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National Report for AUSTRIA

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National Report for AUSTRIA
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Notes:

With the aim of ensuring optimum readability, persons are referred to only with their male forms in this text. Of course, all statements equally refer to female persons as well.

Due to the chapter structure which was predefined by the project leaders, some items appear in similar form in several chapters.

Bremen, September 2015

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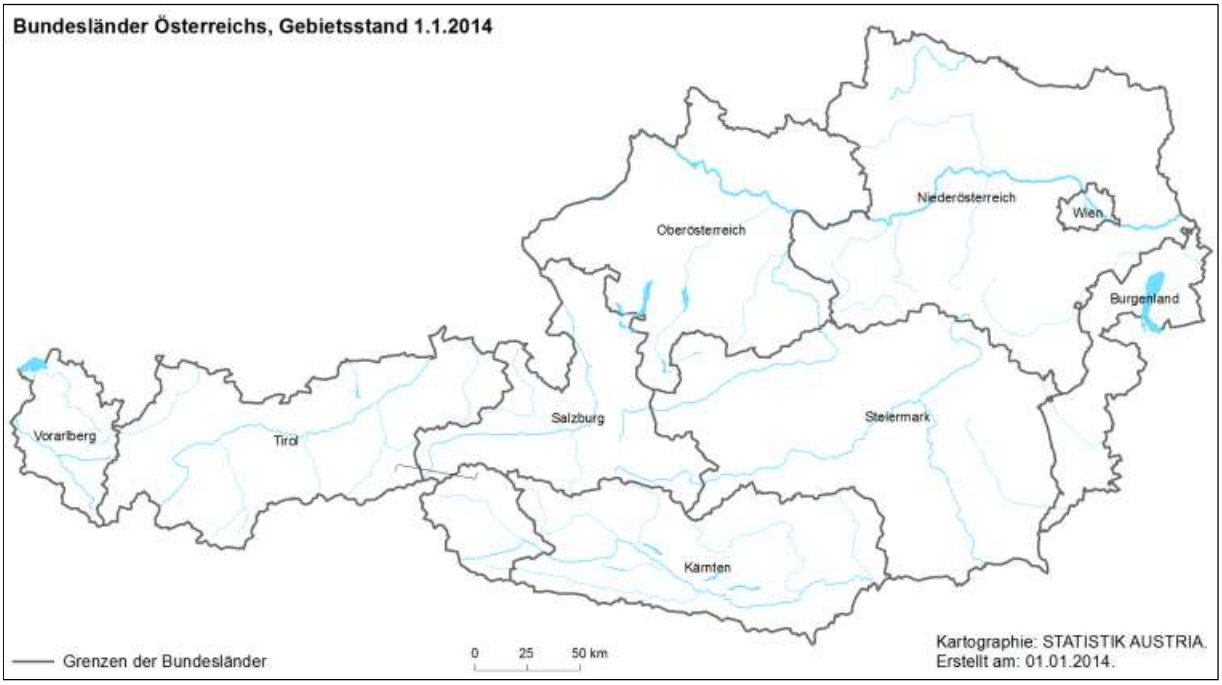
1. Current housing situation

1.1 General features

The Republic of Austria is composed of one federal state ("Bund") and nine regions ("Länder") called "Burgenland", Carinthia ("Kärnten"), Lower Austria ("Niederösterreich"), Upper Austria ("Oberösterreich"), "Salzburg", Styria ("Steiermark"), Tyrol ("Tirol"), "Vorarlberg" and Vienna ("Wien"), see fig. 1.

Fig. 1: Republic of Austria, political structure[3]



Source: Statistics Austria, 2014.

According to the last census in 2011, the population living in the present area of Austria has risen from about 4.5 million in 1869 to 8.4 million inhabitants.[4] Since 1991 the population of Austria has increased by 600,000 people or 7.6 % of the population, significantly in Tyrol (+ 12 %), Vorarlberg (+ 11.4 %), Vienna (+ 11.3 %), Salzburg (+ 9.5 %) and Lower Austria (+ 9.4 %), see tab. 1.

[3] Statistics Austria, <http://www.statistik.at/web_de/klassifikationen/regionale_gliederungen/bundeslaender/index.html>, 10 October 2014.

[4] 8,401,940 inhabitants on 31 October 2011 (census cutoff date); Statistics Austria, 'Registerbasierte Statistiken Demographie (RS), Schnellbericht 10.7', <www.statistik.at/web_de/Redirect/index.htm?dDocName =071439>, 29 October 2014.

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Tab. 1: Population 1869 to 2011[5]

Year of Census	Austria	Burgen-land	Carin-thia	Lower Austria	Upper Austria	Salz-burg	Styria	Tyrol	Vor-arlberg	Vienna
Total population										
1869 (31.12.)	4,497,000	254,301	315,397	1,077,232	736,856	153,159	720,809	236,426	102,702	900,998
1880 (31.12.)	4,963,528	270,090	324,857	1,152,767	760,091	163,570	777,453	244,736	107,373	1,162,591
1890 (31.12)	5,417,360	282,225	337,013	1,213,471	786,496	173,510	828,375	249,984	116,073	1,1430,213
1900 (31.12)	6,003,845	292,426	343,531	1,310,506	810,854	192,763	889,017	266,374	129,237	1,769,137
1910 (31.12)	6,648,310	292,007	371,372	1,425,238	853,595	214,737	957,610	304,713	145,408	2,083,630
1923 (7.3.)	6,534,742	285,698	371,227	1,426,885	876,698	222,831	978,816	313,888	139,979	1,918,720
1934 (22.3)	6,760,044	299,447	405,129	1,446,675	902,965	245,801	1,014,920	349,098	144,402	1,935,881
1939 (17.5.)	6,652,567	287,866	416,268	1,455,373	927,583	257,226	1,015,054	363,959	158,300	1,770,938
1951 (1.6.)	6,933,905	276,136	474,764	1,400,471	1,108,720	327,232	1,109,335	427,465	193,657	1,616,125
1961 (21.3.)	7,073,807	271,001	495,226	1,374,012	1,131,623	347,292	1,137,865	462,899	226,323	1,627,566
1971 (12.5.)	7,491,526	272,319	526,759	1,420,816	1,229,972	405,115	1,195,023	544,483	277,154	1,619,885
1981 (12.5.)	7,555,338	269,771	536,179	1,427,849	1,269,540	442,301	1,186,525	586,663	305,164	1,531,346
1991 (15.5.)	7,795,786	270,880	547,798	1,473,813	1,333,480	482,365	1,184,720	631,410	331,472	1,539,848
2001 (15.5.)	8,032,857	277,558	559,346	1,545,794	1,376,607	515,454	1,183,246	673,543	351,048	1,550,261
2011 (31.10.)	**8,401,940**	**285,685**	**556,173**	**1,614,693**	**1,413,762**	**529,066**	**1,208,575**	**709,319**	**370,040**	**1,714,227**
Change of population in %										
1869 – 1880	10.4	6.2	3.0	7.0	3.2	6.8	7.9	3.5	4.5	29.0
1880 – 1890	9.1	4.5	3.7	5.3	3.5	6.1	6.5	2.1	8.1	23.0
1890 – 1900	10.8	3.6	1.9	8.0	3.1	11.1	7.3	6.6	11.3	23.7

[5] Ger. „Volkszählungsjahr“ = eng. year of census; ger. „Bevölkerung absolute“ = eng. total population; Ger. „Veränderung der Bevölkerung in Prozent“ = eng. change of population in percent; Statistics Austria, ‘Ergebnisse im Überblick: Bevölkerung Österreichs seit 1869 nach Bundesländern’, <http://www.statistik.at/web_de/statistiken/bevoelkerung/volkszaehlungen_registerzaehlungen/bevoelkerungsstand/index.html>, 1 June 2013.

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1900 – 1910	10.7	-0.1	8.1	8.8	5.3	11.4	7.7	14.4	12.5	17.8
1910 – 1923	-1.7	-2.2	0.0	0.1	2.7	3.8	2.2	3.0	-3.7	-7.9
1923 – 1934	3.4	4.8	9.1	1.4	3.0	10.3	3.7	11.2	11.0	0.9
1934 – 1939	-1.6	-3.9	2.7	0.6	2.7	4.6	0.0	4.3	1.9	-8.5
1939 – 1951	4.2	-4.1	14.1	-3.8	19.5	27.2	9.3	17.4	22.3	-8.7
1951 – 1961	2.0	-1.9	4.3	-1.9	2.1	6.1	2.6	8.3	16.9	0.7
1961 – 1971	5.9	0.5	6.4	3.4	8.7	16.6	5.0	17.6	22.5	-0.5
1971 – 1981	0.9	-0.9	1.8	0.5	3.2	9.2	-0.7	7.7	10.1	-5.5
1981 – 1991	3.2	0.4	2.2	3.2	5.0	9.1	-0.2	7.6	8.6	0.6
1991 – 2001	3.0	2.5	2.1	4.9	3.2	6.9	-0.1	6.7	5.9	0.7
2001 – 2011	**4.6**	**2.9**	**-0.6**	**4.5**	**2.7**	**2.6**	**2.1**	**5.3**	**5.5**	**10.6**

Source: Statistics Austria, 2013.

The stock of buildings increased from around 560,000 in 1869 to more than 2.19 million units in 2011, and the total stock of dwellings rose from about 900,000 units in 1869 to more than 4.44 million units in 2011 - with altogether 3.65 million households living in their own homes.[6] The stock of dwellings (used as main residences) increased from 2.43 million in 1971 to 3.65 million in 2011.[7] For the developments since 1951 see **tab. 2 - tab. 4** and **fig. 2** below.

Tab. 2: Stock of buildings 1951 to 2011 by Länder[8]

Region	1951	1961	1971	1981	1991	2001	2011
Burgenland	58,504	66,617	76,978	93,413	103,529	114,403	123,109
Carinthia	69,767	84,795	105,024	126,574	143,929	162,075	172,465
Lower Austria	259,037	293,843	355,398	437,075	494,198	553,604	591,433
Upper Austria	150,518	180,788	222,548	69,652	307,850	352,326	383,429

[6] Statistics Austria, 'Statistisches Jahrbuch 2013', (2013), 281.

[7] Statistics Austria, <http://www.statistik.at/web_de/wcmsprod/groups/b/documents/webobj/074183.gif>, 1 March 2014. The stock of dwellings can be divided in main residences, parttime residences and residences without official registration of inhabitants.

[8] Ger. "Bundesland" = eng. state; <http://www.statistik.at/web_de/static/ergebnisse_im_ueberblick_gebaeude-_und_wohnungsbestand_1951_bis_2011_nach__022979.pdf>, 1 March 2014.

Salzburg	44,683	55,867	69,516	87,259	102,691	119,818	129,233
Styria	150,087	176,329	213,121	257,046	288,802	325,822	350,651
Tyrol	58,193	72,000	91,332	116,874	138,537	161,261	177,745
Vorarlberg	32,293	40,680	50,988	64,627	75,831	89,236	98,469
Vienna	72,948	79,034	96,209	134,321	153,693	168,167	164,746
Austria	**896,030**	**1,049,953**	**1,281,114**	**1,586,841**	**1,809,060**	**2,046,712**	**2,191,280**

Source: Statistics Austria, 2013.

Tab. 3: Stock of dwellings[9] 1951 to 2011 by Länder[10]

Region	1951	1961	1971	1981	1991	2001	2011
Burgenland	72,592	76,205	85,195	99,956	110,920	126,269	147,376
Carinthia	127,224	127,281	160,698	189,603	223,267	260,541	301,096
Lower Austria	443,733	450,735	515,945	591,164	648,471	738,235	852,574
Upper Austria	312,315	324,923	383,483	451,122	513,150	604,299	699,956
Salzburg	96,452	96,384	129,693	168,971	200,860	238,480	282,847
Styria	304,824	318,270	372,028	425,076	469,527	532,470	616,801
Tyrol	113,650	121,072	160,196	203,761	249,774	303,632	375,583
Vorarlberg	52,986	58,034	77,292	101,209	124,211	148,591	181,335
Vienna	614,225	675,774	781,518	821,174	853,091	910,745	983,840
Austria	**2,138,001**	**2,249,678**	**2,666,048**	**3,052,036**	**3,393,271**	**3,863,262**	**4,441,408**

Source: Statistics Austria, 2013.

[9] As used herein, “dwelling” includes all apartments for living purposes including secondary homes and vacation homes.

[10] Ger. “Bundesland“ = eng. state; Statistics Austria, ‘Gebäude- und Wohnungsbestand 1951 bis 2011 nach Bundesländern‘, <http://www.statistik.at/web_de/static/ergebnisse_im_ueberblick__gebaeude-_und_wohnungsbestand_1951_bis_2011_nach__022979.pdf>, 1 March 2014.

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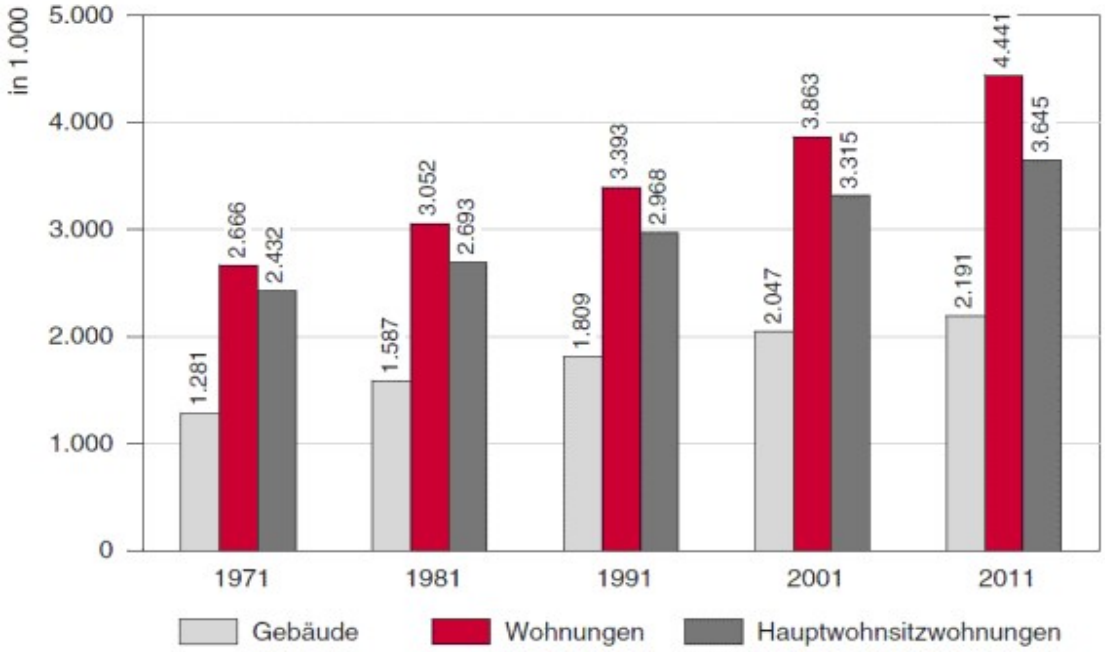
Tab. 4: Stock of dwellings (main residences) 1971 to 2011[11]

	1971	1981	1991	2001	2011
Austria	**2,432,000**	**2,693,000**	**2,968,000**	**3,315,000**	**3,645,000**

Source: Statistics Austria, 2013.

Fig. 2: Development of number of buildings, dwellings and dwellings (main residences) 1971 to 2011[12]



Source: Statistics Austria, 2013.

[11] Statistics Austria, 'Registerzählung 2011' <http://www.statistik.at/web_de/wcmsprod/groups/b/documents/webobj/074183.gif>, 1 March 2014.

[12] Ger. "Gebäude" = eng. buildings, ger. "Wohnungen" = eng. dwellings, ger. "Hauptwohnsitzwohnungen" = eng. dwellings (main residences); Statistics Austria, 'Registerzählung 2011' <http://www.statistik.at/web_de/wcmsprod /groups/b/documents/webobj/074183.gif>, 1 March 2014.

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1.2. Historical evolution of the national housing situation and housing policy

- ***Please describe the historic evolution of the national housing situation and housing policies briefly.***

Until recent decades, especially in the period after World War II to the 1970s, the priorities, structures and systems of Austrian housing and funding policy developed largely in parallel to those in many other European countries. The focus of post-World War II housing policy was to reconstruct destroyed buildings and supply residential housing by providing object-related subsidies directly by the state.[13]

Whereas in many states of the EU starting in the 1980s housing policy began a fundamental change towards a more liberal, market-orientated model, such a basic change did not happen in Austria.[14] *Stöger*[15] points out four significant similar trends in many European states beginning in the 1980s:

1. The focus of housing policy changed from object-related subsidies ("Objektförderungen") to subject-related subsidies ("Subjektförderungen") and direct or indirect promotion of home ownership. Furthermore, the total funding volume for housing has been reduced by many states.
2. Dwellings built and owned by the state, by public enterprises or by legal entities working on a non-profit or limited-profit basis often have been sold to with profit orientated private investors or sitting tenants by the introduction of a right to buy (e.g. in UK).
3. A deregulation of rent limits took place to allow for-profit orientated private investors to actually make profit from their investments.
4. A decentralization of competences for housing policy from the federal state level to regions or municipalities occured.

In contrast to the above mentioned trends, Austrian housing policy was and still is dominated by the aim to provide adequate living space for households with low or middle income through housing policy focused on object-related subsidies and by close cooperation of the state with limited-profit housing associations ("gemeinnützige Bauvereinigungen" or abbr. LPHA, which will be explained in detail below). Also, a significant privatization of public-owned dwellings to for-profit investors[16] or a

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[13] Oberhuber & Schuster, 'Wohnbauförderung als Instrument zur Sicherung des Wohnstandortes Österreich – Kurzfassung', <http://www.bmwfj.gv.at/ Wirtschaftspolitik/Wohnungspolitik/Documents/Wohnstandort%20%C3%96sterreich%20Kurzfassung.pdf>, (2012), 8, 1 June 2013.

[14] Oberhuber & Schuster, 'Wohnbauförderung als Instrument zur Sicherung des Wohnstandortes Österreich – Kurzfassung' (2012), 8.

[15] Stöger, 'Das System des österreichischen sozialen Wohnungswesens im Europäischen Vergleich' in *Die Österreichische Wohnungsgemeinnützigkeit als Europäisches Erfolgsmodell*, ed. Lugger & Holoubek, (Wien: Manz, 2008), 32 et seq.

[16] Nevertheless in 2000 the federal governmentdecided to sell five state-owned limited-profit housing associacions ("BUWOG", "ESG Villach", "WAG Wohnungsanlagen GmbH", "Wohnen und Bauen GmbH" and "EBS Wohnungsgesellschaft mbH Linz") with a total of 62,265 dwellings to for-profit investors; see

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deregulation of rent limits has not occured so far.[17] The Austrian system of housing has provided relatively stable and affordable housing conditions and has not experienced a major boom or significant rise in home ownership.[18]

- ***In particular: Please describe briefly the evolution of the principal types of housing tenures from the 1990s on. Explain the growth and decline of the different tenures and the reasons why that happened (e.g. privatization or other policies).***

In Austria, a stable structure of the dwelling stock (main residences) exists regardless of the legal basis of the tenure.[19] Although the total dwelling stock increased from 2,693,000 units in 1981 to 3,678,000 units in 2012, the percentage for homeownership and ownership of dwellings in condominiums on the one hand and the percentage for rental tenures or tenures on other legal grounds (inkl. sub-rental) on the other hand remained almost 50 % each (see **tab. 5**).

Tab. 5: Dwellings (main residence) by legal grounds 1981 – 2012[20]

	1981	**%**	**1991**	**%**	**2001**	**%**	**2012**	**%**
Owners of single family houses	1,053,000	39	1,174,000	40	1,269,000	38	1,449,000	39
Owners of dwellings in condominiums	226,000	8	310,000	10	357,000	11	379,000	10
Principal tenants	1,145,000	43	1,150,000	39	1,336,000	40	1,477,000	40
Sub –tenants / other legal grounds	268,000	10	333,000	11	354,000	11	373,000	10
Total	**2,693,000**		**2,968,000**		**354,000**		**3,678,000**	

Source: Lugger & Amann, 2013.

Mundt, 'Privatisierungen von gebundenem sozialen Wohnraum' in *Die Österreichische Wohnungs-gemeinnützigkeit als Europäisches Erfolgsmodell*, ed. Lugger & Holoubek (Wien: Manz, 2008), 342 et seq.

[17] Stöger, 'Das System des österreichischen sozialen Wohnungswesens im Europäischen Vergleich' in *Die Österreichische Wohnungsgemeinnützigkeit als Europäisches Erfolgsmodell*, ed. Lugger & Holoubek, (Wien: Manz, 2008), 34 et seq.

[18] Lawson, 'Secure occupancy in rental housing: A comparative analysis – Country case study: Austria' (2011), 1.

[19] Lugger & Amann, *Österreichisches Wohnhandbuch 2013* (Innsbruck: Studien Verlag, 2013), 24.

