a maximum monthly rent is fixed per m² and enacted by decree of the ministry of justice; the category rents per m² today[1] are € 3,25 (A), € 2,44 (B), € 1,62 (C) and € 0,81 (D).[2]

(iii) „Richtwertmietzins" (standard value rent):

According to this system of rent control, a standard dwelling ("mietrechtliche Normwohnung") is defined and for this standard premise a certain basic rent per m²

[1] Since 1.8.2011, BGBl. II Nr. 218/2011.

[2] Please note that category D is under certain circumstances even divided into two subcategories of habitable ("brauchbar") and inhabitable ("unbrauchbar").

and month is fixed for each Austrian State separately in bylaws. In Vienna, e.g., this basic rent is currently[3] € 5,16 per m² /month, in Styria € 7,11 per m²/month.

Surcharges and deductions to this basic rent, depending on size, kind, location, maintenance condition and furniture, have to be taken into account.

All three systems of rent control have in common, that for contracts limited in time an additional discharge for this limitation in time of 25% has to be considered, after the maximum legal rent level has been determined.

In case, the landlord is a Limited-profit rental housing association, the rent is based on the cost covering principle and limited by provisions of the WGG and the criteria for subsidies for construction and modernisation of dwellings, which have been in force at the time of application for the subsidies.

- Rent and the implementation of rent increases
    - When is a rent increase legal? In particular:
        - Are there restrictions on how many times the rent may be increased in a certain period?
        - Is there a possible cap or ceiling (fixed by statute or jurisprudence) which determines the maximum rent that may be charged lawfully?

In case the MRG is non- or partially applicable to the tenancy agreement, the parties are usually free to agree on every clause on rent increase. Nevertheless there is no possibility for the landlord to increase the rent one-sidedly, e.g. by taking legal action for an "adequate" increase of rent. The landlord certainly can give notice of termination and make a new agreement with the tenant, if the contract is unlimited in time. If the tenant refuses to consent to the increased rent requested by the landlord, but continues to use the rented dwelling, he is obliged to pay an adequate compensation for use.

In case the MRG is fully applicable to the tenancy agreement, an agreement on rent increase by the parties is only valid within the strict limits of the MRG. This means that the contracting parties are in principle free to agree on any clause of rent increase, but the rent after rent increase is not allowed to exceed the limits for adequate rent, category rent or standard value rent, depending on which system of rent control is applicable to the concrete rented dwelling.

In case, the landlord is a Limited-profit rental housing association, provisions of the WGG and of the Statutes about subsidies for construction and modernisations are relevant and leges specialis, so rent increases are not allowed to outvalue the limits set therein.

    - What is the procedure to be followed for rent increases? To what extent can the tenant object to a rent increase?

[3] Since 1. 4. 2012, BGBl II 2012/82.

The landlord has to inform the tenant about the prospective rent increase beforehand. The tenant can refuse to pay a higher rent, if he thinks that the rent increase is not lawful. Additionally the tenant can file a request to the District court or an arbitrational board for housing – if existing in the municipality - to proof the rent increase.

- Entering the premises and related issues
    - Under what conditions may the landlord enter the premises?

A landlord may enter the premises – as any third party – to obviate a threat of actual danger (like a fire or the burst of water pipe.

Furthermore the landlord is allowed to enter the premises for important reasons. Important reasons e.g. are that the landlord wants to show the rented dwelling to prospective tenants or buyers or that the landlord needs to prepare, supervise or execute necessary maintenance works. Also he can control the actual use of the premise by the tenant, but only in a way that is not chicanery.

    - Is the landlord allowed to keep a set of keys to the rented apartment?

There exist no special rules or court decisions on a possible right of the landlord to keep a set of keys to the rented apartment. As long as the landlord does not actually use the keys, he does not intervene any right of the tenant.

    - Can the landlord legally lock a tenant out of the rented premises, e.g. for not paying rent?

A tenant cannot legally lock a tenant out of the rented premise until the day of eviction.

    - Can the landlord legally take or seize a tenant's personal property in the rented dwelling, in particular in the case of rent arrears?

The landlord has a lien on every moveable property within the rented dwelling, which is property of the tenant and of those relatives who live together with him in the rented dwelling. The lien is to secure not only the payment of the rent, but also the payment of overheads, taxes and other costs and expenses considered as service of the landlord in return for the use of the dwelling. The scope of this right is directed to all movable property including money of the tenant and his relatives which can be subject to distress, i.e. in general everything above the minimum subsistence level (“Existenzminimum”).

To enforce his lien a landlord de facto often files a request for attachment of property - which is similar to a request for an interim order - together with a claim for rent payment and for eviction (“Mietzins- und Räumungsklage”).