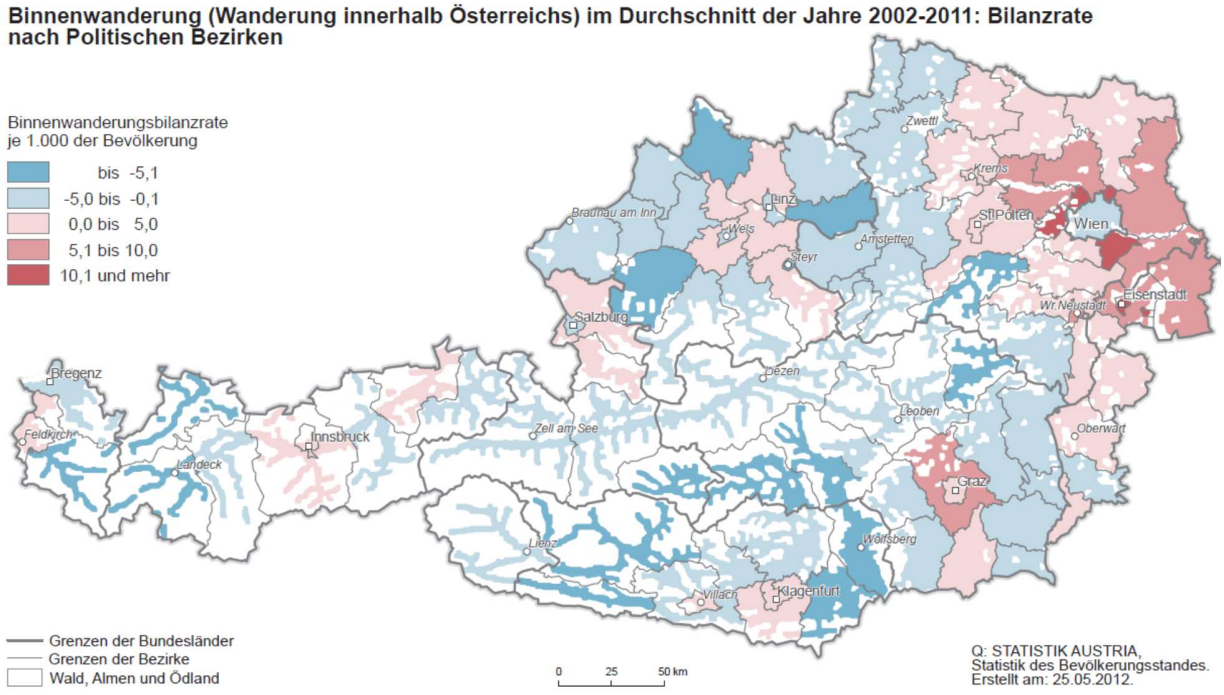
[20] Lugger & Amann, *Österreichisches Wohnhandbuch 2013* (Innsbruck: Studien Verlag, 2013), 24.

- ***In particular: What is the role of migration within the country, immigration or emigration from/towards other countries inside and outside the EU (including war migration as in Ex-Yugoslavia)?***

Migration within the country:

Migration trends between 2002 and 2011 within Austria show that a significant number of people moved to major cities and their surroundings, especially the metropolitan region of Vienna (see **fig. 3**).

Fig. 3: Internal migration (political districts) 2002-2011[21]



Source: Statistics Austria, 2012.

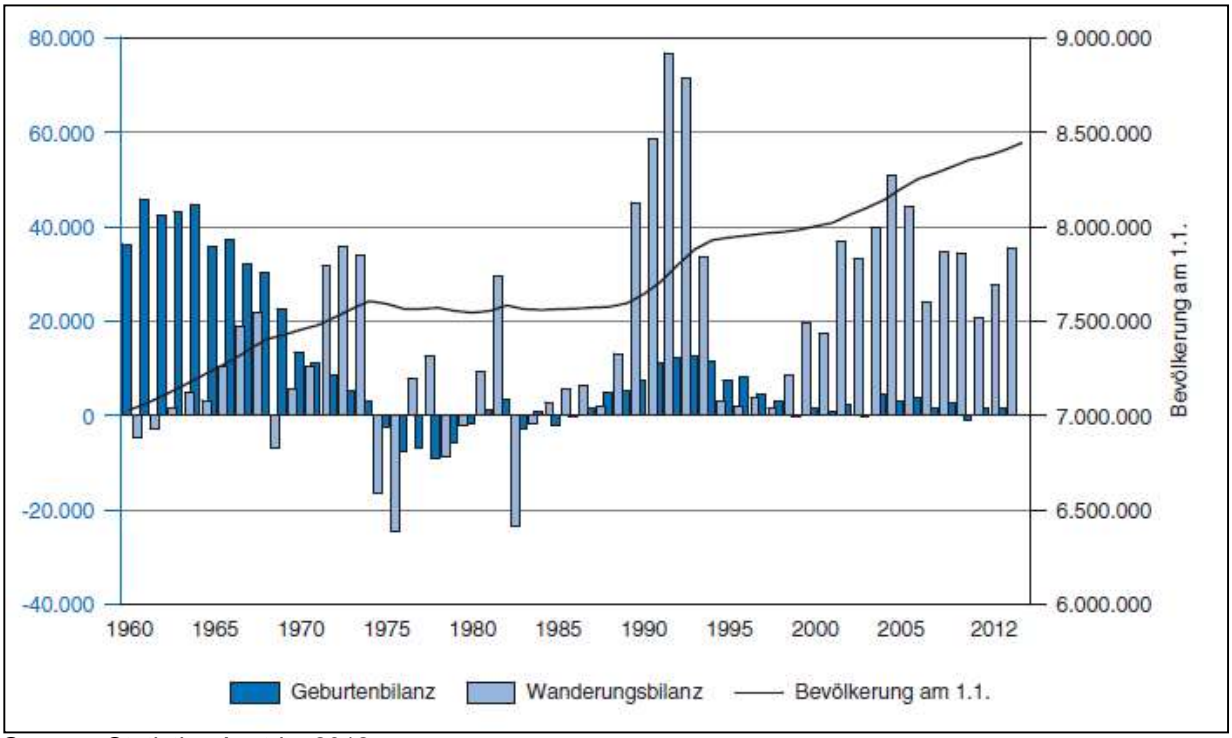
Immigration/emigration from/towards other countries:

In 1961 only about 100,000 foreign nationals lived in Austria, which represented 1.4 % of the total population. In the late 1960s and beginning of the 1970s, immigration of foreign nationals increased significantly due to the active recruitment of labour migrants by the Austrian government in Turkey and former Yugoslavia. In 1974 around 311,700 foreign nationals lived in Austria, which represented 4.1 % of the total population and a

[21] Ger. "Binnenwanderungsbilanzrate je 1.000 der Bevölkerung" = result of migration within the country per 1,000 inhabitants; online available at https://www.statistik.at/web_de/statistiken/bevoelkerung/wanderungen/wanderungen_innerhalb_oesterreichs_binnenwanderungen/index.html.

temporary peak of the immigration level was reached. After a period of stagnation in the late 1970s and 1980s, immigration again strongly increased, and foreign-born inhabitants reached a volume of over 8 % of the total population at the beginning of the 1990s, also as a consequence of immigration by refugees of the Yugoslav Wars. Due to stricter immigration laws in 1993, immigration temporarily slowed down until 1998, when immigration laws, especially with regard to reuniting of families, were changed again. Interestingly, no significant immigration increase happened as a direct effect of the EU membership of Austria in 1995, when suddenly the same rules for residence and employment for EU-citizens came into effect. However, this situation has changed since the beginning of the 2000s, and Austria has again become a favourable destination for immigrants. In 2008 the total amount of immigrants living in Austria reached 10 % of the total amount of the population (see fig. 4 below.)[22]

Fig. 4: Population development by components 1960-2012[23]



Source: Statistics Austria, 2012.

In 2013[24] altogether 1,004,268 foreign citizens were living in Austria representing 11.9 % of the total population. 416,022 people were citizens of the EU, of which 217,776 were

[22] Statistics Austria, <https://www.statistik.at/web_de/statistiken/bevoelkerung/bevoelkerungsstruktur/bevoelkerung_nach_staatsangehoerigkeit_geburtsland/index.html>, 8 October 2013.

[23] Ger. "Geburtenbilanz" = eng. birth rate; ger. „Wanderungsbilanz" = migration rate; ger. „Bevölkerung am 1.1." = eng. inhabitants as of 1.1; Statistics Austria, 'Bevölkerungsstand 1.1.2012', (2012), 14, online available at https://www.statistik.at/web_de/statistiken/bevoelkerung/volkszaehlungen_registerzaehlungen/bevoelkerungsstand/index.html, 8 October 2013.

people from the 14 EU member states joining the EU before 2004 ("old" member states), 130,841 were people from the 10 countries joining the EU in 2004 and 67,405 were people from Bulgaria and Romania. Furthermore 298,096 were citizens of former Yugoslavia (without Slovenia), and 113,670 were from Turkey.[25]

1.3 Current situation

- ***Give an overview of the current situation.***

- ***In particular: What is the number of dwellings? How many of them are rented vs. owner-occupied? What would be the normal tenure structure (see summary table 1)? What is the most recent year of information on this?***

In 2013, according to the Austrian micro-census[26], the number of dwellings (main residences) in Austria reached 3,705,100 units. Of these, 1,444,100 units (39 % of the total stock) were occupied by owners of single-family houses, 409,200 units (11 %) were possessed by owners of a dwelling in condominiums, 1,494,000 units (40.3 %) units were rented to principal tenants, 45,900 units (1.2 %) were rented to sub-tenants, and 311,900 units (8.4 %) were occupied on other legal grounds (use of dwellings based on family relations, etc.); see tab. 6.[27]

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[24] As of 1.1.2013.

[25] Considering other criteria, 1,364,711 foreign-born people (2013), representing 16.1 % of the total population, and 1,578,900 people with migration background (2012), representing 18.9 % of the total population were living in Austria; see Statistics Austria, 'Migration & Integration Zahlen.Daten.Indikatoren 2013', (2013), 9; online available at http://www.statistik.at/web_de/services/publikationen/2/index.html, 8 October 2013.

[26] Statistics Austria, 'Wohnen 2012' (2013), 49; Please note that the results presented are based on the Austrian micro-census 2012, a household survey which comprises a housing survey in addition to a labour force survey. Since 2004 it is a continuous survey, covering each week of the year. Data on housing costs are collected on a monthly basis. The sample size is about 22,000 households per quarter. Participation is obligatory by law.

[27] Statistics Austria, 'Wohnen 2012' (2013), 49; Please note that the results presented are based on the Austrian micro-census 2012, a household survey which comprises a housing survey in addition to a labour force survey. Since 2004 it is a continuous survey, covering each week of the year. Data on housing costs are collected on a monthly basis. The sample size is about 22,000 households per quarter. Participation is obligatory by law.

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Tab. 6: Dwellings (main residence) by legal grounds[28]

Type of Tenure	Austria	Burgen-land	Carin-thia	Lower Austria	Upper Austria	Salz-burg	Styria	Tyrol	Vor-arlberg	Vienna
Dwellings (main residence) 2013										
Total (in 1,000)	3,705.1	115.3	242.9	682.6	598.6	229.3	512.2	297.5	155.8	870.9
in %										
Homeowners (single-family houses)	39.0	74.0	48.9	56.8	45.5	39.4	48.4	41.3	45.0	5.7
Relatives of homeowners (single-family houses)	5.2	4.2	5.6	7.4	8.8	5.6	4.7	5.7	4.0	1.4
Home owners of dwellings in condominiums	11.0	2.1	7.7	7.7	7.9	15.6	13.0	16.6	15.8	12.9
Principal tenant	40.3	16.9	33.1	24.2	32.8	33.6	29.8	31.1	30.5	76.1
Sub-tenant	1.2	1.4	0.2	1.0	1.4	0.6	1.2	1.0	0.7	2.0
Others	3.2	1.4	4.4	2.9	3.7	5.2	2.9	4.4	4.0	2.0

Source: Statistics Austria, Microcensus 2014.

1.4 Types of housing tenures

In Austria, the following important types of housing tenures exist:[29]

- Homeownership:

  (i) Ownership of single-family houses.

  (ii) Ownership of dwellings in condominiums ("Wohnungeigentum").

- Rental tenures:

  (i) Private rental housing in dwellings owned by private landlords;

[28] Ger. „Hauseigentümer" = eng. homeowners; ger. "Wohnungseigentümer" = eng. owners of dwellings in condominiums; ger. "Hauptmieter" = eng. main tenant; ger. „Untermieter" = eng. subtenant; ger. "sonstige Rechtsverhältnisse" = eng. use of dwellings on other legal grounds; <http://www.statistik.at/web_de/statistiken/wohnen_und_gebaeude/bestand_an_gebaeuden_und_wohnungen/hauptwohnsitz-wohnungen/index.html>, 1 March 2014.

[29] Similar to a classification by Deutsch & Lawson, 'International measures to channel investments towards affordable rental housing: Austrian case study', (2012), 6 et seq.

(ii) Limited-profit rental housing in dwellings owned by limited profit housing associations (“gemeinnützige Bauvereinigungen”);

(iii) Municipal rental housing in dwellings owned by municipalities or non-profit municipal bodies (“Gemeindewohnungen”).

Apart from the above mentioned types of housing tenures, other forms of lawful possession of premises for housing purposes are of secondary relevance:

loan (“Leihe”), precariat (“Prekarium“), obligatory right of housing (“obligatorisches Wohnrecht”), right of housing in rem (“dingliches Wohnrecht”), usus fructus (“Wohnungsfruchtgenussrecht”), and life tenancy or life annuity (“Ausgedinge” or “Leibrente”). Furthermore the use of dwellings based on company housing agreements (“Dienst-, Werks- oder Naturalwohnungen”), family ties, property leasing, and time-sharing are other existing forms of lawful possession of premises in Austria.[30]

- ***Describe the various types of housing tenures.***
- ***Home ownership***
- ***How is the financing for the building of homes typically arranged (e.g. own equity, mortgage based loan, personal loan, mix, other)?***
- ***Restituted and privatized ownership in Eastern Europe***

Homeownership on detached buildings is the most important type of housing tenure in eight out of nine Austrian Länder (with the exception of Vienna where rented housing dominates significantly). Characteristic for ownership of immovable property in Austria is the obligatorily registration of ownership in the land register and the importance of state laws on regional development planning (“Raumordnung”), on construction and maintenance (“Bauordnung”), and on transfer of land (“Grundverkehr”).

The financing for the building of homes for private households in Austria is often a mix of various methods including personal equity, inheritance and endowments of family members, mortgage-based loans, personal loans, public loans, and subsidies for construction and modernization of dwellings (“Wohnbauförderung”).[31]

In Austria, foreign currency loans – especially in Swiss franc – are very popular. Of all housing loans, 33 % were denominated in a foreign currency in 12/2011, slightly decreasing from a peak of 38.5 % in 10/2008, and representing around 32 % of the outstanding housing loan volume in the first quarter of 2012.[32]

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[30] For details see below.

[31] Albacete & Wagner, ‘Wie finanzieren private Haushalte in Österreich ihr Immobilienvermögen?’, *Geldpolitik & Wirtschaft* Q3 (2009): 68 et seq.; online available at <http://www.hfcs.at/de/img/gewi_2009_q3_analyse04_tcm14-142509.pdf>, 23 October 2013.

[32] Amann & Springler, ‘2011 EMF Hypostat’ (2011), 26.

- ***Intermediate tenures:***
  Are there intermediate forms of tenure classified between ownership and renting? e.g.

In Austria, ownership of dwellings in condominiums and in the author´s opinion under certain circumstances[33] non-profit rental housing in dwellings owned by limited profit housing associations, "gemeinnützige Bauvereinigungen" (LPHA), can be classified as intermediate tenures between ownership and renting. Details will be explained right below.

- ***Condominiums (if existing: different regulatory types of condominiums)***

Individual ownership of dwellings in condominiums ("Wohnungseigentum") according to the "Wohnungseigentumsgesetz 2002"[34] (WEG) grants co-owners or partnerships of co-owners ("Eigentümerpartnerschaften") of immovable property an exclusive right *in rem* of use and domain for a specific dwelling in condominiums ("Wohnungseigentumsobjekt"). In Austria, ownership is clearly the dominant factor of this intermediate form, because ownership of dwellings in condominiums is in many ways legally treated equivalent or rather similar to ownership of single family houses. Important differences exist especially with respect to the role of the condominium owners corporation ("Wohnungseigentümergemeinschaft") and their competences in decision making about topics which are relevant for the building en bloc (e.g. repairs of roof or exterior walls of the building or the use of common areas by the owners).

- ***Company law schemes: tenants buying shares of housing companies***

- ***Cooperatives***

In Austria, the LPHA provide housing to individuals on a non-profit basis according to the federal Limited-profit Housing Act ("Wohnungsgemeinnützigkeitsgesetz 1979", WGG)[35]. A LPHA can either be legally formed as cooperative ("Genossenschaft"), as limited company ("Gesellschaft mit beschränkter Haftung") or as public limited company ("Aktiengesellschaft") and their non-profit status has to be officially approved and monitored by state authorities.

A shareholder of a LPHA formed as cooperative ("Wohnungs- und Siedlungsgenossenschaft") who himself uses a premises owned by a LPHA, has a clear intermediate status between ownership and rental tenure. In contrast, a person not a shareholder of a LPHA formed as private or public limited company who rents a dwelling owned by a LPHA cannot be classified as living in intermediate tenure but rather rental

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[33] See below.

[34] BGBl. I Nr. 70/2002, last amendment BGBl. I Nr. 30/2012; all cited legal norms in their current and former version and all cited judgements can be found in the "Rechtsinformationssystem" (RIS) of the office of the federal chancellery which can be freely accessed online (www.ris.bka.gv.at). Furthermore, the author uses well-established online commentaries of private law of the "Rechtsdatenbank" of a private company, which unfortunately cannot be accessed online free of charge (www.rdb.at).

[35] BGBl. Nr. 139/1979, last amendment BGBl. I Nr. 51/2013.

tenure.[36] The right of possession of an individual dwelling is directly linked to the status of the possessor as member of the cooperative. Therefore, in case of an exclusion of the cooperation, the right to use the dwelling expires at the same time.

- ***Rental tenures***

- ***Are rental tenures with and without a public task distinguished? If so, how are they called and what is their share in the housing stock?***

In Austria, rental tenures with and without a public task are distinguished. Rental tenures with a public task are:

- Limited-profit rental housing in dwellings owned by limited profit housing associations ("gemeinnützige Bauvereinigungen");
- Municipal rental housing in dwellings owned by municipalities or non-profit municipal bodies ("Gemeindewohnungen");
- Private rental housing in dwellings owned by private landlords which have received state subsidies for the refurbishment of their dwellings[37]

Rental tenures without a public task in Austria are private rental housing in dwellings owned by private landlords (for-profit corporations or for-profit cooperatives, limited or public limited companies or individual landlords).

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. These data show the high importance of tenancies with a public task in Austria in comparison to the total rental stock (see tab. 7).

Tab. 7: Rented dwellings by owner of the building[38]

Owner of the building	Average / year				
	2008	**2009**	**2010**	**2011**	**2012**
Total (in 1,000)	1,389.8	1,423.8	1,445.5	1,459.3	1,474.7

[36] Also, members of for-profit cooperatives can in theory be classified as intermediate tenures if they are members of the for-profit cooperative and user of a dwelling at the same time. In practice for-profit cooperatives do not yet play an important role in the Austrian housing system.

[37] These landlords have to respect income limits and rent ceilings during the repayment period of a state loan.

[38] Ger. "Gebäudeeigentümertyp" = eng. type of owner of building; ger. "Jahresdurchschnitt" = eng. annual average; ger. "Gemeindewohnung" = eng. dwelling owned by municipality or a non-profit municipality body; ger. "Genossenschaftswohnung" = eng. dwelling owned by a limited-profit housing association; ger. "andere Hauptmiete" = eng. other forms of rental tenures; Statistics Austria, 'Wohnen 2012' (2013), 28; Please note that the survey has been slightly changed by the Statistics Austria within the year 2007.

Municipality or municipal company	285.2	278.9	286.9	276.6	279.9
Limited Profit Housing Association	515.5	558.5	575.3	585.6	597.7
Private legal person	589.1	586.4	583.3	597.1	597.1
Total (in %)	100	100.0	100.0	100.0	100.0
Municipality or municipal company	20.5	19.6	19.8	19.0	19.0
Limited Profit Housing Association	37.1	39.2	29.8	40.1	40.5
Private legal person	42.4	41.2	40.4	40.9	40.5

Source: Statistics Austria, Microcensus[39]

- ***How is the financing for the building of rental housing typically arranged? (Please be brief here as the questionnaire returns to this question under 3)***

The financing for the building of private rental housing in general does not differ from the building of other homes for private households in Austria. It is a mix of various methods including personal equity, inheritance and endowments of family members, mortgage-based loan, personal loan, public loans, and subsidies for construction and modernization of dwellings ("Wohnbauförderung").[40]

An important financial instrument though is the Austrian Housing Construction Convertible Bond (HCCB), which has been available to retail and institutional investors in Austria since 1994.[41] The HCCB is a special purpose private bond that raises low-cost funds for the development of affordable rental housing delivered for the for-profit and limited-profit sectors. It is one extremely important component of the total package used

[39] Please note that the differences in the amount of dwellings owned by municipality or a non-profit municipality body is within the range of variation of the Austrian microcensus. De facto the amount of dwellings did not raise or fall.

[40] Albacete & Wagner, 'Wie finanzieren private Haushalte in Österreich ihr Immobilienvermögen?', *Geldpolitik & Wirtschaft* Q3 (2009): 68 et seq.

[41] Lawson, 'Housing Supply Bonds – a suitable instrument to channel investments towards affordable housing in Australia' (2012), 33 et seq.; online available at http://www.ahuri.edu.au/publications/download/ahuri_30652_fr, 24 March 2014.

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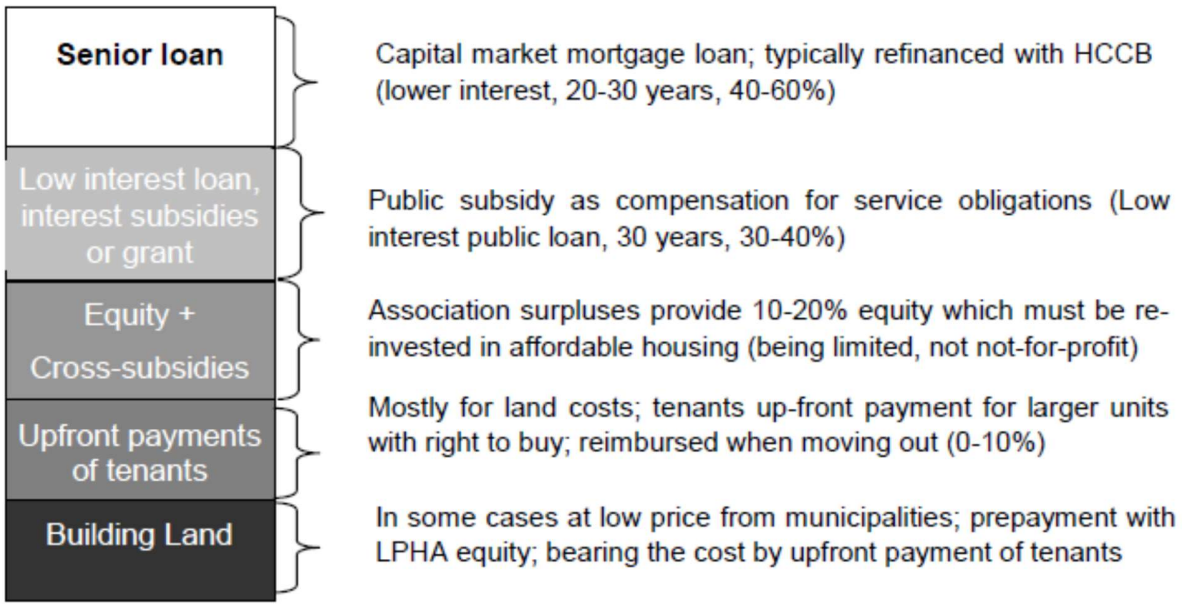
to finance LPHA projects in Austria, which *Lawson* illustrates in **Tab. 8** in the following way:

Tab. 8: Funding of limited profit rental housing in Austria[42]



Source: Lawson 2012.

- ***What is the market share (% of stock) of each type of tenure and what can be said in general on the quality of housing provided?***
  Please consider the following criteria: type of building (single family versus multifamily versus high-rise; plus definition); construction period; number of rooms, number of square metres or average number of rooms or average useful floor area per dwelling and per person; availability of bath/shower, hot running water and/or central heating, etc.)

With respect to the legal basis, 39 % of the total stock (main residences) was occupied by homeowners ("Hauseigentümer") and 5.2 % by their relatives in 2013. 11 % of the total stock was occupied by owners of the dwelling in a condominium ("Wohnungseigentümer"), 40.3 % by principal tenants, 1.2 % by subtenants, and 3.2 % by individuals on another legal basis like usufruct, lease, etc., see tab. 6 above.

Characteristic for Austria are the huge regional differences with respect to the legal basis for possession, especially between Vienna and the other eight Länder. Whereas in Vienna in 2013 76.1 % of the population were principal tenants and only 5.7 % of the population lived as homeowners (excl. condominiums), in Burgenland 74 % of the

[42] Lawson, 'Housing Supply Bonds – a suitable instrument to channel investments towards affordable housing in Australia' (2012), 34.

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population lived as homeowners (excl. condominiums) and only 16.9 % as main tenants, see tab. 6 above.

With respect to the construction period of the buildings in Austria (cf. tab. 9), 22.2 % of the total dwelling stock (main residences) is found in buildings constructed before 1945, 52.4 % of the total dwelling stock (main residences) in buildings between 1945 and 1990 and 25.3 % in new buildings constructed since 1991. In Vienna the stock of dwellings constructed before 1919 ("Gründerzeithäuser") is particularly large to this day.

Tab. 9 Dwellings (main residences) by type of heating and construction period[43]

Construction period	Dwellings (main residence) in total	Central heating system or comparable heating system					Central heating system or comparable heating system in total	Individual Furnance heating (non-electric or gas)
		District heating supply	Central heating	Self-contained central heating	Gas convector	Electric heating (ganged)		
	in total (1,000)							
Total	3,705.1	879.6	1,794.8	469.0	144.8	186.5	3,474.8	230.4
Before 1919	550.5	41.7	210.5	168.9	32.9	28.0	482.0	68.5
1919 – 1944	275.4	71.2	95.6	48.8	17.7	16.8	250.1	24.3
1945 – 1960	433.2	71.2	95.6	48.8	17.7	16.8	250.1	25.3
1961 – 1970	533.3	130.1	266.8	57.1	20.4	26.4	500.7	32.6
1971 – 1980	533.2	141.2	309.6	36.5	12.8	32.3	532.3	20.8
1981 – 1990	421.3	101.2	228.8	30.3	11.6	30.2	402.1	19.2
1991 – 2000	451.4	137.3	235.8	34.0	14.9	13.8	435.8	15.6
2001 and later	486.9	173.5	249.7	32.7	12.1	11.8	479.8	7.0

Source: Statistics Austria, Microcensus 2013.

In 2013, 35.3 % of all dwellings (main residences) were single-family homes, 12.4 % of all dwellings were situated in buildings with two apartments or in semi-detached houses, 19.7 % were located in buildings with 3 to 9 units, 17.3 % were situated in buildings with 10 to 19 units and 15,3 % were located in buildings with 20 or more units. Again,

[43] Ger. "Bauperiode" = eng. construction period; ger. "Zentral- und gleichwertige Heizung" = eng. central heating system or comparable heating system; ger. "Hauptwohnsitzwohnungen insgesamt" = dwellings (main residence) in total; ger. "Fernwärmeversorgung" = eng. district heating supply; ger. "Hauszentralheizung" = eng. central heating; ger. "Etagenheizung" = eng. self-contained central heating; "Gaskonvektor" = eng. gas convector; ger. "Elektroheizung (fest verbunden)" = eng. electric heating (ganged); ger. "Einzelofen (nicht Strom oder Gas)" = eng. individual furnance heating (non-electric or gas); ger. "Gebäude" = eng. buildings; ger. "Wohnung" = eng. dwelling; Statistics Austria, <http://www.statistik.at/web_de/static/hauptwohnsitzwohnungen_2013_nach_art_der_heizung_gebaeude_groesse_und_baupe_023005.pdf>, 1 March 2014.

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regional differences were significant, especially between Vienna and the other eight Länder, so that in Vienna e.g. almost 78.9 % of the dwellings (main residences) were located in buildings with 10 or more units, whereas in Burgenland only 5.9 % of the dwellings were situated in buildings with 10 or more units[44]

In 2013 a dwelling (main residence) in Austria had on average 100.1 m² of floor space. Homeowners lived in dwellings with an average floor space of 139.5 m², owners of dwellings in condominiums in dwellings with 84.3 m² and principal tenants in dwellings with 69.3 m², see tab 10.

Tab. 10 Dwellings (main residences): Floor space by construction period and type of tenure[45]

Tenure Type	Dwellings (main residences) in total	Construction Period							
		Before 1919	1919 – 1944	1945 - 1960	1961 – 1970	1971 – 1980	1981 – 1990	1991 – 2000	2001 and later
		Average floor space per m²							
Total	100.1	100.5	82.8	87.9	92.6	104.1	107.3	101.6	109.1
Homeowners (single-family houses)	139.5	146.2	124.0	125.5	129.0	138.3	140.1	152.9	151.8
Relatives of homeowners (single-family houses)	93.8	97.6	83.6	84.6	93.1	99.3	98.6	120.4	106.7
Home owners of dwellings in condominiums	84.3	97.7	81.9	81.3	78.9	82.8	83.9	92.0	87.7
Principal tenants	69.3	74.0	61.8	60.4	63.7	71.3	72.7	55.0	76.2
Sub-tenant	63.8	61.4	55.6	64.2	63.1	69.5	61.8	77.3	69.3
Others	87.8	85.6	91.0	80.9	86.6	95.3	90.6	130.9	80.0

Source: Statistics Austria, Microcensus 2013.

[44] Statistics Austria, <http://www.statistik.at/web_de/static/hauptwohnsitzwohnungen_2013_nach_art_der_heizung_gebaeudegroesse_und_baupe_023005.pdf>, 1 March 2014.

[45] Statistics Austria, <http://www.statistik.at/web_de/static/durchschnittliche_nutzflaeche_der_hauptwohnsitzwohnungen_2013_nach_bauperi_023012.pdf>, 1 March 2014.

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On average, 2.26 people lived in one dwelling with an average floor space per person of 44 m² in 2013. This is an increase of average floor space per person of 6 m² within the last 11 years (38 m² in 2001). This increase is not only attributable to a general increase in size of dwellings but also to a decrease in the number of people living together in one dwelling (cf. 2.38 people per dwelling in 2001). Again, strong regional differences between Vienna and the other eight Austrian Länder 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, whereas e.g. in Burgenland 2.48 people lived in dwellings with 50 m² floor space per person.[46]

In Austria residences are usually classified according to their quality level in 4 categories ranging from A (best category) to D (worst category, sub-standard):[47]

A: Dwellings with inside bathroom, toilet, heating and hot water supply, 30 m² minimum living space

B: Dwellings with inside toilet and bathroom

C: Dwellings with inside toilet and some form of inside water supply

D: Dwellings lacking inside water supply and/or inside toilet

In 2013, 92.9 % of all dwellings (main residences) in Austria were classified in category A, 5.6 % as category B, 0.2 % as category C and 1.3 % as category D. Only in Vienna, still a considerable amount of 4.2 % of category D or sub-standard dwellings exist, see tab. 11. These sub-standard dwellings usually only provide toilets in hallways outside apartments, sometimes they also share toilets with other dwellings.

Tab. 11: Dwellings (main residence): equipment category of dwelling and by Länder[48]

Equip-ment cate-gory	Austria	Burgen-land	Carin-thia	Lower Austria	Upper Austria	Salz-burg	Styria	Tyrol	Vor-arlberg	Vienna
	in 1,000 / in %									
Total (in 1,000)	3,705.1 / 100	115.3	242.9	682.6	598.6	229.3	512.2	297.5	155.8	870.9
		in %								

[46] Statistics Austria, 'Wohnen 2013' (2014), 26 et seq.; Statistics Austria, 'Wohnen 2012' (2013), 37 et seq.

[47] According to the categorization of § 15a Mietrechtsgesetz 1983 (MRG, Tenancy Statute).

[48] ger. „Ausstattungskategorie" = eng. equipment category; ger. "Rechtsverhältnis" = eng. tenure type; ger. "Hauptwohnsitzwohnungen" = eng. dwellings (main residence); Statistics Austria, <http://www.statistik.at/web_de/static/ergebnisse_im_ueberblick_hauptwohnsitzwohnungen_2012_und_2013_nach_bundesl_022997.pdf>.

A	3,442.0 / 92,9	90.3	90.8	91.3	94.8	93.4	95.9	88.4	93.7	93.2
B	208.3 / 5.6	9.5	8.7	7.6	4.6	6.3	3.2	10.9	5.9	9.5
C	8.3 / 0.2	0.2	0.0	0.1	0.4	0.1	0.6	0.4	0.2	3.7
D	46.6 / 1.3	1.3	0.2	0.3	0.8	0.4	0.6	0.4	0.2	3.7

Source: Statistics Austria 2013.

93.8 % of the total dwelling stock (main residences) is supplied by central heating or comparable heating systems, 6.2 % of the total dwelling stock is supplied by individual furnace heating or is not supplied at all (see tab. 9 above).

- ***Which actors own these dwellings (private persons, profit or non-profit organizations, etc.)?***

According to the last census in 2011, on basis of a total stock of buildings of 2,191,280

- 1,944,590 buildings were owned by one or more private individuals, which is 88.7 % of the total stock of buildings;
- 70,736 by Bund, Länder or municipalities (3.2 % of total stock);
- 16,392 by other statutory bodies under public law (0.75 % of total stock);
- 71,822 by limited-profit housing associations (3.3 % of total stock);
- 77,860 by other companies (3.6 % of total stock), and
- 9,880 by other owners (e.g. associations), which is 0.45 % of the total stock of buildings

In 2011, on basis of a total stock of dwellings of 4,441,408

- 3,254,635 dwellings were owned by one or more private individuals, which is 73.3 % of the total stock of dwellings;
- 356,963 units by Bund, Länder or municipalities (8.0 % of total stock);
- 30,913 by other statutory bodies under public law (0.70 % of total stock);
- 563,644 units by limited-profit housing associations (12.7 % of total stock);
- 212,255 by other companies, and
- 22,998 by other owners (e.g. associations), which is 0.52 % of the total stock of dwellings.

Once again, significant differences between Vienna and the other eight Länder exist regarding the ownership structure (see **tab. 12** below).

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Tab. 12 Buildings and dwellings by legal grounds and Länder 2011[49]

Region	Buildings / Dwellings in total	Owner of the building					
		Private Individuals	Bund, Länder or municipalities	other statutory body under public law	limited-profit housing associations	other companies	other owners (e.g. association)
Buildings							
Austria	2,191,280	1,944,590	70,736	16,392	71,822	77,860	9,880
Burgenland	123,109	114,736	2,195	748	2,985	2,115	330
Carinthia	172,465	156,347	3,548	1,579	4,538	5,765	688
Lower Austria	591,433	540,798	14,587	3,775	13,797	16,433	2,043
Upper Austria	383,429	344,114	7,150	2,491	8,502	13,593	1,425
Salzburg	129,233	115,208	2,813	1,034	3,584	5,984	610
Styria	350,651	315,132	9,508	2,491	8,502	13,593	1,425
Tyrol	177,745	158,771	4,546	1,778	4,096	7,641	913
Vorarlberg	98,469	88,156	1,870	800	2,869	4,277	497
Vienna	164,746	111,328	24,519	1,396	17,156	8,450	1,897
Dwellings							
Austria	4,441,408	3,254,635	356,963	30,913	563,644	212,255	22,998
Burgenland	147,376	127,831	3,028	630	13,973	1,703	211
Carinthia	301,096	231,346	12,867	1,681	38,017	16,056	1,129
Lower Austria	852,574	699,898	37,527	4,151	89,913	18,900	2,185

[49] Ger. „Bundesland“ = eng. state; ger. „Gebäude/Wohnungen insgesamt“ = eng. buildings/dwellings in total; ger. „Privatperson(en)“ = eng. one or more private individuals; ger. „Bund, Land oder Gemeinde“ = eng. Federal state, state or municipality; „andere öffentlich-rechtliche Körperschaft“ = eng. other statutory body under public law; ger. „Gemeinnützige Bauvereinigungen“ = eng. limited-profit housing associations; ger. „sonstige Unternehmen“ = eng. other companies; ger. „andere Eigentümerin / anderer Eigentümer (z.B. Verein)” = eng. other owner (e.g. association); Statistics Austria, <http://www.statistik.at/web_de/static/ergebnisse_im_ueberblick_hauptwohnsitzwohnungen_2012_und_2013_nach_bundesl_022997.pdf>, 1 March 2014.

Upper Austria	699,956	525,933	13,327	4,434	127,657	25,720	2,885
Salzburg	282,847	224,731	6,742	2,174	33,755	13,615	1,830
Styria	616,801	488,237	32,072	3,981	59,431	30,739	2,341
Tyrol	375,583	302,570	13,048	2,130	33,853	22,593	1,389
Vorarlberg	181,335	142,807	2,520	860	21,207	13,301	640
Vienna	983,840	511,282	235,832	10,872	145,838	69,628	10,388

Source: Statistics Austria 2012.

1.5 Other general aspects

- ***Are there lobby groups or umbrella groups active in any of the tenure types? If so, what are they called, how many members, etc.?***

In Austria, several lobby or umbrella groups for different target groups with reference to housing exist.

Traditionally in Austria, the "Wirtschaftskammer Österreich" (WKÖ, Austrian Chamber of Commerce) and the "Arbeiterkammer Österreich" (AK, Austrian Chamber of Labour) have a huge impact on Austrian politics in general and also with reference to housing. As self-regulatory public-law institutions, the WKÖ and AK represent interests of their members, e.g. for the construction industry, real estate agents and enterprises in general (WKÖ), or workers and employees (AK).

The most important lobby groups[50] apart of WKÖ and AK are

- "Österreichischer Verband der Immobilienwirtschaft"[51] as representatives of real estate agents, construction experts, property developers and property managers;
- "Österreichischer Haus- und Grundbesitzerbund"[52] as representatives of homeowners and landlords;
- "Österreichischer Verband gemeinnütziger Bauvereinigungen"[53] as representatives of limited-profit housing associations;
- "Österreichischer Mieter-, Siedler- und Wohnungseigentümerbund"[54] as representatives of possessors of dwellings, i.e. tenants, homeowners, owners of

[50] Selection of the author; other smaller and subordinarily relevant groups are e.g. „Gemeinschaft der Wohnungseigentümer", <http://www.gdw.at/> , 29 October 2013 as representatives of owners of dwellings in condominiums or "Österreichischer Vermieter Schutzverein", <http://www.oevsv.eu/> , 29 October 2013, as representatives of landlords.

[51] <http://www.ovi.at/de/verband/index.php>, 9 September 2015.

[52] <http://www.oehgb.at>, 29 October 2013.

[53] <http://www.gbv.at>, 29 October 2013; Please note that in contrast to other lobby groups, this organization has a special status insofar as apart from lobbying for its members it is also granted auditing functions for all limited profit housing associations by law.

dwellings in condominiums, landlords, housing administrations, real estate developers, and governmental representatives;

- ”Mietervereinigung Österreichs”[55] as representatives of tenants;
- ”Mieterschutzverband Österreich”[56] as representatives of tenants;
- ”Verein für Konsumenteninformation“[57] as representatives of consumers.

The entire above mentioned lobby groups are founded as registered societies (“Vereine”, “Verbände”), often comprised of one federal umbrella society (“Dachverband”) and nine independent societies in the Austrian Länder..

- ***What is the number (and percentage) of vacant dwellings?***

No representative data exists for the number and percentage of vacant dwellings. In Austria it is not obligatory for landlords to report vacant dwellings to the authorities. Furthermore, the number and percentage of vacant dwellings is also not part of the surveys for regular housing statistics.

- ***Are there important black market or otherwise irregular phenomena and practices on the housing market (especially the rental market)?***

Strict rent limits and artificially low market rents in Austria caused in the 1980s and at the beginning of the 1990s the black market phenomenon of one-off payment by tenants (“key money”) to landlords. The tenant had to pay an amount of money to the landlord in advance to get a tenancy contract for a dwelling where the rent level was below private market level.[58] Although these one-off payments for premises were explicitly prohibited by law and could be reclaimed by legal action from the landlord later on, the tenant had significant problems providing evidence for such payments in court without any invoice.[59] Nowadays this problem has lost significance due to the past legislative amendments and the more market-orientated rent level ceilings.

One current irregular phenomenon in the rental market is the wrong calculation of rents by landlords in disfavour of their tenants, as reported by the Chamber of Labours of Vienna[60].

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[54] <https://www.mietervereinigung.at/>, 29 October 2013.

[55] <http://www.mieterbund.at/>, 29 October 2013.

[56] <http://www.mieterschutzverband.at/>, 29 October 2013.

[57] <http://www.konsument.at>, 19 November 2013.

[58] Hausmann, ‘30 Jahre MRG – Lobens- und weniger Lobenswertes aus Sicht des Rechtsberaters’, *wobl* (2012), 288.

[59] Stabentheiner, ‘Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre’, *wobl* (2012), 91 (101).

[60] Kammer für Arbeiter und Angestellte Wien, ‘Die Praxis des Richtwert- Mietzinssystems’, <http://media.arbeiterkammer.at/wien/PDF/studien/Studie_Richtwertmieten_2011.pdf>, (Wien, 2010), 9 June 2013.

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In 1994 a new form of rent control, the "Richtwert" (benchmark rent level) was introduced in Austria. A standard dwelling is defined by a special statute ("Richtwertgesetz 1994") and for this standard dwelling, a certain basic rent per m² is fixed and adapted annually for each of the nine Austrian Länder. Surcharges and deductions to this basic rent, depending on size, quality, location, maintenance condition, and furniture, can be taken into account.