4. Ending the tenancy

4.1. Termination by the tenant

- Open ended contract (if existing): under what conditions and in what form may the tenant terminate the tenancy?

Ordinary notice ("ordentliche Kündigung") in Austria means giving notice without reference to any reason for termination. The tenancy ends usually after the period of notice at the date of termination. Extraordinary notice ("außerordentliche Kündigung") signifies giving notice with reference to an important reason. The tenancy usually ends immediately.

Every continuous obligation ("Dauerschuldverhältnis") - whether limited in time or unlimited – can be terminated by extraordinary notice. Important reasons for this extraordinary notice are lost confidence in the other party, frustration of contract or serious impairment of performance.

In case the MRG is not applicable to the tenancy agreement, the tenant must respect the contractual terms for giving notice, if the parties have agreed on period of notice and date of termination in a tenancy agreement unlimited in time. Otherwise the tenant has to comply with the period of notice and date of termination, which are regulated by law. The notice period for dwellings or parts of dwellings is one month, if the rent is paid monthly or within shorter interval. If the rent has to be paid in longer intervals than one month, the notice period for dwellings or parts of dwellings is three months. The date of termination is the last day of the month.

A contract limited in time generally requires no notice to quit at the end of the term. The term simply expires by effluction of time or on the occurrence of an event that is deemed to terminate the tenancy.

In case the MRG is partially or fully applicable to the tenancy agreement, the notice period for the termination of contracts limited in time prior to the agreed term or prior to the agreed prolongation term by the tenant is three months.

- Under what circumstances may a tenant terminate a tenancy before the end of the rental term (e.g. unbearable neighbours; bad state of dwelling; moving for professional reasons)?

In case the MRG is not applicable to the tenancy agreement, the tenant may terminate the agreement before the end of the term for important reasons („aus wichtigem Grund"), if the tenant according to the purpose of the contract cannot use the rented dwelling any more or the dwelling is in unhealthy conditions. Culpability of the landlord for the unusableness or the unhealthy housing conditions is not required. The tenant is not allowed to terminate the agreement if the reason for the unusableness of the dwelling lies within his own sphere.

In case the MRG is partially or fully applicable to the tenancy agreement, the tenant has also a right to terminate the tenancy contract for important reasons. Furthermore the tenant can (ordinary) terminate his contract limited in time, if a minimum period of one year after conclusion of the contract has passed (§ 29 par. 2 MRG). Additionally

the three months period of notice and the date of termination have to be considered; therefore a tenant is at maximum bound to a contract limited in time for 16 months. A tenant can also terminate a tenancy contract limited in time after prolongation of the contract, if a minimum period of one year has passed.

- May the tenant leave before the end of the rental term if he or she finds a suitable replacement tenant?

There are no legal preconditions such as proposing another tenant to the landlord for the termination of a tenancy agreement by the tenant.

4.2. Termination by the landlord

- Open ended contract (if existing): under what conditions and in what form may the landlord terminate the tenancy (= eviction) (e.g. the landlord needs the house for himself or wants to renovate and use it differently in the future)?

In case the MRG is not applicable to the tenancy agreement, the landlord may terminate contracts unlimited in time by ordinary or extraordinary notice. Contracts limited in time may be terminated by extraordinary notice only. Important reasons for the extraordinary notice are the harmful use of the dwelling or arrears of rent.

Individually set limits in the contract to the possibility to give notice are lawful and common.

In case the MRG is partially or fully applicable to the tenancy agreement, the landlord may terminate contracts unlimited and limited in time only by extraordinary notice. Important reasons are again the harmful use the dwelling or arrears of rent and other cases demonstratively listed in the MRG like arrears of rent, after the tenant has been dunned and a period of grace of minimum 8 days has past; failure to perform a service, if a rent payment in the form of performance of service has been agreed; harmful use of the dwelling or illegal conduct or considerable criminal acts that attack the property, morality or integrity of the human body of the landlord or of other tenants; illegal subletting; death of the tenant, if no one enters ex lege into the contract; non-use of the premise as dwelling; adverse use of business premises; personal need for housing of the landlord or of his descendents without requirement to provide the tenant an alternative dwelling; a weight of interests has to be in clear in favour of the landlords/descendents interests; personal need for housing of the landlord or of his ascendents or descendents with requirement to provide the tenant an alternative dwelling; no weight of interest is necessary; the landlord´s employees need for company housing; the need of federal state, state or municipality of using premises for administrative purposes with requirement to provide the tenant an alternative dwelling; termination of subleases by the main tenant, if he needs the dwelling for his own or his relatives living purposes or if the living together with the subtenant is not acceptable any more; an additional important reason for termination has been included into the tenancy agreement in written form; maintenance works are technically impossible or lack of finance with requirement to provide the tenant an alternative dwelling; deconstruction/alteration of the building in the public interest with

requirement to provide the tenant an alternative dwelling and if the tenant of a category D-dwelling refuses improvement works to raise the standard category C.