The existing system of benchmark rent is in practice criticised for being inefficient and misleading. Tenant-affine unions like the Chamber of Labours Vienna have criticised the benchmark rent as an ineffective system of rent regulation which leads to a higher rent level because according to their experiences, landlords tend to consistently miscalculate the amount of rent.[61]

Representatives of landlords and the construction industry however often claim that the artificially low rent level set through the benchmark rent level system prevents landlords and property developers from investments in the modernization of buildings. This is, according to their experiences, especially problematic in Vienna, which has an extremly low benchmark rent compared to the market rent that is set by the regional government.[62]

The author qualifies the existing benchmark rent system and its implementation, which is influenced by diverse regional interests of the Länder, as one of the most evident examples for a regulatory failure in Austrian tenancy law.[63]

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[61] Kammer für Arbeiter und Angestellte Wien, 'Die Praxis des Richtwert- Mietzinssystems', <http://media.arbeiterkammer.at/wien/PDF/studien/Studie_Richtwertmieten_2011.pdf>, (Wien, 2010), 9 June 2013; This research of the Chamber of Labours of Vienna has shown that only one out of 100 landlords offer contracts in Vienna in which the rent amount was calculated correctly according to the benchmark rent level system set by law and the amount of rent was on average 61.5 % above the rent level guaranteed by law. These research results would indicate that the current system of benchmark rent is also not at all effective but is an example of regulatory failure of the Austrian legislator. This study was, though, criticised a lot because the sample size was 150 contracts only and was only referring to tenancy contracts that were subject of out-of-court procedures at the arbitrational tenancy board of Vienna; see e.g. Österreichischer Verband der Immobilienwirtschaft, <http://www.ovi.at/de/verband/news/2011/20110217_AKStudie.php>, 9. September 2015.

[62] Österreichischer Verband der Immobilienwirtschaft, <http://www.ovi.at/de/verband/news/2011/20110217_AKStudie.php>, 9. September 2015.

[63] See an cross section of the recent discussions in Austrian tenancy la wand housing policy in: Wippel (Ed.), Wohnbaukultur in Österreich, Geschichte und Perspektiven (Innsbruck: Studienverlag 2014).

Summary table 1 Tenure structure in Austria 2012:[64]

Home ownership		Renting*		Other	Total
Ownership of Single Family homes	Ownership of dwellings in condominiums	Renting with a public task	Renting** without a public task		
39 %	**11 %**	**24 %**	**16.3 %**		
50 %		**40.3 %**		**9,7 %**	**100 %**

* excl. sub-renting.

** incl. LPHA

2. Economic urban and social factors

Macroeconomic environment:

This short introduction will at first focus on the development of the Austrian economy in 2012 in comparison to other EU member states and then focus on two significant indicators, the real Gross Domestic Product (GDP) and the inflation rate for this development since 1980.

In 2012, Austria's economy was performing far better on average than other EU-countries. The GDP per inhabitant in Austria was EUR 36,400 (EU27: EUR 25,600), the annual average rate of GDP change was + 0.9 % (EU27: -0.4 %), the inflation rate according to the Harmonised Indices of Consumer Prices (HICPs) was at + 2.6 % (EU27: + 2.6 %), the government deficit was at 2.5 % of GDP (EU27: 4.0 %), and the unemployment rate was at 4.3 % (EU27: 10.5 %).[65]

Between 1980 and 2010, the real GDP growth rate in Austria was on average higher than 2 % per year. In the 1990s, the GDP growth rate on average even reached + 2.6 % per year, whereas between 2000 and 2010, as consequence of the crisis, the GDP growth rate reached only + 1.5 % on average per year.[66]

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[64] Based tab. 6: Dwellings (main residences) by legal basis and states, tab. 7: Rented dwellings by owner of the building above and own calculations.

[65] Eurostat, <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/>, 15 November 2013.

[66] Kunnert & Baumgartner, ‚Instrumente und Wirkungen der österreichischen Wohnungspolitik', <http://wien.arbeiterkammer.at/service/studien/wohnen/Oesterreichische_Wohnungspolitik.html>, (2012), 41; 15 November 2013.

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As in many other EU-states, the GDP growth rate in 2009 decreased significantly (-3.9 %). In 2012, the GDP growth rate was on average + 0.9 %. From 2013-2015, an increase of the GDP of 0.4 % (2013), 1.6 % (2014) and 1.8 % (2015) is predicted (see tab. 13 for details).

Tab. 13: GPD growth rate – annual average rate of change (in %) between 2007 – 2015*[67]

2007	2008	2009	2010	2011	2012	2013*	2014*	2015*
+ 3.7	+ 1.4	- 3.8	+ 1.8	+ 2.8	+ 0.9	+ 0.4	+ 1.6	+ 1.8

*forecast

Source: Eurostat 2013.

Between 1980 and 2010, the price level according to the Austrian Consumer Price Index (VPI) increased on average by 2.7 % per year. Between 1991 and 2000, the VPI increased by 2.3 % on average per year, and between 2001 and 2010 the VPI increased by 2.0 % on average per year. Recently the VPI increased by 3.3 % (2011) and 2.4 % (2012) on average per year.[68]

The "Harmonised Index of Consumer Prices" (HICP) in Austria between 2002 and 2012 showed an average inflation rate of + 1.9 % per year. In 2012, the HICP inflation rate increased on average by 2.6 % per year (see **tab. 14** for details).

Tab. 14 HICP inflation rate – annual average rate of change (in %) between 2002 – 2012[69]

2002	2003	2004	2005	2006	2007	2008*	2009*	2010	2011	2012
+ 1.7	+ 1.3	+ 2.0	+ 2,1	+ 1.7	+ 2.2	+ 3.2	+ 0.4	+ 1.9	+ 3.3	+ 2.4

Source: Eurostat 2013.

[67] Eurostat, "Real GPD Growth Rate – Volume", <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tec00115>, 15 November 2013.

[68] Own Calculations and Statistics Austria, <http://www.statistik.at/web_de/statistiken/preise/verbraucherpreisindex_vpi_hvpi/index.html>, 15 November 2013.

[69] Eurostat, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tec00118>, 15 March 2014.

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2.1 Current situation of the housing market

- ***What is the current situation of the housing market? Is the supply of housing sufficient/insufficient and where is this the case (possibly in terms of areas of scarcity of dwellings in growth areas versus shrinkage areas)? What have been the effects of the current crisis since 2007?***

In comparison to other European states, the supply of housing in Austria in 2012 was indeed adequate. Per 1,000 inhabitants, about 440 units (main residences) were available, and on average 2.3 persons were living together in these units.[70]

- ***How is the demand for housing expected to develop? What is the expectation about the growth and decline in number of households in the future in a scenario of average economic development? Is there a year forecasted where growth in number of households will stabilize or will start declining?***

Recent forecasts[71] 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 %), see tab. 15.

Tab. 15 Forecast of demographic structure of the Austrian population 2012-2075 (main scenario)[72]

Year	Demographic structure of Austrian population						
	Total	Under 20	20 – 65	65 and older	Under 20	20 – 65	65 and older
	absolut				in %		
2012	8,426,311	1,705,025	5,209,025	1,512,261	20.2	61.8	17.9
2013	8.468,570	1,694,646	5,231,670	1,542,254	20.0	61.8	18.2
2014	8,502,960	1,685,575	5,247,270	1,570,115	19,8	61,7	18,5
2015	8,538,252	1,679,370	5,264,073	1,594,809	19,7	61,7	18,7
2020	8,696,226	1,674,602	5,307,787	1,713,837	19,3	61,0	19,7
2025	8.846,673	1,698,089	5,244,991	1,904,593	19.2	59.3	21.5
2030	8,985,216	1,721,020	5,109,012	2,155,184	19,2	56,9	24,0

Source: Statistics Austria 2013.

[70] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 43.

[71] Statistics Austria, 'Bevölkerungsprognose 2013', <http://www.statistik.at/web_de/statistiken/bevoelkerung/demographische_prognosen/bevoelkerungsprognosen/index.html>, 5 November 2013.

[72] Statistics Austria, 'Bevölkerungsprognose 2013'; Please be aware of the fact that such long term forecasts are highly speculative as can be seen at the moment with reference to the recent political developments in Middle East. In 2015 the Austrian government expects more than 80.000 refugees to file a request for asylum.

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With respect to the number of private households[73], recent forecasts also show an increase in the number of households basically because of the increase of the total population in Austria. In 2011, 3.65 million private households were established in Austria. This number is predicted to rise to 4.03 million in 2030 (+ 10.5 %) The number of households will increase in all Austrian Länder, but with different intensity and in some Länder not through the whole forecast period. The strongest increase of private households through 2030 is predicted in Vorarlberg, Vienna, Lower Austria, and Burgenland.[74]

In the past years, the number of newly constructed dwellings changed from around 37,600 (2006, 2007 and 2008) to 37,100 (2009), 38,150 (2010), 44,300 (2011) and 38,700 (2012) according to the number of valid construction permits ("Baubewilligungen").[75]

In the last decade, various studies[76] have tried to evaluate the demand for housing and construction of new buildings in Austria in the future. Different models[77] expect a demand of new dwellings from 34,000 units/year up to 58,000 units/year in the next two decades.

The "Österreichische Raumordnungskonferenz" (ÖROK, Austrian Conference of Spatial Planning) e.g. predicted in 2005[78] a demand of around 46,000 new dwellings/year until January 2011, of 40,000 new dwellings/year between 2011-2020, and of 30,000 of new dwellings/year between 2021-2030.

Due to a statistical revision, these forecasts have been adapted by *Amann*[79] in 2006 to a demand of 54,000 new dwellings/year until January 2011, for 53,000 new dwellings/year between 2011 - 2020, and 52,000 for new dwellings/year between 2021-2030.

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[73] In 2011, apart from private households in which 98.5 % of the total Austrian population was living, 116,594 persons (1.4 % of the Austrian population) were living in 3,171 "Anstaltshaushalten", i.e. institutions for a specified group of people (students, care recipients, prisoners etc.) and 5,811 persons (0.1 % of the Austrian population) were officially registered without living in a household ("wohnungslos mit Wohnsitzbestätigung"); See Statistics Austria, <http://www.statistik.at/web_de/statistiken/bevoelkerung/volkszaehlungen_registerzaehlungen/haushalte/index.html>, 6 November 2013.

[74] Statistics Austria, <http://www.statistik.at/web_de/statistiken/bevoelkerung/demographische_prognosen/index.html>, 6 November 2013.

[75] Statistics Austria, <http://www.statistik.at/web_de/statistiken/wohnen_und_gebaeude/errichtung_von_gebaeuden_und_wohnungen/baubewilligungen/index.html>, 6 November 2013.

[76] See e.g. ÖROK (ed.), 'ÖROK-Prognosen 2001-2031. Teil 2: Haushalte und Wohnungsbedarf nach Regionen und Bezirken Österreichs' (2005); Czerny & Weingärtler, 'Wohnbau und Wohnungssanierung als Konjunkturmotor' (2007); Amann & Mundt, 'Rückläufige Bewilligungszahlen versus Wohnungsbedarf / Leerstandsraten im GBV-Sektor / Vorausschätzung Wohnbeihilfe', (2009).

[77] Amann & Mundt, 'Rückläufige Bewilligungszahlen versus Wohnungsbedarf / Leerstandsraten im GBV-Sektor / Vorausschätzung Wohnbeihilfe', (2009), 54.

[78] ÖROK (ed.), 'ÖROK-Prognosen 2001-2031. Teil 2: Haushalte und Wohnungsbedarf nach Regionen und Bezirken Österreichs' (2005), 64 et seq.

[79] Amann, 'Trendanalyse Hochbau bis 2012', <http://www.iibw.at/deutsch/portfolio/bauen/downloads/Trendanalyse%20Hochbau%20060308.pdf>, (March 2006), 5 et seq., 15 March 2014.

Czerny/Weingärtler[80] predicted in 2007 a demand of 55,000 new dwellings/year within the next 5 to 10 years.

Although these forecasts of Czerny/Weingärtler for the new construction of dwellings still seem to be plausible, it is likely that, according to the lower numbers of newly constructed dwellings between 2006 and 2012 and the recent forecasts concerning the development of population and household structure in Austria, the demand of dwellings will increase to more than 55,000 new dwellings/year in the future.[81]

- ***What is the number/percentage of families/households depending on rental housing (vs. owner-occupancy and other forms of tenure)? What is the number/percentage of immigrants among them?***

As above mentioned, considering the persons living in private dwellings by legal basis in Austria in 2012, 48.6 % of the total population of 8,351,700 inhabitants were living in homeownership (without condominium), 4.9 % as relatives of a homeowners, 10.3 % in dwellings in condominiums, 34.8 % as main tenant, 0.9 % as subtenant and 2.4 % on other legal basis.[82]

An analysis of the type of housing in 2012 by migrant background status and household representatives showed that home ownership is less frequent among immigrants. Of people with a migrant background, 69 % depend on rental housing, 25 % live in home ownership (incl. condominiums) and 6 % live as relatives of homeowners or use dwellings on other legal grounds, whereas only 35 % of people without migrant background depend on rental housing, 55 % live in home ownership and 10 % live as relatives of homeowners or on other legal basis.[83]

2.2 Issues of price and affordability

- ***Prices and affordability:***

- ***What is the typical cost of rents and its relation to average disposable income (rent-income ratio per household)?***
  (Explanation: If rent is EUR 300.-- per month and disposable household income EUR 1,000.-- per month, the rent-to-income ratio is 30 %).

In 2012 the typical cost of rent in Austria per dwelling (main residence, excl. garage costs) per month was EUR 458 or 6.61 EUR/m². The typical cost of rents differed widely between the nine Austrian Länder and in relation to the construction periods of the

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[80] Czerny & Weingärtler, 'Wohnbau und Wohnungssanierung als Konjunkturmotor' (2007), 27.

[81] Oberhuber & Schuster, 'Wohnbauförderung als Instrument zur Sicherung des Wohnstandortes Österreich – Kurzfassung', (2012), 24; With respect to the recent political developments in Middle East in 2015 and the number of expected refugees the demand is predicted even to exceed these numbers significantly.

[82] Statistics Austria, ´Wohnen 2012`(2013), 30.

[83] Statistics Austria, 'Migration & Integration Zahlen.Daten.Indikatoren 2013', (2013), 76 et seq.

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rented dwellings, their equipment categories and their respective floor space, see tab. 16.[84]

Tab. 16. Rented dwellings (main residence): housing costs[85]

	Rented Dwellings										
	Total	HousingCosts[86] in EUR per		Contract limited in time				Contract unlimited in time			
		Dwelling	m²	together		Housing Costs[87] in EUR per		together		Housing Costs[88] in EUR per	
				in 1000	in %	dwelling	m²	in 1000	in %	dwelling	m²
Total	1,474.7	458	6.61	263.3	17.9	566	8.37	1,211.4	82.1	435	6.24
Burgenland	18.0	402	4.86	(2.0)	(11.2)	(461)	(5.84)	16.0	88.8	395	4.75
Carinthia	81.1	409	5.67	9.9	12.2	477	6.43	71.2	87.8	400	5.56
Lower Austria	167.2	418	5.97	24.7	14.8	522	7.08	142.5	85.2	400	5.76
Upper Austria	190.6	439	6.33	26.1	13.7	521	7.29	164.4	86.3	426	6.17
Salzburg	77.8	525	8.21	26.4	34.0	614	9.71	51.4	66.0	480	7.45
Styria	149.9	426	6.31	22.2	14.8	569	7.91	127.7	85.2	401	6.01
Tyrol	91.2	503	7.15	31.3	34.3	614	8.93	59.9	65.7	445	6.25
Vorarlberg	46.8	563	7.73	25.9	55.4	620	8,53	20.9	44.6	492	6.75
Vienna	652.2	467	6.48	168.5	20.5	571	8.10	654.0	79.5	420	6.06
Landlord:											
Municipality or municipal company	279.9	356	5.78	31.9	11.4	366	5.85	248.0	88.6	355	5.77
Limited Profit Housing Association	597.7	437	6.18	24.6	4.1	539	7.76	573.0	95.9	432	6.11

[84] Statistics Austria, 'Wohnen 2012' (2013), 30.

[85] Statistics Austria, 'Wohnen 2012' (2013), 89.

[86] Housing costs excluding expenses for garage / car park.

[87] Housing costs excluding expenses for garage / car park.

[88] Housing costs excluding expenses for garage / car park.

Private legal person	597.1	527	7.37	206.7	34.6	600	8.80	390.4	65.4	489	6.67
in Vienna:											
Municipality or municipal company	201.1	361	5.91	(20.5)	(10.2)	(356)	(5.83)	180.6	89.8	361	5.92
Limited Profit Housing Association	172.2	490	6.56	(4.2)	(2.4)	(656)	(9.15)	180.6	97.6	486	6.50
Private legal person	278.9	529	7.44	70.1	25.1	609	9.78	208.9	74.9	503	6.79
Equipment category:											
A	1,336.7	476	6.74	238.5	17.8	588	8.54	1,098.2	82.2	452	6.37
B	91.6	321	5.05	(15.4)	(16.8)	(401)	(6.05)	76.1	83.2	305	4.83
C	(4.9)	(205)	(4.40)	(0.7)	(13.7)	(363)	(6.36)	(4.2)	86.3)	(180)	(4.0)
D	41.6	210	4.96	(8.7)	21.0	255	7.43	32.9	79.0	198	4.46
Duration of contract:											
< 1 year	127.8	516	7.89	54.1	42.3	572	8.76	73.7	57.7	475	7.26
1 – 2 years	168.1	525	7.79	65.5	39.0	606	8.94	102.6	61	472	7.04
2 – 3 years	143.6	504	7.52	46.8	32.6	550	8.58	96.8	67.4	482	7.04
3 – 4 years	109.2	501	7.37	26.3	24.1	577	8,60	82.8	75.9	476	6.98
4 – 5 years	83.6	490	7.04	(14.02)	(17.0)	(581)	(7.84)	69.6	83.0	471	6.86
> 5 years	841.2	420	5.92	56.0	6.7	516	7.27	785.2	93.3	413	5.83

Source: Statistics Austria 2013.

In relation to the disposable net income per household, 51 % of all tenants had to spend more than 25 % of their income on housing costs (incl. General expenses and energy costs) in 2013, whereas only 11 % of all homeowners (incl. Condominiums) had to spend more than 25 % of their net income for loan-paybacks, general expenses and energy costs.[89]

- ***To what extent is home ownership attractive as an alternative to rental housing?***

Homeownership or ownership of dwellings in condominiums as an alternative to rental housing is attractive as long-term investment. Often this investment is also used for retirement planning and handed down to children or grandchildren. An advantage of

[89] Statistics Austria, Tabellenband EU-SILC 2013 (2014), 58

homeownership or ownership of dwellings in condominiums is lower costs in a long-term perspective after mortgages have completely been paid back.

Disadvantages compared to rental housing are higher short- to mid-term costs for the investment, the requirement of an amount of personal equity of at least 20 % to 30 % of the investment costs, the dependence on a fixed income, and bank loans and the duties which are linked to homeownership.

However, in Austria, municipal housing and housing provided by LPHA is an attractive long-term viable alternative to home ownership - especially in Vienna - which has also contributed to low homeownership rates in Austria.[90]

- ***What were the effects of the crisis since 2007?***

The development of prices and of debt-equity ratio of private households remained stable, i.a. because of the existence of a variety of offers of (subsidized) dwellings for rent. Object-related subsidies and the high percentage of rented dwellings with rather moderate rents in Austria were stabilising factors and part of the reason why extreme speculations on land and real estate did not occur in Austria as had occurred in other EU member states like the UK or Spain.

2.3 Tenancy contracts and investment

- ***Is the return (or Return on Investment (RoI)) for rental dwellings attractive for landlords-investors?***

- ***In particular: What were the effects of the crisis since 2007?***

Official statistics on the return or RoI for rental dwellings in Austria do not exist.

A recent study on supply and price developments of immovable property for housing and of multi-storey-buildings for rent ("Zinshäuser") in Vienna, done in 2012 by *Gutheil-Knopp-Kirchwalder/Getzner*[91] for the Chamber of Labour Vienna, showed that demand and prices had both risen significantly since 2000. The price for an average multi-storey-building (with various rental dwellings) was 1,168 EUR/m² in the year 2000 and increased to 3,411 EUR/m² in 2010, which represents an increase of prices of almost 11.2 % per year!

Since 2007 the crisis had the effect that many investors searched for a stable investment in immovable property, and consequently, prices per m² for multi-storey buildings for rent increased further and did not decline as in other European states.

According to a real estate country report by the "Bank Austria" (one of the largest Austrian banks and member of the UniCredit banking group), the average return for

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[90] Deutsch, `The Austrian Social Rented Sector at the Crossroads for Housing Choice`, EJHP Vol. 9, No. 3, 285 et seq.

[91] Gutheil-Knopp-Kirchwald & Getzner, 'Analyse der Angebots- und Preisentwicklung von Wohnbauland und Zinshäusern in Wien', <http://media.arbeiterkammer.at/PDF/Studie_Wohnbauland_und_Zinshaeuser.pdf>, (2012), especially 61 et seq., 21 March 2014.

multi-storey buildings for rent in Vienna was between 1.4 % and 6.1 % at the beginning of 2013.[92]

- ***To what extent are tenancy contracts relevant to professional and institutional investors?***

- ***Is the securitization system related to tenancies in your country? Are commercial (or other) landlords allowed to securitize their rental incomes? If yes: Is this usual and frequent?***

Commercial and other landlords are allowed to securitize their rental incomes if the Mietrechtsgesetz (MRG) is not or is only partially applicable to a tenancy agreement.[93]

In case the MRG is fully applicable, a securitization of the rental income is, according to § 42 par. 2 MRG, lawful only for mortgages for maintenance works ("Erhaltungsarbeiten", § 3 MRG) or improvement works ("Verbesserungsarbeiten", §§ 4 and 5 MRG).[94]

The securitization of immovable property and rental incomes are usual and frequent in Austria, but, due to the limits of § 42 par. 2 MRG, less relevant for residential rental tenancies about dwellings than for commercial rental tenancies.

2.4 Other economic factors

- ***What kind of insurances play a role in respect to the dwelling (e.g. insurance of the building, the furniture by the landlord; third party liability insurance of the tenant?)?***

The following insurances of the building are usually important in Austria:[95]

- fire insurance (including insurance for demolition costs);
- third party liability insurance;
- tap water damage insurance (including insurance for damages through corrosion);
- insurance for other kinds of damages, especially glass breakage or tornado;
- insurance for fire alarm systems.[96]

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[92] Bank Austria, <http://www.bankaustria.at/files/Real_Estate_Country_Facts__Oesterreich_9_2013.pdf>, especially 20 et seq., 21 March 2014; Please note that the numbers presented as average return rates are questionable due to a high fluctuation rate. Reliable data on this aspect is unfortunately not available in Austria.

[93] For the distinction between full, partial- and non applicability of the MRG and details see Chapter 6.1.

[94] Angst, 'Hypothekarische Besicherung und nachträgliche Abtretung von Bestandzinsforderungen', *ÖBA* (2007), 444 (452 et seq.).

[95] See § 21 par. 1 fig. 4, 5 and 6 MRG.

[96] MietSlg 45.311.

The above-mentioned insurance contracts are determinded by the homeowner, cooperation of owners of dwellings in condominiums ("Wohnungseigentümer-gemeinschaft") or the property management of the building, and the tenant pays insurance fees pro rata through general expenses.

Additionally, many tenants are obliged by the tenancy agreement to acquire household insurance ("Haushaltsversicherung") for damages in relation to the interior parts of their rented dwellings and often are also obliged to proove the purchase of these insurances at the time their tenancy agreement begins by presenting a copy of a valid insurance policy to the landlord.

- ***What is the role of estate agents? Are their performance and fees regarded as fair and efficient?***

In Austria, an estate agent is usually mandated by the landlord to find an adequate tenant, contacts potential tenants individually, and then acts as a double-sided agent ("Doppelmakler"). As a double-sided agent he is theoretically obliged to preserve the interests of both parties, adopt a neutral position and treat both parties equally. This in fact a rather difficult task, especially with respect to private rent objects, because although the estate agent in Austria typically is mandated by the landlord, the tenant usually pays the commission fee.[97]

Although the commission fee for tenants was recently limited by law to a maximum amount of two monthly rents (incl. overheads, service charges, rent for furnishing, and in some limited cases energy costs, plus VAT), this practice is still criticized in political discussion, and some organizations demand a total shift of the duty to pay the commission fee to landlords.[98]

2.5 Effects of the current crisis

The current global financial crisis did not affect the Austrian housing finance, construction, or consumption markets dramatically.[99]

As already mentioned above, the development of prices and of debt-equity ratio of private households remained stable, i.a. because of the existence of a variety of offers of (subsidized) dwellings for rent. Object-related subsidies and the high percentage of rented dwellings with rather moderate rents in Austria were stabilising factors in Austria and part of the reason why extreme speculation on land and real estate did not occur in Austria as had occurred in other EU member states like the UK or Spain.[100]

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[97] Limberg, 'Immobilienmakler im Interessenskonflikt', *ecolex* (2011), 287.

[98] Arbeiterkammer Wien, <http://wien.arbeiterkammer.at/beratung/Wohnen/wohnpolitik/Vermieter_sollen_Maklergebuehren_zahlen.html>, 15 March 2014.

[99] Deutsch & Lawson, 'International measures to channel investments towards affordable rental housing: Austrian case study', (2012), 50.

[100] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 107.

- ***Has mortgage credit been restricted? What are the effects for renting?***

The allocation of mortgage loans has been adapted to the criteria of "Basel II" according Directives 2006/48/EC and 2006/49/EC, which have been implemented into the Banking Act ("Bankwesengesetz 1993").

The allocation of mortgage loans in Austria has still increased within the crisis since 2007, although the rate of increase of mortgage loans has slowed down significantly from 6.5 % in mid-2008 to less than 1.8 % in mid-2013.[101] Foreign-currency mortgages (mainly in CHF) strongly curbed in new emissions since 2008, many also restructured in Euro denominated loans.[102]

Between 2005 and 2011, the Residential Mortgage Debt to GDP ratio (in %) increased only moderately from 21.9 % to 27.8 %.[103]

- ***Indicate the current figures on repossession (seizures of houses in case of mortgage credit default of the buyer)? Have repossessions affected the rental market?***

Current figures on repossessions and their affect on the rental market are not available for Austria.

- ***Has new housing or housing related legislation been introduced in response to the crisis?***

In response to the crisis, no new housing or housing-related legislation apart of the above mentioned changes to the Banking Act has been introduced in Austria.

2.6 Urban aspects of the housing situation

- ***What is the distribution of housing types in the city scale (e.g.: are rented houses mainly in the city centres and owner occupied in the suburbs?) vs. the region scale (e.g.: more rented houses in the big cities, less in the villages?)***

As previously indicated, huge regional differences regarding the legal basis for possession, especially between Vienna and the other eight Länder, are characteristic for Austria. Whereas in Vienna 75.4 % of the population are principal tenants and only 7.9 % of the population live in homeownership (excl. condominiums), in Burgenland, a predominantly rural state in the east of Austria, 79.7 % of the population live in homeownership (excl. condominiums) and only 13.2 % as principal tenants (see tab. 7 above). Also, within the regions, the share of rental housing varies strongly, mainly with high shares in urban municipalities.

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[101] Österreichische Nationalbank, '11. Kreditbericht', <http://www.oenb.at/dms/oenb/Publikationen/Volkswirtschaft/Kreditbericht/Kreditbericht-Dezember-2013/Kreditbericht%20Dezember%202013.pdf>, (2013), 14, 23 March 2014.

[102] Mundt & Springler, 2015

[103] Lugger & Amann, *Österreichisches Wohnhandbuch 2013* (Innsbruck: Studien Verlag, 2013).

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- ***Are the different types of housing regarded as contributing to specific, mostly critical, "socio-urban" phenomena, in particular ghettoization and gentrification?***

"Socio-urban" phenomena like ghettoization and gentrification can of course be seen in many bigger Austrian towns like Vienna, Graz, Linz, Salzburg, and Innsbruck. However, due to the huge importance of limited-profit housing and municipal rental housing, especially in Vienna, as well as the strict rent limits of the MRG, these phenomena have not been classified as highly problematic so far. Promoting a social mix in neighbourhoods has always been a priority of urban administrations, especially in Vienna, fostered by strategically placing subsidised housing projects (LPHA, municipal housing) throughout the whole city.

In Vienna, a detailed urban development plan ("Stadtentwicklungsplan") [104] exists, which is frequently renewed and which follows the concept of soft urban renewal ("sanfte Stadterneuerung"). This urban development plan is an instrument of general, anticipatory urban development and planning, and determines the main pillars for a regulated development of the city, such as areas of development. The aim of the concept of soft urban renewal is a citizen-centred renewal of the existing dwelling stock and, if possible, an improvement of the quality of the structure of the buildings and existing infrastructure, e.g. green spaces, streets, etc. The main goal is to enable sitting tenants to maintain their rental contracts after the refurbishment of the buildings. For this goal, special subsidies in exchange for stable rental contracts of sitting tenants are granted by the administration, which secures a rent level for the sitting tenants below the market rent level.

- ***Do phenomena of squatting exist? What are their – legal and real world – consequences?***

Squatting has occasionally been reported in the media in the past years in Vienna[105], Graz[106], and Linz[107], but in the author's opinion it is a rare phenomenon in Austria. In most cases, the motivation for the squatting activities by Austrian citizens were not housing issues but protests of activists to gain places for autonomous cultural centres or

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[104] See for a summary of the recent STEP 2005 in English <http://www.wien.gv.at/stadtentwicklung/strategien/step/step05/download/pdf/step05kurz-en.pdf>, 23 March 2014.

[105] Standard, 'Kein Gott, kein Staat, kein Mietvertrag?', <http://derstandard.at/1256743517593/Wohnungsleerstaende-in-Wien-Kein-Gott-kein-Staat-kein-Mietvertrag>, 18 November 2013; Figl, 'Räumung auf sanfte Tour', <http://www.wienerzeitung.at/nachrichten/wien/stadtleben/409648_Raeumung-auf-die-sanfte-Tour.html>, 18 November 2013; Wiener Zeitung, 'Wieder Hausbesetzung in Neubau', <http://www.wienerzeitung.at/nachrichten/wien/stadtleben/ 410859_Wieder- Hausbesetzung-in-Neubau.html>, 18 November 2013.

[106] Kleine Zeitung, ‚Hausbesetzung in der Grazbachgasse', <http://www.kleinezeitung.at/steiermark/graz/graz/3043558/hausbesetzung-grazbachgasse.story>, 16 June 2012; Kleine Zeitung, ‚Drei "temporäre" Hausbesetzungen in Graz', <http://www.kleinezeitung.at/steiermark/graz/graz/1601780/index.do>, 18 November 2013.

[107] Der Standard, ‚Hausbesetzungen in Wien und Linz', <http://derstandard.at/1308680895810/Kulturelle-Freiraeume-Hausbesetzungen-in-Wien-und-Linz>, 15 March 2014.

similar institutions. Some squatting activities were also related to protests for re-entry into certain buildings after renovation.[108]

2.7 Social aspects of the housing situation

- ***What is (are) the dominant public opinion(s) towards certain forms of rental types or tenure forms? (e.g. is renting considered as socially inferior or economically unsound in the sense of a "rental trap"?)***
  In particular: Is only home ownership regarded as a safe protection after retirement?

In the opinion of the author, renting is considered socially inferior, although not to such a negative extent as in many other European countries or in the sense of a "rental trap". Municipal rental housing and limited-profit rental housing as well as private rental housing, if the MRG is fully or partially applicable, also offer protection after retirement in the case of a contract unlimited in time because the possibilities for the landlord to give notice are very limited. Especially in Vienna, living in municipal housing or limited-profit rental housing is seen as absolute equivalent form of tenure with regards to homeownership.[109]

- ***What is the typical attitude of tenants towards different forms of tenure (e.g. owners of privatized apartments in former Eastern Europe not feeling and behaving as full owners)?***

In general, Austrians are subjectively quite satisfied with habitation and housing in all tenure forms based on recent surveys. [110] In 2012, a minimum of 81 % of citizens were very or mostly satisfied with their housing conditions. Nevertheless, some differences between the tenure forms can be seen.

98 % of homeowners and 96 % of owners of dwellings in condominiums said that they were very or somewhat satisfied with housing, whereas only 81 % of the people living in private rental housing, 82 % of the people living in municipal rental housing, and 88 % of people living in limited-profit housing were very or somewhat satisfied with their housing conditions.[111]

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[108] Wiener Zeitung, ‚Hausbesetzungen in Ottakring von Polizei und WEGA aufgelöst', <http://www.wienerzeitung.at/nachrichten/wien/stadtleben/359221_Hausbesetzung-in-Ottakring-von-Polizei-und-WEGA-aufgeloest.html>, 15 March 2014.

[109] See Chapter 6.6 for details.

[110] Statistics Austria, ‚Tabellenband EU-SILC 2012: Einkommen, Armut und Lebensbedingungen', <https://www.statistik.at/web_de/Redirect/index.htm?dDocName=074633>, 56 et seq, 23 March 2014.

[111] Statistics Austria, ‚Tabellenband EU-SILC 2012: Einkommen, Armut und Lebensbedingungen', <https://www.statistik.at/web_de/Redirect/index.htm?dDocName=074633>, 57 (23 March 2014).

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Summary table 2: Urban and Social Aspects of the Housing Situation

	Home ownership	Renting **with a public task**	Renting **without a public task**
Dominant public opinion	Very positive	positive	positive
Contribution to gentrification?	Yes	No	Yes
Contribution to ghettoization?	Yes	No	Yes

3. Housing policies and related policies

3.1 Introduction

- ***How is housing policy related to the structure and concept of the (national) welfare state, to other welfare policies and the tax system?***

The Austrian housing policy acknowledges housing as a basic human need and encourages an affordable and high-quality supply of dwellings. Especially relevant are policies for public loans and subsidies for construction and modernization of dwellings ("Wohnbauförderung"), the limited-profit housing sector, housing banks ("Wohnbaubanken"), building society savings ("Bausparen"), building society loans ("Bauspardarlehen"), and tenancy law.[112]

In comparison to other European states, there are hardly any tax advantages in Austria for the use of personal immovable property. Only the increment value tax often is omitted.[113]

- ***What is the role of the constitutional framework of housing? (in particular: does a fundamental right to housing exist?)***

The constitutional framework of housing in Austria is primarily important with reference to the spheres of competences of legislation and execution of housing policy, as a constitutional guaranteed right to housing for an individual does not exist.[114]

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[112] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 44.

[113] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 44.

[114] Sonntag, 'Recht auf Wohnen aus verfassungs- und verwaltungsrechtlicher Sicht. Eine Bestandsaufnahme', *juridikum* (2013), 221 et seq.; Schober, 'Das Recht auf Wohnen', *wobl* (2012), 5 et

The Austrian Constitution of 1920, the "Bundes-Verfassungsgesetz"[115] (B-VG), divides the spheres of competences between Bund ("Bund") and the nine Austrian Länder ("Länder"). Mixed competences in legislation and execution between Bund and Länder are common, not exceptional, and often problematic[116] In so far as a matter is not expressly assigned by the B-VG to the Bund for legislation and/or execution, it remains within the autonomous sphere of competence of the Länder.

Municipalities ("Gemeinden") in the Austrian legal system are self-governing bodies, which act either by instruction ("weisungsgebunden") or free of instruction ("weisungsfrei") but under supervision of the Bund or state.[117] Vienna has an exceptional constitutional status in comparison to all other Austrian Länder because it has both Länder and municipal competences.

3.2 Governmental actors

- ***Which levels of government are involved in housing policy (national, regional, local); what are they called; how many are there of each?***

In Austria, national, regional, and local levels of government are involved in housing policy.

(i) National governmental agents (Bund):
- the federal government ("Bundesregierung") as collective body;
- the chancellor ("Bundeskanzler");
- the federal government ministry ("Bundesminister").

(ii) Regional governmental agents (9 Länder):
- the regional government ("Landesregierungen") as collective body or the regional governor ("Landeshauptmann") and the regional government ministry ("Landesräte").[118]

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seq.; Gutknecht, 'Das Recht auf Wohnen und seine Verankerung in der Österreichischen Rechtsordnung', *JBl* (1982), 173 et seq.

[115] BGBl. Nr. 1/1920, reannounced i.a. BGBl. Nr. 1/1930 and StGBl. Nr. 4/1945, last amendment BGBl. I Nr. 65/2012.

[116] Bundesministerium für Wirtschaft und Arbeit (ed.), 'Kompetenzgefüge im österreichischen Wohnungswesen' (2008), 10, <http://www.iibw.at/deutsch/portfolio/wohnen/downloads/Kompetenzgefuege%20Wohnen%200811201%20fuer%20web.pdf>, 15 March 2014.

[117] See Öhlinger, *Verfassungsrecht*, 4th ed. (Wien: WUV-Univ.-Verlag, 1999), 545 et seq. for details.

[118] Depending on the Constitution of each state (Landesverfassung"); see Öhlinger, *Verfassungsrecht*, 4th ed. (Wien: WUV-Univ.-Verlag, 1999), 517.

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(iii) Local governmental agents (2354 Municipalities[119]):

- the municipal council ("Gemeinderat");
- the municipal board ("Gemeindevorstand", "Stadtrat" or "Stadtsenat") as collective body;
- the mayor ("Bürgermeister").

Vienna has an special status, as the competences of the Länder are united with the competences of the municipality and executed by local governmental agents.

- ***Which level(s) of government is/are responsible for designing which housing policy (instruments)?***

Important housing policy instruments in Austria are especially

- the subsidies for construction and modernization of dwellings ("Wohnbauförderung") for the construction of new buildings and dwellings within the responsibility of the regional governmental actors and
- the "Mietrechtsgesetz 1982" (Tenancy Statute, MRG) for existing dwellings within the responsibility of national governmental actors. [120]

In Austria, the following levels of government are responsible for designing housing policy (instruments):[121]

National government	Regional government	Local government
Ministry of Economics, responsible for international representation of housing policy and the law on limited profit housing.	Design of and contribution to programs relating to the promotion of housing policies.	Building Law, within limits set by regional government for matters of regional importance.
Ministry of Justice, responsible for the Rent Act and the Home Ownership Act (also concerning decision-making on	Implementation of the law relating to limited profit housing.	Planning regulation, within limits set by regional government for matters of regional importance.

[119] As of 1 January 2013.

[120] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 107.

[121] Demonstrative selection of important housing policy matters, adopted from Wirtschaftsministerium (ed.), 'Kompetenzgefüge im österreichischen Wohnungswesen' (2008), 7 and Deutsch & Lawson, 'International measures to channel investments towards affordable rental housing: Austrian case study', (2012), 17.

condominiums).		
Ministry of Environment, responsible for climate arrangements, together with Länder governments.	Together with the Ministry of the Environment, implementation of climate programs.	Policies on the use of land and its allocation for housing purposes.
Ministry of Finance, responsible for tax law and jointly with Länder determines the equalization of tax revenue distribution between the state and formerly allocated specific funds for housing programs.		Policies on the allocation of subsidized dwellings.

- ***Which level(s) of government is/are responsible for which housing laws and policies?***

Although Austrian tenancy law is mainly federal (national) law,[122] powers are separated in some important political matters:[123]

Matter:	Legislation:	Execution:	Norms (B-VG):
Civil law affairs ("Zivilrechtswesen") e.g. ABGB, MRG, WEG	Bund	Bund	Art 10 par. 1 fig. 6
Social housing affairs ("Volkswohnungswesen") e.g. WGG	Bund	Länder	Art 11 par. 1 fig. 3
Complete refurbishment ("Assanierung") e.g. Stadterneuerungs-gesetz 1974	Bund	Länder	Art 11 par. 1 fig. 5

[122] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 7.

[123] Adopted from Wirtschaftsministerium (ed.), 'Kompetenzgefüge im österreichischen Wohnungswesen' (2008), 10.

Subsidies for construction and modernization of dwellings (“Wohnbauförderung und Wohnhaussanierung”) e.g. Wiener Wohnbau-förderungs- und Wohnhaus-sanierungsgesetz 1989	Länder	Länder	Art 15 par. 1
Land transfer (“Grundverkehr”) e.g. Steiermärkisches Grundverkehrsgesetz 1993	Länder	Länder	Art 15 par. 1
Construction law* (“Baurecht“) e.g. Steiermärkisches Baugesetz 1955	Länder	Länder / Municipality	Art 15 par. 1
Regional Development (“Raumordnung“) e.g. Steiermärkisches Raumordnungsgesetz 2010	Länder	Länder / Municipality	Art 15 par. 1

*with exceptions, see Art 10-15 B-VG.

3.3 Housing policies

- ***What are the main functions and objectives of housing policies pursued at different levels of governance?***

The main objective of Austrian housing policies pursued at all levels of governance is to provide affordable housing of high quality to the citizens.

- ***In particular: Does the national policy favour certain types of tenure (e.g. rented housing or home ownership (owner-occupation)?***

As in Austria a stable structure of the dwelling stock (main residences) with reference to the legal basis exists since 1981[124], a clear national policy preference for certain types of tenure cannot be seen. In comparison to housing policy in other European states, limited-profit housing and municipal housing have an important standing in Austrian housing policies and, with regard to issues of prices and affordability, can be seen as privileged compared to private rental tenancies.

- ***Are there measures against vacancies (e.g. fines or forced assignments of vacant houses)?***

In Austria, no measures against vacancies like fines or forced assignments of vacant houses exist. Recently there have been some discussions about fines for vacant dwellings in the media, but so far no legislative actions have been taken.[125]

- ***Are there special housing policies targeted at certain groups of the population (e.g. elderly people, migrants, Sinti and Roma etc)?***

In general, housing subsidies and sector for housing with a public task is targeted at low- and middle-income groups. Special housing policies targeted at certain groups exist, lately often for elderly people with reference to barrier-free construction of new buildings and barrier-free modernization of existing buildings. Many Austrian Länder have integrated standards from the Austrian Institute of Construction Engineering[126] into their construction law and linked subsidies for construction and modernization of dwellings to the requirement of barrier-free housing.