- Must the landlord resort to court?

The landlord is obliged to file a request of an order of termination by judicial decree ("gerichtliche Aufkündigung") to the District Court even for contracts where the MRG is not applicable.

- Are there any defences available for the tenant against an eviction?

After receiving the court order, the tenant can challenge it within four weeks and then a regular civil process with hearings of both parties and applicability of special procedural norms for tenancy law processes is started. Otherwise the court order will become final and enforceable. At the end of the civil process in first instance, the District court decides in a judgment whether the notice was justified or not.

Against a District Courts` decision the tenant has a right of appeal to the second instance, the Court of Appeal, within four weeks and in limited cases also a right of appeal to the third instance, the Supreme Court.

- Under what circumstances may the landlord terminate a tenancy before the end of the rental term?

In case the MRG is not applicable to the tenancy agreement, contracts unlimited or limited in time may be terminated by the landlord by extraordinary notice. Important reasons for the extraordinary notice are the harmful use of the dwelling or arrears of rent.

In case the MRG is partially or fully applicable to the tenancy agreement, the landlord may – as already mentioned above - terminate contracts unlimited and limited in time only by extraordinary notice.

- Are there any defences available for the tenant in that case?

The tenant can challenge the court order within four weeks and then a regular civil process with hearings of both parties.

- What happens if the tenant does not leave after the regular end of the tenancy or does not hand in (all) the keys of the dwelling?

The eviction of the tenant can be requested by the landlord and the tenant has to pay rent for the additional time he stays within the dwelling.

4.3. Return of the deposit

- Within what timeframe and under what conditions does the landlord have to return the tenant's security deposit?

- What deductions can the landlord make from the security deposit?

In case the MRG is partially or not applicable to the tenancy agreement, the contractual partners are free to agree on any clause for deposits. Allowed uses of the deposit are subject to the individual tenancy contract.

In case the MRG is fully applicable to the tenancy agreement, the landlord may deduct an amount of money from the security deposit for any contractually prohibited or illegal use of the rented object (e.g. damages) or breach of contractual duties by the tenant.

  - In the case of a furnished dwelling: may the landlord make a deduction for damages due to the ordinary use of furniture?

The landlord is not allowed to make any deduction for damages due to the ordinary use of furniture.

4.4. Adjudicating a dispute

- In what forum are tenancy cases typically adjudicated?
  - Are there specialized courts for adjudication of tenancy disputes?

In proceedings which have as object rights in rem, in immovable property or tenancies of immovable property, the ordinary court - so called “Bezirksgericht” (District Court) - has generally exclusive jurisdiction rationae materiae. Rationae loci, one of currently 128 District Courts in which the immovable property or dwelling is located, enforces tenancy law regardless of the actual domicile of the landlord or tenant.

Against a District Courts` decision a party has a right of appeal to the second instance, one of currently4 16 “Landesgerichte” (Courts of Appeals) and in limited cases, also a right of appeal to the third instance, the Supreme Court.

  - Is an accelerated form of procedure used for the adjudication of tenancy cases?

Yes.

  - Is conciliation, mediation or some other form of alternative dispute resolution available or even compulsory?

In some municipalities like Vienna, Graz or Salzburg, “Schlichtungsstellen” (arbitrational boards for housing) are authorized to settle specific tenancy law cases in first instance. In many cases a claim to an ordinary court in pending cases before the arbitrational board is only lawful, if a minimum period of three months has passed by. The decisions of the arbitrational boards are binding and no appeal against their decisions is possible. However, a delegation of competence of decision to the District

[4] 1.7.2013 (Quelle)

Court is possible for any party within 4 weeks after notification of the boards' decision.

5. Additional information

- How does a prospective tenant proceed in order to get social or subsidized housing (e.g. dwellings offered by housing associations, municipalities, public bodies etc.) or housing allowances?

Most municipalities or non-profit municipal bodies allocate their dwellings using waiting lists and specific point systems for applicants. Apart from the date of application, actual living conditions of the applicants, number of people living together in one household, and age of the applicants (e.g. young family, elderly persons) and income are taken into account. Furthermore priority allocation e.g. for criminal victims, evicted citizens with urgent need for allocation and for handicapped people exist.

Limited-Profit housing associations usually allocate their dwellings – if organized as cooperatives - to their members and use waiting lists of applicants. Often municipal authorities also have a right of allocation of citizens into dwellings of Limited-Profit housing associations as well.

- Is any kind of insurance recommendable to a tenant?