3.4 Urban policies

Urban policies differ significantly throughout the bigger Austrian towns Vienna, Graz, Linz, Salzburg, and Innsbruck. In general, urban policies are linked to regional development ("Raumordnung") and area zoning ("Flächenwidmung"). Every Austrian Land has enacted a regional development statute ("Raumordnungsgesetz"), which is the basis for the area zoning of the local government. Every municipality also has to create an urban development plan ("örtliches Entwicklungskonzept" or "Stadtentwicklungs-konzept") which is usually set up for a period of 15 years and supervised by regional government authorities to guarantee its compatibility with trans-regional interests. Furthermore, the municipalities enact specific construction plans ("Bebauungspläne") for

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[124] See Tab. 4 above.

[125] Vorarlberger Nachrichten, 'Steuer auf leerstehende Wohnungen überlegt', <http://salzburg.orf.at/news/stories/2596599/>; Vorarlberger Nachrichten, 'Strafsteuer auf leerstehende Wohnungen', <http://www.vorarlbergernachrichten.at/lokal/vorarlberg/_2013/08/23/strafsteuer-fur-leere-wohnungen.vn>, 18 November 2013.

[126] <http://www.oib.or.at/RL4_061011.pdf>, 25 March 2014.

building land to create spatial diversity and specify allowable building activity (densities, building heights, etc.)

- ***Are there any measures/incentives to prevent ghettoization, in particular***

- ***mixed tenure type estates***[127]***?***

Mixed tenure type estates can certainly be established within the limits of area zoning. Tenants of rental units owned by limited-profit housing associations furthermore have a rent-to-buy option of their rental unit. If tenants use this option, mixed tenure-type is automatically created.

- ***"pepper potting"***[128]***?***

Dwellings owned by limited-profit housing associations, by municipalities, or by non-profit municipal bodies can be found in different parts of Austrian cities to prevent ghettoization.

- ***"tenure blind"***[129]

The financial status of applicants for municipal rental housing or limited profit rental housing is not open to the public. Nevertheless, often buildings constructed by limited profit housing associations, by municipalities, or by non-profit municipal bodies can be identified by signs on the front of the buildings.

- ***public authorities "seizing" apartments to be rented to certain social groups***

- ***Other "anti-ghettoization" measures could be: lower taxes, building permit easier to obtain or requirement of especially attractive localization as a condition to obtain building permit, condition of city contribution in technical infrastructure.***

- ***Are there policies to counteract gentrification?***

In Vienna, a specific model of "soft" or "gentle" urban renewal has been developed step by step in the last three decades[130] and is especially dedicated to prevent gentrification.

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[127] Mixed tenure means that flats of different tenure types: rented, owner-occupied, social, etc. are mixed in one estate. It is the simplest way of avoiding homogenized communities, and to strengthen diversification of housing supply.

[128] This mechanism is locating social housing flats among open market ones, so as not to gather lowest income families in one place. The concept is quite controversial; however it was used for a long time in the English affordable housing system to minimize the modern city ghetto problem.

[129] This is a mechanism for providing social housing in a way that the financial status of the inhabitants is not readily identifiable form the outside. It is used to avoid/minimize stigmatization and social exclusion which could be caused by living in a (openly identifiable) social stock.

[130] Fassmann & Hatz, 'Urban Renewal in Vienna' <https://www.academia.edu/189782/Urban_Renewal_in_Vienna> (2006), 1, 25 March 2014.

This model focuses on sustainable renovation that incorporates the tenants into the renewal process. The aims are to maintain and improve the existing dwelling stock and create affordable, high-standard dwellings while a balanced, socially-mixed residential population is maintained.[131]

Urban renewal is carried out on three different spatial levels: the level of individual dwellings (apartments), the level of the building, and the level of an entire neighbourhood (block). For each level, different measuresand goals are defined, see **Tab 17**.

Tab. 17. Entities of Renewal, Measures, Content and Goals:[132]

Level	Measures	Content and Goals
Apartments	individual improvements	improvement of heating, sanitation and floor plan of the apartment; subsidizing interests of mortgages and loans
Building	basic maintenance, base renewal and total renovation; thermal energy renewal	preservation and improvement of electricity and water supply (pipes,..), sewage, elevator, roof etc.; improvement of the insulation, windows; subsidizing most of the renovation costs
Block	block renewal	coordination of the single-building renovations and improvements of the semi-public space within the block

Source: Fassmann & Hatz 2006.

The most important type of renewal, the so called “base renewal” (“Sockelsanierung”) involves simultaneous maintenance and modernization of buildings which are partially or fully inhabited. This maintenance and modernization of buildings can occur at once or in separate stages, while the rental agreement remains valid. Tenants are invited to participate in any modifications of their dwellings, but they are not obliged to. In contrast to the more radical total renewal, which involves the full renovation of an empty building with the aim of creating category A dwellings, the base renewal allows a gentle renewal without complete exchange of the inhabitants. Whenever the administration grants subsidies for the renewal sitting tenants maintain their rental contracts after renovation.[133]

- ***Are there any means of control and regulation of the quality of private rented housing or is quality determined only by free market mechanisms? (Does a flat have to fulfil any standards so that it may be rented? E.g.: minimum floor area, equipment, access to technical and/or social infrastructure and/or public***

[131] Fassmann & Hatz, ‘Urban Renewal in Vienna’ (2006), 1.

[132] Fassmann & Hatz, ‘Urban Renewal in Vienna’ (2006), 5.

[133] Fassmann & Hatz, ‘Urban Renewal in Vienna’ (2006), 5 et seq.

transport, parameters such as energy efficiency, power/water consumption, access to communal services such as garbage collection. If so: how are these factors verified and controlled?)

The Construction Law Statutes of the nine Austrian Länder and bylaws provide binding technical standards for the construction of new dwellings. Every dwelling in Austria furthermore needs a valid permission of usage by the local construction authorities ("baubehördliche Benützungsbewilligung"), which can also be revoked by the local authorities.

- ***Does a regional housing policy exist? (in particular: are there any tools to regulate housing at regional level, e.g.: in order to prevent suburbanization and periurbanization? Is it possible to distribute local taxes so that villages can afford the limitation of housing areas?)***

As mentioned above, regional development, area zoning and urban development plans are tools to regulate housing at regional and local level.

3.5 Energy policies

- ***To what extent do European, national and or local energy policies affect housing?***

Austria has quite a long tradition in pursuing energy policies with the aim to increase energy efficiency.

Even before the implementation of the first EU Directives 2004/8/EC and 2006/32/EC on energy efficiency, most of the statutes on subsidies for construction and modernization of the nine Austrian Länder provided incentives for energy efficient construction and modernization of buildings. Especially Vorarlberg began as early as 1990 with additional subsidies for the construction of new buildings with a reduced calculated heating energy demand.[134] Subsidies for construction and modernization are still the most important instrument to increase energy efficiency in Austria because the energy standards to be observed for the construction and modernization were (and still are) always stricter than the current legal standards enacted in the construction laws of the Länder.

The first Energy Efficiency Action Plan of Austria in 2007[135], in accordance with the EU-Directive 2006/32/EC, lists a number of energy efficient measures with reference to private households, such as improving the thermal quality of the building shell, the use of energy-efficient building installations (for heating, cooling, hot water and ventilation), in the case of new construction, renovation and ongoing operation, or the use of energy-efficient appliances (white-goods, etc.) and lighting.

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[134] Lorenz, 'Vorreiter im ökologischen Wohnbau' in *Die Österreichische Wohnungsgemeinnützigkeit als Europäisches Erfolgsmodell*, ed. Lugger & Holoubek (Wien: Manz, 2008), 327.

[135] Federal Ministry of Trade, Industry and Labor, '1. Energy Efficiency Action Plan of the Republic of Austria', <http://ec.europa.eu/energy/demand/legislation/doc/neeap/austria_en.pdf>, 29 March 2014, 132.

The second Energy Efficiency Action Plan of Austria in 2011[136] has evaluated these measures, and in the meantime, the National Energy Strategy[137] was also presented in 2010.

European energy policies affected Austrian housing, especially with regard to the implementation of the first Directive 2002/91/EC and second Directive 2010/31/EU on the energy performance of buildings.[138]

Summary table 3: Important Policy Aims, laws and Instruments

(X) – involved (O) – not involved (*) – with exceptions

	Bund / National government	**Länder / Regional government**	**Municipality / Local government**
Policy aims:			
(1) Provide new affordable rented dwellings of high quality for Austrian citizens	**X**	**X**	**X**
(2) Secure affordability of existing rented dwelling stock	**X**	**X***	**O**
(3) energy policy	**X**	**X**	**X**

[136] http://www.buildup.eu/sites/default/files/content/AT%20-%20Energy%20Efficiency%20Action%20Plan%20EN.pdf (29.03.2014).

[137] Federal Ministry of Economy, Family and Youth, 'Second National Energy Efficiency Action Plan of the Republic of Austria 2011', <http://www.energiestrategie.at/images/stories/pdf/longversion/energiestrategie_oesterreich.pdf>, 29.

[138] For Details see Chapter 6.1 below.

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Laws:			
(1), (2), (3) General Civil Law (ABGB, MRG, WGG)	**X**	**O**	**O**
(1), (3) Construction law, regional development law, law on subsidies for construction and modernization	**O**	**X**	**X**
Instruments:			
(1), (3) Object-related subsidies for the construction and modernization of new dwellings	**O**	**X**	**X***
(2) Rent regulations	**X**	**O**	**O**
(2) Subject-related subsidies	**O**	**X**	**X***

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3.6 Subsidization

- ***Are different types of housing subsidized in general, and if so, to what extent? (give overview)***

- ***Explain the different forms of subsidies for tenants, (certain) landlords and, if relevant, housing associations or similar entities acting as intermediaries (e.g. direct, by means of investment loans, tax privileges). Which level of government is competent to assign the subsidies? Is there a subjective right to certain subsidies or does the public administration have discretion in whom to assign the subsidy?***

In Austria, there is a mixed system of object-related subsidies (supply-side subsidies), subject-related subsidies (demand-side/allowances), tax incentives, and capital market instruments for the subsidization of housing. The clearly preferred type of housing subsidization is object-related subsidization for the construction and modernisation of dwellings.

Subsidies for construction and modernization of dwellings ("Wohnbauförderung") differ between the nine Austrian Länder and are characterized by a variety of instruments and channels to serve different dwelling types and housing needs, not just for rental housing. Each Austrian Land designs subsidy schemes to finance new dwellings and their modernization reflecting regional policy preferences and often provides long-term low-interest public loans with conditions and target groups that differ across the Länder.[139]

Typical instruments[140] by the Länder are:

- (long-term) public loans ("Landesdarlehen")
- annuity and interest subsidies ("Annuitäten- und Zinsenzuschüsse")
- non-refundable grants for citizens or property developers ("Wohnbauschecks")
- housing subsidy ("Wohnbeihilfe")

Typical instruments by the Bund are:

- tax incentives ("Steuerliche Förderung")
- building society savings ("Bausparförderung")

Housing benefits ("Wohnbeihilfe") are an example of a subject-related subsidy. The region grants an amount of money each month to households with very little income, so that they are able to pay their rent and general expenses or operation costs. In some Länder, even homeowners and owners of dwellings in condominiums have access to

[139] Deutsch & Lawson, 'International measures to channel investment towards affordable rental housing: Austrian case study' (2012), 12.

[140] Amann & Oberhuber in Rainer (Ed.), Chap.in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012), Chapter 18.5.3.1 et seq.

this housing subsidy.[141] In Styria, a region in the south of Austria, a maximum of EUR 143 per month for a single person is granted (2014).

Another well known instrument is the "Heizkostenzuschuss", a subsidy for heating costs for citizens paid by the social department of the regional government or municipality to very low income households. This subsidy can usually be combined with housing benefits. In Styria, a maximum of EUR 120 per year for each household is granted (2014).

Additionally, social welfare law also provides subject-related instruments in the form of the "Bedarfsorientierte Mindestsicherung" (BMS), a needs-based minimum benefit system, which provides direct financial aid to citizens who have no or little income and no assets. Of this financial aid of EUR 795 per month (2013) for a single person, 25 % (i.e. approximately EUR 199) is granted for housing purposes. In case of an imminent danger of eviction, this monthly amount of money for housing purposes can also be paid directly to the landlord to prevent an eviction.

In Austria public authorities spent around 2,200 Mio. EUR – or 0.71 % of the GPD – for housing in 2012. The majority of around 1,520 Mio. EUR was granted as subsidies for construction and modernization of dwellings ("Wohnbauförderung"). Around 180 Mio. EUR was granted as subsidies for building society savings ("Bausparförderung") or tax incentives for Austrian Housing Construction Convertible Bonds, around 200 Mio. EUR was granted for the deduction of costs from the income tax for the construction and modernization of dwellings, and around 400 Mio. EUR was provided for other subsidies e.g of municipalities.[142]

- ***Have certain subsidies been challenged on legal grounds (in particular: on the basis of competition law or budget law)?***

The laws on subsidies for construction and modernization of dwellings of several Austrian Länder have been challenged at the Constitutional Court ("Verfassungs-gerichtshof", VfGH) in the 1990s[143] by for-profit land developers and construction companies. Aims of their challenges were to attack the privileged position of limited-profit housing associations in general and in particular their privileged access to subsidies for construction and modernization of dwellings. The for-profit land developers and construction companies claimed a violation of the principle of equality, but the VfGH rejected their challenges as inadmissible. In some regions commercial housing providers now have access to housing subsidies if they comply with the same standards set by subsidy laws (like the LPHA also have to comply).

The "Wohnbauförderungs-ZweckzuschußG 1989", which regulated the distribution of tax incomes between Bund and Länder regarding subsidies for construction and

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[141] Amann & Oberhuber in Rainer (Ed.), in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012), Chapter 18.5.3.4 et seq. Chap.

[142] Lugger & Amann, Österreichisches Wohnhandbuch 2013 (Innsbruck: Studien Verlag, 2013), 65.

[143] VfGH 26. 6. 1992, V 268/91 and others.

modernization of dwellings, was challenged in 1994[144] at the VfGH and the judges declared that the distribution mechanism had violated the principle of objectivity and therefore was unconstitutional. Since 2008 federal funds distributed to the Länder for housing purposes are not ear-marked for such tasks anymore so that legal disputes in the future are unlikely.

Summary table 4: Subsidization of the Landlord

Subsidization of the Landlord	Private landlord	Municipality or municipality bodies	Limited-profit housing association
Subsidy before start of contract (e.g. savings scheme)		Municipality directly invests in free building land; Subsidies for construction and modernization	Municipality offers free or cheap building land for lower prices; Subsidies for construction and modernization, mostly by regional. low interest loans Housing Construction Banks raise money for affordable housing through tax-privileged Housing Construction Convertible Banks
Subsidy at start of contract (e.g. grant)	None	Subsidies for construction and modernization	Subsidies for construction and modernization
Subsidy during tenancy (e.g. lower than market interest rate for investment loan, subsidized loan guarantee)	Some tax privileges Subsidies for modernization and renewals of buildings	Subsidies for construction and modernization	Subsidies for construction and modernization, mostly by regional. low interest loans

[144] VfGH 28. 9. 1995, G 296/94.

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Summary table 5: Subsidization of the Tenant

Subsidization of the Tenant	private rental housing	municipal rental housing	Limited-profit rental housing
Subsidy before start of contract (e.g. voucher allocated before finding a rental dwelling)	None	None	None
Subsidy at start of contract (e.g. subsidy to move)	None	None	Individual low interest loans to fund capital contributions by tenants in LPHA stock
Subsidy during tenancy (in e.g. housing allowances, rent regulation)	Housing benefits	Social rents or cost rents in municipal housing stock Housing benefits	Cost rents based on historical building costs in LPHA stock Housing benefits

Summary table 6: Subsidization of Owner-Occupier

Subsidization of Owner-Occupier	
Subsidy before purchase of the house (e.g. savings scheme)	Subsidies for building society savings and loans
Subsidy at start of contract (e.g. grant)	Some municipalities offer free or cheap building land or land leases
Subsidy during tenure (e.g. lower than market interest rate for investment loan, subsidized loan guarantee, housing allowances)	Low interest regional loans for construction and modernization of family houses, additional housing benefits in some regions Subsidies for construction and modernization

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3.7 Taxation

- ***What taxes apply to the various types of tenure (ranging from ownership to rentals)? In particular:***

- ***Tenants: Do tenants also pay taxes on their rental tenancies? If so, which ones?***

Tenants have to pay value added tax (VAT, "Umsatzsteuer") of 10 % on their rent for dwellings. General expenses or operating costs ("Betriebskosten") and public charges are part of the rent for dwellings, to which a VAT of 10 % also applies except for costs for heat supply. Furthermore, tenants are obliged to pay VAT of 20 % on their rent for furniture or garages and on their costs for heat supply (§ 10 par. 2 fig. 4 "Umsatzsteuergesetz 1994"[145]).

As public charges are part of the rent for dwellings according to § 15 par. 1 fig. 2 MRG, tenants also pay the expanses of their landlords for real property tax ("Grundsteuer").

According to § 15 et seq. and § 33 TP 5 Gebührengesetz 1957 (GebG), every written tenancy agreement with a duration of more than 3 months is subject to a 1 % transfer tax, which is due when signing a rental contract. The basis of assessment is

- the yearly amount of rent (incl. all general expenses, VAT) plus single payments, which a tenant has to pay e.g. for investments, and
- the duration of the contract.

Although both contracting parties are liable for the payment of this transfer tax (§ 28 par. 1 lit. a GebG), the notification of the tax authorities of the agreement and the actual payment of the tax to the authorities is often carried out by the landlord or his legal representative after conclusion of the contract. The tenant usually pays the full tax costs to the landlord before or at beginning of the rent agreement together with the demanded deposit.

- ***Homeowners:***

- ***Income tax of homeowners: is the value of occupying a house considered as a taxable income?***

The value of occupying your own house as a homeowner or your own dwelling in a condominium is not considered a taxable income.

Every homeowner or owner of dwellings in condominium nevertheless has to pay a real property tax which is calculated according to the Real Property Tax Act ("Grundsteuergesetz 1955"[146]) from a rateable value ("Einheitswert") of the immovable property, which only represents 10 % to 25 % of the market value of the immovable property. The real property tax is between 0.05 % and 0.2 % of the rateable value, and

[145] BGBl. Nr. 663/1994, last amendment: BGBl. I Nr. 13/2014.

[146] BGBl. Nr. 149/1955, last amendment BGBl. I Nr. 34/2010.

municipalities independently have the opportunity to raise the actual real property tax by millage rate up to 0.5 % and 1 %.

Rental revenues ("Einkünfte aus Vermietung und Verpachtung") of natural persons are a type of income subject to tax according the Income Tax Act (Einkommensteuergesetz 1988[147]). Every household income above EUR 11,000 is subject to a progressive income tax of up to 50 %.

Rental revenues of corporate bodies are a type of income subject to tax according to the Corporate Income Tax Act ("Körperschaftsteuergesetz 1988"[148]). Every total income is subject to a flat tax of 25 %.

Every transfer of land or equivalent rights (e.g. construction rights), including endowments etc., is subject to a transfer tax between 2 % and 3.5 % from a triple rateable value or market price of the immovable property according to the Land Transfer Tax Act ("Grunderwerbsteuergesetz 1987"[149]). Furthermore, administration fees for the registration into the land register of 1.1 % for transfer of land or 1.2 % for transfer of construction rights, which fees are calculated by referring either to the triple rateable value or the market price of the immovable property.

- ***Is the profit derived from the sale of a residential home taxed?***

Since 2012, the profit derived from the sale of land, buildings or equivalent rights (e.g. construction rights) of natural persons is subject to a real property profit tax ("Immobilienertragssteuer") according the Income Tax Act (Einkommensteuergesetz 1988). The profit of sale is subject to a flat tax of 25 %. A reduced tax fee of 3.5 % applies to immovable property, which has been purchased before 1.4.2002. Profits from sales of immovable property which has been used as main residence are in general excluded from the application of this real property profit tax.

Before 2012 derived profits on commercial sales of real estate were taxed within income tax (e.g. of real estate agents) The reduction to a 25% flat tax actually reduced the tax in most cases because realtors usually paid income taxes below 25%.

- ***Is there any subsidization via the tax system? If so, how is it organized? (for instance, tenants being able to deduct rent from taxable income; landlords being able to deduct special costs; homeowners being treated favourably via the tax system)***

Limited-profit housing associations are privileged compared to other corporate bodies or private landlords. Their core economic activities of construction and modernization of buildings for housing with a public task are according to § 5 fig. 10 and § 6a Körperschaftsteuergesetz 1988 excluded from the obligation to pay corporate income tax, if these activities are provided in line with the provisions of the WGG.

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[147] BGBl. Nr. 400/1988, last amendment BGBl. I Nr. 13/2014.

[148] BGBl. Nr. 401/1988, last amendment BGBl. I Nr. 13/2014.

[149] BGBl. Nr. 309/1987, last amendment BGBl. I Nr. 1/2013.

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- ***In what way do tax subsidies influence the rental markets?***

The exclusion of limited-profit housing associations from the obligation to pay corporate income tax promotes the building of new objects and modernization of existing objects for rent and strengthens the position of limited-profit housing associations as important player in the market of supply of rental housing.

- ***Is tax evasion a problem? If yes, does it affect the rental markets in any way?***

In the opinion of the author, tax evasion is only a very limited problem with respect to the duty to pay a 1 % transfer tax for every written tenancy agreement. Sometimes private landlords "forget" to organize the notification of the tax authorities of the contract to the tax authorities and the duty to pay the transfer tax, especially if they only own one or two objects for rent. An affect of this tax circumvention on the rental markets cannot be quantified because of the lack of comprehensive data.

Summary table 7: Taxation with regard to Housing

(+) – tax applicable with exceptions (-) – tax not applicable with exceptions

	Name of taxation	Homeowners (incl. condo-minium owners)	Private landlords	Municipality / Limited profit housing association	Tenant
Taxation at point of acquisition	Land transfer tax ("Grunderwerbs-steuer") and administration fee ("Eintragungs-gebühr")	+	+	+	-
	Transfer tax for written tenancy agreement	-	-	-	+
Taxation during tenure	Real property tax ("Grundsteuer")	+	-	-	+
	Value added tax ("Umsatz-steuer")	-	-	-	+

	Tax on rental revenues in accordance with the Income Tax Act or Corporate Income Tax Act	-	+	+	-
Taxation at the end of occupancy	Real property profit tax ("Immobilien-ertragssteuer")	+	+	+	-

4. Regulatory types of rental and intermediate tenures[150]

4.1 Classifications of different types of regulatory tenures

- ***Which different regulatory types of tenure (different regulation about contracts and tenant security) do you classify within the rental sector? What are their shares in dwelling stock (compare summary table 1)?***

Three different types of rental housing with respect to the ownership of the dwelling can be classified in Austria:

(i) Private rental housing in dwellings owned by private landlords;

(ii) Limited-profit rental housing in dwellings owned by limited-profit housing associations ("gemeinnützige Bauvereinigungen");

(iii) Municipal rental housing in dwellings owned by municipalities or non-profit municipal bodies ("Gemeindewohnungen").

The main difference between private rental housing on the one side and limited-profit rental housing and municipal rental housing on the other side is that the latter have selection procedures and/or at least criteria of eligibility for tenants with regard to subsidies for construction and modernization. Therefore, with reference to the rental dwelling stock, private rental housing falls within the regulatory types of tenures without a public task, and limited-profit rental housing and municipal rental housing fall within the regulatory types of tenures with a public task.

With regard to tenancy law and lawful possession of premises for housing purposes such as an obligatory right of housing ("obligatorisches Wohnrecht") or a right of housing in rem ("dingliches Wohnrecht"), this classification is far more complex. Austrian tenancy law is inhomogeneous and inconsistent in many perspectives.[151] Different rules of law apply depending on the type and age of the premises and depending on the legal or

[150] I.e. all types of tenure apart from full and unconditional ownership.

[151] See Chapter 5 and 6 for details.

contractual basis. The Austrian legal system has two main sources of tenancy law: the "Allgemeine Bürgerliche Gesetzbuch 1811"[152] (ABGB, General Civil Code) and the "Mietrechtsgesetz 1982"[153] (MRG, Tenancy Statute). Judgements are rendered either according to the ABGB, the MRG or other special statutes.[154] With regard to some rented premises or tenancy agreements, the freedom of contract is not (or almost not)[155] 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. According to the ABGB, tenancy agreements are subject only to the general restrictions of laesio enormis (§ 934 ABGB) and the regulations of the ABGB concerning exorbitant rents (usury § 879 par. 2 fig. 4 leg. cit.). The MRG protects the tenant by far stricter limits: In the cases listed by § 16 par. 1 MRG, an adequate main rent has to be agreed in terms of size, situation, furnishings, etc.[156]

In general, the most important differences existing among tenancy agreements depend whether the MRG is fully, partially, or not applicable. For tenancy agreements, where the MRG is

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

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

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[152] JGS Nr. 946/1811, last amendment BGBl. I Nr. 68/2012.

[153] BGBl. Nr. 520/1981, last amendment BGBl. I Nr. 29/2010.

[154] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 1.

[155] Except the mandatory norms § 1096 par. 1 last sentence ABGB and § 1117 last sentence ABGB.

[156] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 2.

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4.2 Regulatory types of tenures without a public task

- ***Please describe the regulatory types in the rental sector in your country that do not have a public task. This category may be called private or market rental housing.***[157]
- ***Different types of private rental tenures and equivalents:***
- ***Rental contracts***
- ***Are there different intertemporal tenancy law regimes in general and systems of rent regulation in particular?***

Tenancy contracts as continuing obligations often "survive" more than one tenancy legislator. According to general rules and to § 43 par. 1 MRG, usually the MRG is also applicable to tenancy contracts that have been concluded before the MRG came into effect (1.1.1982). Nevertheless many of the derogated norms still have effect on current tenancy contracts due to liberal transfer terms and due to the liberal rights of relatives and other third parties to enter into an existing tenancy contract.[158]

In a recent sample of the Statistics Austria for the period 2005 to 2011, the oldest tenancy agreement reported in the survey had been concluded in the year 1900. The first tenancy law regulations were introduced in 1917 and between 1922 and 1981 the former Tenancy Statute, "Mietengesetz" (MG) was in force, which has been amended several times.[159]

With regard to the date of conclusion of tenancy contracts and the age of buildings, *Kunnert/Baumgartner*[160] classify at least 7 different regulatory types:

1. Rental contracts concluded before 1922

The ABGB was applicable to all new tenancy agreements and no special rent regulations were enacted. For existing rental agreements, though, the increase of rent was limited in 1917.

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[157] Market rental housing means housing for which the rent price determines the conclusion of contracts and not some social rules of allocation based on need.

[158] Böhmin Schwimann (Ed.)*, Praxiskommentar zum ABGB*, vol. IV, 2nd ed. (Wien: LexisNexis Österreich, 2001), before § 1 MRG note 26 et seq.

[159] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 68; For details see Chapter 5 below.

[160] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 68 et seq.

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2. Rental contracts concluded between 1922 and 1925

The MG was applicable to the majority of new tenancy agreements, and rents were regulated by law.

3. Rental contracts concluded between 1926 and 1938

Amendments of the MG in 1926 and 1929 reduced to a great extent the possibilities of rent regulations for new tenancy agreements.

4. Rental contracts concluded 1939 and 1954

Due to the Anschluss of Austria to the Third Reich, the German rent regime with strict rent regulations by the state came into effect. These regulations were repealed by the Constitutional Court in 1954 and a new “Zinsstoppgesetz” was introduced to regulate rents for dwellings, where the MG was not applicable.

5. Rental contracts concluded 1955 and 1981

With the amendment of the MG in 1955 and 1967, the possibility of rent regulations for new tenancy agreements was again reduced to a great extent. In 1968 the rules for the limited-profit housing sector and subsidies for construction and modernization of dwellings set clear rent limits, although the limited-profit housing sector was not as dominant at that time compared to today.

6. Rental contracts concluded 1.1.1982 and 28.2.1994

In 1982, the new Tenancy Statute (MRG) came into effect and the “Kategoriemietzins” (category rent), a normative system of rent regulation that divides premises into different classes (category A-D) depending on their condition was introduced. Besides that, another rent control system for other premises, that where not covered by the “Kategoriemietzins”, was introduced. For these premises tenants had to pay an adequate rent (“angemessener Hauptmietzins”), depending on size, type, location, maintenance condition and furniture of the premises.

7. Rental contracts concluded after 1.3.1994

The existing two MRG-systems of rent control (“Kategoriemietzins” and “angemessener Hauptmietzins”) were partly superseded by a new, third system of rent control within the MRG: the benchmark rent (“Richtwertmietzins”). According to this system a standard premises was defined by a special statute (“Richtwertgesetz 1994”) and for this standard premises a certain basic rent per square meter was fixed in bylaws. Surcharges and deductions to this basic rent, depending on size, kind, location, maintenance condition and furniture, have to be taken into account.

- ***Are there regulatory differences between professional/commercial and private landlords?***

- ***Briefly: How is the financing of private and professional/commercial landlords typically arranged (e.g. own equity, mortgage based loan, personal loan, mix, other)***

Regulatory differences between professional/commercial and private landlords do not exist in Austria. Anyhow the applicability of consumer protection law to tenancy contracts (if the landlord is a professional/commercial landlord) has to be considered.

- ***Apartments made available by employer at special conditions***

The use of dwellings based on company housing agreements ("Dienst-, Werks- oder Naturalwohnungen") is also lawful in Austria. The MRG is not applicable to a contract concerning such dwellings (§ 1 par. 2 MRG).

- ***Mix of private and commercial renting (e.g. the flat above the shop)***

A mix of private and commercial renting is also lawful in Austria and occurs if within one tenancy agreement both housing and business premises are rented out. Sometimes in such tenancy agreements it is questionable, whether the MRG is applicable or not. The MRG is usually applicable to the lease of premises for commercial use ("Geschäftsraum-miete") but not to usufructuary lease of a company ("Unternehmenspacht").

- ***Cooperatives***

In Austria, for-profit cooperatives are defacto not relevant in the private rental market.

- ***Company law schemes***

Company law schemes do not exist in Austria.

- ***Real rights of habitation***

- ***Any other relevant type of tenure***

In Austria, civil law acknowledges several other forms of legal possession of premises for housing purposes:

1. loan ("Leihe");
2. precariat ("Prekarium");
3. obligatory right of housing ("obligatorisches Wohnrecht");
4. right of housing in rem ("dingliches Wohnrecht");
5. usus fructus ("Wohnungsfruchtgenussrecht");
6. life tenancy or life annuity ("Ausgedinge" or "Leibrente");
7. use of dwellings based on family ties;
8. property leasing;

9. time-sharing.[161]

4.3 Regulatory types of tenures with a public task

- ***Please describe the regulatory types of rental and intermediary tenures with public task (typically non-profit or social housing allocated to need) such as***

- ***Municipal tenancies***

The MRG is usually fully applicable to tenancy agreements concerning dwellings owned by municipalities or non-profit municipal bodies ("Gemeindewohnungen").

The rent is limited by provisions of the MRG (or former MG) which were in force at the time of conclusion of the rent agreement. As an act of voluntarily self-restriction ("freiwillige Regulierung"), municipalities furthermore often provide tenants a rent level even below the rent limits of the MRG (or MG).[162] In Vienna, e.g., for first allocations of dwellings between 1982 and 2003 usually the category rent ("Kategoriemietzins") and since 2004 the benchmark rent ("Richtwertmietzins") without surcharges and minus 10 % was common,[163] which provided the tenant a rent level not only below market rent, but also below the legal limits set by the MRG.

- ***Limited-profit housing association tenancies***

For tenancy agreements concerning dwellings owned by limited profit housing associations ("gemeinnützige Bauvereinigungen"), the MRG is also fully applicable but in certain parts derogated by rules of the WGG and the Statutes on subsidies for construction and modernization of dwellings of the nine Austrian Länder ("Wohnbauförderungsgesetze").

The rent is limited by provisions of the WGG and the criteria for subsidies for construction and modernization of dwellings which were in force at the time of application for the subsidies. These cost rents are based on the historic costs of construction and the WGG specifies clearly which cost components can be included.[164]

- ***Social tenancies***

- ***Public renting through agencies***

- ***Privatized or restituted housing with social restrictions***

- ***Public entities (e.g. municipalities) taking over private contracts, typically for poor tenants to counteract homelessness***

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[161] For details of the distinction between rental agreements and the above mentioned types of "legal possession" see Chapter 5 below.

[162] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 67.

[163] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 67.

[164] Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 67.

- ***Etc.***

- ***Specify for tenures with a public task:***

- ***selection procedure and criteria of eligibility for tenants***

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.[165]

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.

Summary table 8: Regulatory types of rental and intermediate tenures

(*) without reference to intertemporal tenancies (see above)

Rental housing **without a public task** (market rental housing for which the ability to pay determines whether the tenant will get the dwelling); for example different intertemporal schemes of different landlord types with different tenancy rights and duties **and** **functionally equivalent types of intermediate possession**	Main characteristics • Types of landlords • Public task • Estimated size of market share within rental market • Etc.
1) Private rental tenancy / MRG not applicable* 2) Private rental tenancy / MRG partially applicable* 3) Private rental tenancy / MRG fully applicable* 4) company housing agreements (“Dienst-, Werks- oder Naturalwohnungen”) / MRG not	1) to 3) All types of landlords, e.g. private owners, enterprises are owners of the dwelling Estimated size of market share for 1) to 3) including subrenting is 16.6 % 4) Owner of the dwelling is an entrepreneur

[165] E.g. for the allocation method in Vienna see Ottermayer & Zwettler, ‘Skriptum Wohnungsvormerkung, Wohnungsvergabe’, (2010); in Graz see ‘RL der Stadt Graz für die Zuweisung von Gemeindewohnungen GZ.: A21/I-K-34/1989 vom 6.4.2000’.

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applicable 5) loan ("Leihe") 6) precariat ("Prekarium") 7) obligatory right of housing ("obligatorisches Wohnrecht") 8) right of housing in rem ("dingliches Wohnrecht") 9) usus fructus ("Wohnungsfruchtgenussrecht") 10) life tenancy or life annuity ("Ausgedinge" or "Leibrente") 11) use of dwellings based on family ties 12) property leasing agreements / MRG fully applicable 13) time-sharing agreements	or enterprise 5) to 11) Owner of the dwelling usually is an ascending or descending family member 12) and 13) Owner of the dwelling is an entrepreneur or enterprise Estimated size of market share for 4) to 13) is 9.1 %
Rental housing for which a **public task** has been defined (provision of housing that is not determined by the free market, but any form of state intervention)	
14) municipal rental tenancies / MRG full applicable 15) Limited-profit rental housing tenancies / MRG full applicable, WGG and Statutes for subsidies on construction and modernization are leges specialis	14) Landlords are municipalities or non-profit municipal bodies 15) Landlords are limited-profit housing associations Estimated size of market share for 14) to 15) is 24.5 %

- ***For which of these types will you answer the questions in Chapter 5 and 6; which regulatory types are important in your country?***

  1) Tenancy type 1 = Private rental tenancy / MRG not applicable

  2) Tenancy type 2 = Private rental tenancy / MRG partially applicable

  3) Tenancy type 3 = Private rental tenancy / MRG fully applicable

  4) Tenancy type 14 = Municipal rental tenancies / MRG fully applicable

5) Tenancy type 15 = Limited-profit rental housing tenancies / MRG fully applicable, WGG and Statutes for subsidies on construction and modernization are leges specialis

5. Origins and development of tenancy law

- ***What are the origins of national tenancy law and where was and is it laid down (civil code, special statute, case law)?***

The Austrian legal system has two main sources of tenancy law: the "Allgemeine Bürgerliche Gesetzbuch 1811"[166] (ABGB, General Civil Code), and the "Mietrechts-gesetz 1982"[167] (MRG, Tenancy Statute). Judgements are rendered either according to the ABGB, the MRG or other special statutes.[168] Some of these special statutes refer to a particular type and degree of building and land use by the tenant.[169] Other special statutes provide special norms for the establishment and performance of limited profit housing associations ("Wohnungsgemeinnützigkeitsgesetz 1979", (WGG)[170], for the settlement of heat and hot water costs[171], benchmark rents of rents for certain model premises[172], the presentation of energy performance certificates[173], etc. Other relevant sources with respect to the relation of entrepreneurial landlords and non-commercial tenants are the "Konsumentenschutzgesetz 1979"[174] (KSchG, Consumer Protection Statute) and the "Teilzeitnutzungsgesetz 2011"[175] (TNG, Time sharing Statute). Important sources for the civil proceedings and execution of tenancy law are the

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[166] JGS Nr. 946/1811, last amendment BGBl. I Nr. 68/2012.

[167] BGBl. Nr. 520/1981, last amendment BGBl. I Nr. 29/2010.

[168] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 1.

[169] E.g. the "Kleingartenschutzgesetz 1959" (BGBl. I Nr. 6/1959, last amendment BGBl. I Nr. 98/2001) grants similar protection to tenants of properties which do not exceed a certain size and are dedicated to non-commercial use or to relaxation purposes (allotments); the "Landpachtgesetz 1969" (BGBl. I Nr. 451/1969, last amendment BGBl. I. 124/2006), contains statutory limitation on amounts of rent with regard to tenancies for agricultural or fishing purposes; the "Sportstättenschutzgesetz 1990" (BGBl. I Nr. 456/1990, last amendment BGBl. I Nr. 113/2003) offers protection against unwarranted notice to quit for premises which are rented out by regional administrative bodies to persons for their sports practice; see further Binder, '§ 1090' in Praxiskommentar zum ABGB, vol. V, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2006), § 1090 note 6 et seq.

[170] BGBl. Nr. 139/1979, last amendment BGBl. I Nr. 135/2009.

[171] "Heizkostenabrechnungsgesetz 1992" (HeizKG, BGBl. Nr. 872/1992, last amendment BGBl. I Nr. 25/2009).

[172] „Richtwertgesetz 1993" (RichtWG, BGBl. Nr. 800/1993, last amendment BGBl. I. Nr. 25/2009), which only is relevant for premises to which the MRG fully applies.

[173] "Energieausweisvorlagegesetz 2012" (EAVG, BGBl. I Nr. 27/2012).

[174] BGBl. Nr. 140/1979, last amendment BGBl. I Nr. 100/2011.

[175] BGBl. I Nr. 8/2011.

"Zivilprozessordnung 1895"[176] (ZPO, General Civil Code of Civil Procedure), the "Außerstreitgesetz 2003"[177] (AußStrG), and the "Exekutionsordnung 1896"[178] (EO).

Court decisions (and academic writing) are not regarded as official sources of law in Austria. As *Lurger et al.*[179] point out literally: "*The Austrian judge is merely interpreter of the law, he or she cannot "create" the law by himself / herself*." Apart from this principle, the judgements of the "Oberste Gerichtshof" (OGH, Supreme Court of Justice) certainly have a constant impact on Austrian tenancy law, because the OGH is responsible to decide all questions of law that are important for the legal unity, legal certainty and legal development of the Austrian legal system.[180] Frequently the interpretation of currently applicable tenancy law by the OGH leads to new legislative actions and amendments of statutes.[181]

The Austrian tenancy law system is highly complicated and inhomogeneous. The reason for the complexity and inhomogeneity is the historical development of Austrian tenancy law. Important rules were enacted only as provisional standards during the First World War, an exceptional period for the housing market. Many of these rules meanwhile have been partially amended, but partially maintained in force until today. As these rules have often been amended, repealed and issued again for short-term political reasons, Austrian tenancy law still contains a high number of exceptions and counter-exceptions, which are a highly challenging task to discover, even for legal experts.[182]

The main characteristics of the Austrian tenancy law system are the wide protection of the tenant against unwanted eviction, the great diversity of rules to limit rents by law, the rather strict binding of rents to maintenance measures and the wide disposability by the tenant of the rules regarding his/her rented object and his/her contractual rights.[183]

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[176] RGBl. Nr. 113/1895, last amendment BGBl. I Nr. 30/2012; especially §§ 560 et seq. ZPO.

[177] BGBl. I Nr. 111/2003, last amendment BGBl. I Nr. 111/2010; § 37 Abs. 1 Z 3 MRG refers for the applicable civil procedure law explicitly to the AußStrG.

[178] RGBl. Nr. 79/1896, last amendment BGBl I Nr. 50/2012; especially § 382f EO, which provides interim legal protection for the landlord to get an interim rent („einstweiliger Mietzins").

[179] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 1.

[180] See the possibility of ordinary and extraordinary appeal in tenancy law cases according to § 502 et seq. ZPO.

[181] Cf. the current discussion to state more precisely the maintenance duties of the landlord in § 3 MRG according to the OGH opinion in 2 Ob 73/10i; *Vonkilch* qualifies the practical impact of judicature in Austrian tenancy law as notable; Vonkilch, 'Subsumtionsautomat oder Ersatzgesetzgeber? Reflexionen über die Rolle der Rechtsprechung bei der Weiterentwickung des österreichischen Wohnrechts', wob*l*, (2008), 61 (62).

[182] Böhm in Schwimann (Ed.), Praxiskommentar zum ABGB, vol. IV, 2nd ed. (Wien: LexisNexis Österreich, 2001), before § 1 MRG note 2.

[183] Böhm, 'Das Mietrecht in Österreich', in Mietrecht in Europa, ed. Stabentheiner (Wien: Manz, 1996), 128 et seq.