Most tenants are obliged by tenancy agreement to conclude a household insurance ("Haushaltsversicherung") for damages in relation to the interior parts of their rented dwellings and often are also obliged to proof the conclusion of these insurances at the time of the beginning of their tenancy agreements through presentation of a valid insurance policy to the landlord.

- Are legal aid services available in the area of tenancy law?

In procedures in front of arbitrational boards, no legal fees are charged at all and so only costs for own legal representation by a lawyer can occur. In trials before the regular civil courts, the legal fees and costs differ significantly between the various procedures, but tenant and/or landlords always can apply for legal aid ("Verfahrenshilfe"), if they are not able to pay the legal fees or costs for their representation without endangering their existence.

Additionally District courts offer so called "Amtstage" ("Office days") once per week where legal council is provided by young lawyers ("Rechtspraktikanten") under supervision of a judge. At these occasions, citizens also have the possibility to file requests for legal aid or can even file a lawsuit against another party orally. The Austrian bar association offers a service of so called "first legal council by a registered lawyer" free of charge once per week.

- To which organizations, institutions etc. may a tenant turn to have his/her rights protected?

The author recommends tenants to contact the Austrian bar association, the "Österreichische Rechtsanwaltskammer" (http://www.rechtsanwaelte.at/) of the State where they life and ask for attorneys specialised in tenancy law.

1) Burgenland

Rechtsanwaltskammer Burgenland / Bar Association of Burgenland

Marktstraße 3, 7000 Eisenstadt
Tel.: +43 (0) 26 82/70 45 30
Fax: +43 (0) 26 82/70 45 31
e-mail: rak.bgld@aon.at

2) Kärnten / Carinthia

Rechtsanwaltskammer Kärnten / Bar Association of Carinthia

Theatergasse 4/I, 9020 Klagenfurt
Tel.: +43 (0) 4 63/51 24 25
Fax: +43 (0) 63/51 24 25-15
e-mail: kammer@rechtsanwaelte-kaernten.at
Internet: http://www.rechtsanwaelte-kaernten.at

3) Niederösterreich / Lower Austria

Rechtsanwaltskammer Niederösterreich / Bar Association of / Lower Austria

Andreas-Hofer-Straße 6, 3100 St. Pölten
Tel.: +43 (0) 27 42/71 6 50-0
Fax: +43 (0) 27 42/76 5 88
e-mail: office@raknoe.at
Internet: http://www.raknoe.at

4) Oberösterreich / Upper Austria

Rechtsanwaltskammer Oberösterreich / Bar Association of Upper Austria

Gruberstraße 21, 4020 Linz
Tel.: +43 (0) 7 32/77 17 30
Fax: +43 (0) 7 32/77 17 30 85
e-mail: office@ooerak.or.at
Internet: http://www.ooerak.at/

5) Salzburg

Rechtsanwaltskammer Salzburg / Bar Association of Salzburg

Imbergstraße 31C, 5020 Salzburg
Tel.: +43 (0) 6 62/64 00 42
Fax: +43 (0) 6 62/64 04 28
e-mail: info@srak.at
Internet: http://www.srak.at

6) Steiermark / Styria

Rechtsanwaltskammer Steiermark / Bar Association of Styria

Salzamtsgasse 3/IV, 8010 Graz
Tel: +43 (0) 3 16/83 02 90-0
Fax: +43 (0) 3 16/82 97 30
e-mail: office@rakstmk.at
Internet: http://www.rakstmk.at

7) Tirol / Tyrol

Rechtsanwaltskammer Tirol / Bar Association of Tyrol

Meraner Straße 3/III, 6020 Innsbruck
Tel.: +43 (0) 5 12/58 70 67,
Fax: +43 (0) 5 12/57 13 84
e-mail: office@tiroler-rak.at
Internet: http://www.tiroler-rak.at

8) Vorarlberg

Rechtsanwaltskammer Vorarlberg / Bar Association of Vorarlberg

Marktplatz 11, 6800 Feldkirch
Tel.: +43 (0) 55 22/71 1 22
Fax: +43 (0) 55 22/71 1 22-11
e-mail: kammer@rechtsanwaelte-vorarlberg.at
Internet: www.rechtsanwaelte-vorarlberg.at

9) Wien / Vienna

Rechtsanwaltskammer Wien / Bar Association of Vienna

Ertlgasse 2/Ecke Rotenturmstraße, 1010 Wien
Tel. +43 (0) 1/533 27 18-0
Fax: +43 (0) 1/533 27 18-44
e-mail: kanzlei@rakwien.at
Internet: http://www.rakwien.at

Further general information in English language about tenancy law as well as an updated list of other housing authorities and advisory boards can be found online at https://www.help.gv.at/