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The most important principles ("Grundsätze") of Austrian tenancy law which have not been enacted in any code of law but are result of systematization of scholars are the principles of inhomogeneity and inconsistency.[184] These principles can be roughly summarized by stating that different rules of law apply depending on the type and age of the premises and depending on the legal or contractual basis. This object-based and contractual-based differentiation in Austrian tenancy law goes so far that, with regard to some rented premises or tenancy agreements, the freedom of contract is not (or almost not)[185] 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 lessee. Also, different norms usually apply for new tenants ("Neumieter") compared to original tenants ("Altmieter") which leads also to a discrimination against new households on the rental market (young families, immigrants, etc.).[186]

The inhomogeneity and inconsistency of Austrian tenancy law can especially be demonstrated by

1) the existence of tenancy agreements as per §§ 1090 et seq. ABGB ("Bestandvertrag") and other forms of lawful possession of premises;
2) the differentiation of tenancy agreements as per §§ 1090 et seq. ABGB into lease and usufructuary lease ("Miete" / "Pacht");
3) the casuistic scope of application of the MRG to tenancy agreements ("Vollanwendungsbereich"/ "Teilanwendungsbereich" / "Vollausnahmebereich");
4) the relevance of the various other special statutes apart from the ABGB and MRG.
5) the relevance of inter-temporal tenancy law.

Ad 1) the existence of tenancy agreements (§§ 1090 et seq. ABGB) and other forms of lawful possession of premises;

Apart from tenancy agreements ("Bestandvertrag", §§ 1090 et seq. ABGB) loan ("Leihe"), precariat ("Prekarium"), obligatory right of housing ("obligatorisches Wohnrecht"), right of housing in rem ("dingliches Wohnrecht"), usus fructus ("Wohnungsfruchtgenussrecht") and life tenancy or life annuity ("Ausgedinge" or "Leibrente"). Furthermore the use of dwellings based on company housing agreements ("Dienst-,

[184] Böhm in Schwimann (Ed.), Praxiskommentar zum ABGB, vol. IV, 2nd ed. (Wien: LexisNexis Österreich, 2001), before § 1 MRG note 2 et seq.; Böhm, 'Das Mietrecht in Österreich', in Mietrecht in Europa, ed. Stabentheiner (Wien: Manz, 1996), 128.

[185] Except the mandatory norms § 1096 par. 1 sentence 3 ABGB and § 1117 sentence 2 ABGB.

[186] Böhm in Schwimann (Ed.), Praxiskommentar zum ABGB, vol. IV, 2nd ed. (Wien: LexisNexis Österreich, 2001), before § 1 MRG note 8.

Werks- oder Naturalwohnungen"), family relations, property leasing, and time-sharing are other existing forms of lawful possession of premises in Austria.[187]

Ad 2) the differentiation of tenancy agreements (§§ 1090 et seq. ABGB) in lease and usufructuary lease ("Miete" / "Pacht");

§ 1091 sentence 1 ABGB[188] differentiates tenancy agreements (§§ 1090 et seq. ABGB) in two categories: lease and usufructuary lease.

Lease is the right to use an inconsumable object for a certain time for fee, e.g. lease of a flat, a TV-set, or a car. In contrast to a lease, usufructuary lease moreover grants the right to usufruct, which is the right to enjoyment of the property, for example, the usufructuary lease of a company, a farm or a medical practice.[189] The distinction between lease and usufructuary lease still causes a lot of problems in practice, especially related to the grey line between lease of a premises for commercial use ("Geschäftsraummiete") and usufructuary lease of a company ("Unternehmens-pacht").[190]

The most important impact of the differentiation of lease and usufructuary lease is the scope of applicability of the MRG to tenancy agreements: For usufructuary lease the mandatory regulations of the MRG in favour of the tenant are not applicable at all![191]

Most of the norms of the 25th chapter of the ABGB (§ 1090 et seq. ABGB) apply equally to lease and usufructuary lease.

The lessee's right of partial or complete exemption to pay rent in case of partial or complete unusability of the leased object (§ 1096 par. 1 ABGB) and the right to terminate the contract in case of danger for his health (§ 1117 ABGB) is mandatory for lease agreements only, and not for usufructuary lease agreements. The sipositive norm in § 1099 ABGB provides that under a lease agreement the lessor generally must bear all expenses (general expenses, public charges etc.), whereas under a usufructuary lease agreement the lessee generally must bear all expenses. Other differences exist with respect to the right of lien on movable objects within the rented object (§ 1101 ABGB) or with respect to the tacit renewal of a lease or a usufructuary lease agreement (§ 1115 ABGB).

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[187] For details see Part II below.

[188] § 1090 first sentence ABGB literally: „*Der Bestandvertrag wird, wenn sich die in Bestand gegebene Sache ohne weitere Bearbeitung gebrauchen läßt, ein Miethvertrag; wenn sie aber nur durch Fleiß und Mühe benützt werden kann, ein Pachtvertrag genannt.*"

[189] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 216.

[190] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 216.

[191] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 218.

Ad 3) the casuistic scope of application of the MRG to tenancy agreements ("Vollanwendungsbereich"/ "Teilanwendungsbereich" / "Vollausnahmebereich");

In relation to the ABGB, the MRG and other special statutes are leges speciales: As far as the MRG or other special statutes are not applicable or as far as the MRG or other special statutes do not contain any regulations, the provisions of the ABGB (§§ 1090 et seq.) have to be applied to a tenancy agreement.

The scope of application of the ABGB and the MRG is especially important with regard to the issues of maximum rents (§ 16 MRG) and of termination (§§ 29, 30 and 31 MRG). According to the ABGB, tenancy agreements are subject only to the general restrictions of laesio enormis (§ 934 ABGB), the regulations of the ABGB concerning exorbitant rents (usury § 879 par. 2 fig. 4 leg. cit.), bonos mores (§ 879 par. 3 ABGB), standard business terms and/or consumer law.

The MRG protects the tenant by far stricter limits: In the cases listed by § 16 par. 1 MRG, an adequate main rent has to be agreed in terms of size, situation, furnishings, etc.[192]

As already pointed out in Chapter 4, the scope of applicability of the MRG and ABGB on tenancy agreements is basically divided into three main areas:

(i.) full applicability of the MRG ("Vollanwendungsbereich");

(ii.) non-applicability of the MRG ("Vollausnahmebereich");

(iii.) partial applicability of the MRG ("Teilanwendungsbereich").

Systematically, the MRG provides in § 1 par. 1 MRG a definition of what sort of dwellings and contractual relationships to which it is at all applicable. According to § 1 par. 2 MRG the application of all provisions of the MRG is excluded from contractual relationships regarding certain dwellings as defined in § 1 par. 1 leg. cit. Furthermore, according to § 1 par. 4 and 5 MRG the application of some provisions of the MRG is excluded from contractual relationships regarding certain dwellings as defined in § 1 par. 1 leg. cit.[193]

In general, the most important differences between full, partial and non-applicability of the MRG are that for tenancy agreements to which the MRG is

(i.) fully applicable, the tenant is protected by strict rent limits ("Preisschutz") and against unwarranted eviction ("Beendingungs- bzw. Kündigungsschutz")

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[192] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 2.

[193] § 1 par. 3 MRG provides that the application of the MRG for leased property in edifices which have been built by GBV is subject to § 20 WGG.

(ii.) partially applicable, the tenant is protected only against unwarranted eviction,

(iii.) not applicable, the tenant neither is protected neither by strict rent limits nor against unwarranted eviction.

Ad (i.) full applicability of the MRG ("Vollanwendungsbereich"):

According to § 1 par. 1 MRG, the MRG applies to the lease of flats, parts of flats or business premises including the co-leased surrounding house areas or foundations and to the cooperative use of immovable property ("genossenschaftliche Nutzungsverträge").

The definition in § 1 par. 1 MRG excludes therefore loan (§§ 971 et seq. ABGB), precariat (§ 974 ABGB), obligatory right of housing (§ 521 ABGB), right of housing in rem (§ 521 ABGB), usus fructus (§§ 509, 521 ABGB), life tenancy or life annuity (§ 1269 ABGB) and usufructuary lease from the applicability of the MRG.

Also contractual relationships concerning individual so called "neutral objects" that are neither part of (business) dwellings nor used for human habitation or business matters (i.e. garages, ateliers, studios or storerooms for private use, hunter's cabins, etc.) are completely ruled out from the application of the MRG. [194] The lease of vacant land is generally[195] also excluded from the application of the MRG.

Ad (ii) partial applicability of the MRG ("Teilanwendungsbereich").

§ 1 par. 4 MRG partially excludes from the application of the MRG:

- Leased property in edifices which have been newly constructed without public funding with a building permit dated after 30 June 1953 (fig. 1 leg. cit.);
- Leased property which has been newly constructed by extension of the attic or as superstructure with a building permit dated before 31 December 2001 and unextended premises of the attic, which have been leased with the additional agreement that a flat or a business premises is going to be constructed by the landlord or fully or partially by the lessee within them or as superstructure (fig. 2 leg. cit.);
- Leased property which has been constructed as an addition to a building with a building permit dated after 30 September 2006 (fig. 2a leg. cit.)

[194] Hausmann, '§ 1 MRG' in *Österreichisches Wohnrecht*, ed. Hausmann & Vonkilch, vol. I (Wien: Springer, 2007), 13.

[195] But if the lease of vacant land is for the purpose to built edifices on land owned by another person ("Superädifikate"), the MRG is per analogiam applicable; see Hausmann, '§ 1 MRG' in *Österreichisches Wohnrecht*, ed. Hausmann & Vonkilch, vol. I (Wien: Springer, 2007), 54.

- Leased property that is commonly held, if the leased property is within an edifice that has been newly constructed based on a building permit dated after 08 May 1945 (fig. 3 leg. cit.).

Due to § 1 par. 4 MRG, only the mandatory provisions for the case of death of landlord or tenant (§ 14 MRG), for deposit (§ 16b MRG), for termination of a lease contract (§§ 29 to 36 MRG), for indexation of the rent (§ 45 MRG), for rent limitation in case of assumption of the contract (§ 46 MRG), and for transfer terms (§ 49 MRG) apply to contractual relationships regarding the above mentioned premises; all other provisions of the MRG do not apply.

§ 1 par. 5 MRG partially excludes leased property in a commercial centre ("Wirtschaftspark")[196] from the application of the MRG, so that for lease contracts about property in a commercial centre, only the mandatory provisions for the case of death of landlord or tenant (§ 14 MRG) and for termination of a lease contract (§§ 29 to 36 MRG) apply.

Ad (iii.) non-applicability of the MRG ("Vollausnahmebereich"):

§ 1 par. 2 MRG excludes from the application of the MRG:

- Leased property, being rented out either for hotel trade, multi-storey car parks, transport enterprises, warehouses, workshops, official residences or homes for single or aged people, apprentices, young employees, pupils or students (fig. 1 leg cit.);
- Flats which are rented by a charity or humanitarian institution for socio-pedagogical assisted living (fig. 1a leg cit.);
- Flats provided by employers (fig. 2 leg cit.)
- Leases which expire merely with the passing of time and without notice of termination provided that the stipulated duration of the contract does not exceed half a year and the rental unit is either a business premises or a flat which the tenant rents and uses as a second home (fig. 3 leg cit.);
- Flats which are rented merely as a second home for relaxation purposes (fig. 4 leg cit.);
- Leased property in edifices, which do not consist of more than two individual flats or business premises, whereby premises that were or are newly created by expansion of the attic are not included in this calculation (fig. 5 leg cit.).

§ 1 par. 2 MRG conclusively regulates the above mentioned exceptions. Nevertheless, all or certain provisions of the MRG can apply to an agreement between lessor and lessee.

[196] § 1 par 5 MRG defines a "Wirtschaftspark" as „an economic unit of buildings and real estate used solely for commercial purposes, but in which are not primarily operated trading businesses in the sense of the Trade, Commerce & Industry Regulation Act 1973" (Gewerbeordnung 1973).

Ad 4) The relevance of various other special statutes apart from the ABGB and MRG.

As previously mentioned, the Austrian tenancy law system also lacks unity of its sources of law, considering the numerous other special statutes apart from the ABGB and MRG, that have significant impact on tenancy agreements such as the "Wohnungs-gemeinnützigkeitsgesetz 1979"[197] (WGG) and the "Wohnbauförderungsgesetze der Länder"[198] for limited profit housing, the KSchG, TNG, ZPO, AußStrG, EO etc.

Ad 5) The relevance of inter-temporal tenancy law.

Tenancy contracts as continuing obligations often "survive" more than one tenancy legislator. According to general rules and to § 43 par. 1 MRG, usually the MRG is also applicable to tenancy contracts that have been concluded before the MRG came into effect (1 January 1982). Nevertheless many of the explicitly (§ 58 MRG) or implicitly (§ 9 ABGB) derogated norms still have effect on current tenancy contracts due to liberal transfer terms (§§ 45 et seq. MRG) and due to the liberal rights of relatives and other third parties to enter into an existing tenancy contract (§ 12 MRG).[199]

- ***Who was the political driving force? Was it based on a particular legal philosophy (e.g. socialism)? Is there a particular philosophy behind the rules (e.g. protection of the tenant's home as in Scandinavia vs. just a place to live as in most other countries)***

In modern times[200], the first statutes for the regulation of housing matters in the Austrian territory of the Habsburg Empire date back to the 18th century[201]. These statutes provided, for example, norms for the granting of residential money to landlords to build dwellings for immigrants,[202] for the immigration of new inhabitants and for the construction of new dwellings in certain towns in general,[203] while other statutes

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[197] BGBl. Nr. 139/1979, last amendment BGBl. I Nr. 135/2009.

[198] Statutes of the nine Austrian states for the promotion of domestic dwelling construction, e.g. "Steiermärkisches Wohnbauförderungsgesetz 1993" (LGBl. Nr. 25/1993, last amendment LGBl. Nr. 59/2011), "Wiener Wohnbaufördeungs- und Wohnhaussanierungsgesetz 1989" (LGBl. Nr. 18/1989. last amendment LGBl. Nr. 23/2011), „Salzburger Wohnbauförderungsgesetz 1990" (LGBl. Nr. 1/1991, last amendment LGBl. Nr. 119/2012).

[199] Böhm in Schwimann (Ed.), Praxiskommentar zum ABGB, vol. IV, 2nd ed. (Wien: LexisNexis Österreich, 2001), before § 1 MRG note 26 et seq.

[200] For premodern age and general historic overview see Floßmann, *Österreichische Privatrechts-geschichte*, 6th edition (Wien: Springer, 2007), 275 et seq. with further references.

[201] Fuchs & Lugger, *Wohnungspolitische Vorschriften in Österreich von 1782 – 1940* (Wien: Manz, 2008), 4 et seq.

[202] I. Kropatschek, '„Patent vom 12.06.1782, Nr. X, über Wohnungsgelder für Ansiedler" (Immigrantenpatent)', in *Wohnungspolitische Vorschriften in Österreich von 1782 – 1940*, ed. Fuchs & Lugger (Wien: Manz, 2008), 4.

[203] I. Kropatschek, 'Ansiedlerpatent vom 9.12.1782, Nr. XLVIII, für Theresienstadt und Pleß (Josefstadt)', in *Wohnungspolitische Vorschriften in Österreich von 1782 – 1940*, ed. Fuchs & Lugger (Wien: Manz, 2008), 8 et seq.

regulated rents, termination of tenancy agreements, and eviction of dwellings in Vienna.[204]

Since about 1870, there had been a constant political debate in the Austrian-Hungarian Monarchy about housing policy and in about 1911, even strikes, riots and organized protests were held in Vienna against the obligation to pay rents.[205]

The first substantial regulations for the protection of the tenant in Austria – the 1st, 2nd and 3rd "Mieterschutzverordnung" (MSchV)[206] – were introduced during the First World War in 1917 and 1918.[207] It was not a certain legal philosophy that determined these new regulations for the protection of tenants, such as in some other European states like Sweden, but instead reasons of wartime economy and inner security. Politics and political parties did not play an active role in implementing these new regulations but rather public officials.[208] The main aim of the 1st, 2nd and 3rd MSchV was to protect family members of Austrian soldiers from termination of tenancy contracts and increase of rents; indirectly these legislative actions were intended to raise the fighting spirit of the Austrian troops.[209]

- ***What were the principal reforms of tenancy law and their guiding ideas up to the present date?***

The original version of the ABGB from the year 1811 regulated housing agreements following the Roman model of locatio conductio rei as a synallagmatic contract like any other, enacting rules with optional character only.[210] The 25th Chapter of the ABGB contained[211] and contains heretofore[212] in §§ 1090 to 1150 leg. cit. legal norms for tenancy and emphyteuse agreements, with the legal norms for tenancy agreements

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[204] I. Kropatschek, 'Verordnung vom 18.10.1782, Nr. XXXV, betreffend Mieten, Aufkündigung und Räumung von Zinswohnungen', in *Wohnungspolitische Vorschriften in Österreich von 1782 – 1940*, ed. Fuchs & Lugger (Wien: Manz, 2008), 5 et seq.

[205] Stampfer, *Die Anfänge des Mieterschutzes in Österreich* (Wien: Manz, 1995), 10 et seq.; Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (94 et seq.).

[206] Verordnung des Gesamtministeriums vom 26.01.1917 über den Schutz der Mieter, RGBl. Nr. 34/1917 (= 1st MSchV); Verordnung des Justizministers und des Ministers für soziale Fürsorge im Einvernehmen mit den beteiligten Ministerien vom 20.01.1918 über den Schutz der Mieter, RGBl. Nr. 21/1918 (= 2nd MSchV); Verordnung des Justizministers und des Ministers für soziale Fürsorge im Einvernehmen mit den beteiligten Ministerien vom 26.10.1918 über den Schutz der Mieter, RGBl. Nr. 381/1918 (= 3rd MschV).

[207] See Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (96 et seq.) for details.

[208] Stampfer, *Die Anfänge des Mieterschutzes in Österreich* (Wien: Manz, 1995), 2 et seq.

[209] Böhm, 'Das Mietrecht in Österreich', in *Mietrecht in Europa*, ed. Stabentheiner (Wien: Manz, 1996), 126 et seq.

[210] Böhm, 'Das Mietrecht in Österreich', in *Mietrecht in Europa*, ed. Stabentheiner (Wien: Manz, 1996), 127.

[211] JGS Nr. 946/1811.

[212] BGBl. I Nr. 68/2012.

appearing in only §§ 1090 to 1121 leg. cit. According to the rules of the original version of the ABGB, rent is unlimited and the duration of the tenancy agreement is either limited to any length of time or terminable at will.[213]

Since the adoption of the original version of the ABGB 1811, only one relevant amendment to the 25th Chapter of the ABGB has been passed: the 3rd partial amendment of the ABGB ("3. Teilnovelle zum ABGB")[214] in 1916. This amendment led to modification of §§ 1096 to 1098, 1100, 1104, 1105. 1107, 1109, 1117 and 1119 ABGB; furthermore, § 1116a ABGB was established as a new legal norm.

The most important innovation of this amendment was the newly drafted § 1096 ABGB,[215] subjecting the landlord to strict liability for the tenant's warranty claims in certain circumstances ("verschuldensunabhängiger Gewährleistungsanspruch"). In case of partial or complete unusability of a leased object, the lessee has a right of partial or complete exemption of his contractual obligation to pay rent ("Mietzinsminderung" or "Mietzinsbefreiung").[216] § 1117 ABGB[217] provides the lessee a right of termination of a tenancy contract in case a rented object causes damages to his health. These rights of warranty and of termination are mandatory norms (§ 1096 par. 1 sentence 3 ABGB and § 1117 sentence 2 ABGB[218]).[219] Although the 3rd partial amendment of the ABGB for the first time introduced mandatory rules for the protection of the tenant, it was not able to solve the urgent social needs of the Austrian people created by the qualitative and quantitative housing shortage, which has its roots in the middle of the 19th century, especially in urban areas.

As the 3rd partial amendment of the ABGB did not provide substantial protection to tenants, three regulations for the protection of the tenant - the 1st, 2nd and 3rd MSchV[220]-

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[213] Böhm, 'Das Mietrecht in Österreich', in *Mietrecht in Europa*, ed. Stabentheiner (Wien: Manz, 1996), 127.

[214] JGS Nr. 946/1811 as amended on RGBl. Nr. 69/1916.

[215] JGS Nr. 946/1811 as amended on RGBl. Nr. 69/1916.

[216] Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (93).

[217] JGS Nr. 946/1811 as amended on RGBl. Nr. 69/1916.

[218] JGS Nr. 946/1811 as amended on RGBl. Nr. 69/1916.

[219] Other important impacts of the 3rd partly amendment of the ABGB were the extension of the landlord's right of lien to commercially used rental object's (§ 1101 ABGB) and the new right of termination of housing agreements in case of death of either the landlord or the tenant (§ 1116a ABGB). The revised § 1117 ABGB made clear that extraordinary coincidences can permit the tenant to terminate the contract immediately, and the amended § 1121 ABGB stated that in case of a public auction of property by court order for a right of housing in rem the same rules as for easements have to apply; see in detail Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (94 et seq.).

[220] RGBl. Nr. 34/1917, RGBl. Nr. 21/1918, RGBl. Nr. 381/1918.

were launched in 1917 and 1918.[221] § 2 of the 1st MschV generally prohibited the landlord from raising the rents of small- and middle-sized dwellings for private housing or commercial use, with some exceptions such as the increase of service charges and maintenance costs or the increase of home mortgage interest rates. Furthermore, the landlord's right to terminate a tenancy contract was restricted in § 7 of 1st MSchV to certain significant reasons ("wichtige Gründe") for termination, such as outstanding rent (par. 2.1 leg. cit.), constant violation of the house rules (par 2.3 leg. cit.), or personal need of the dwelling of the landlord (par. 2.5 leg. cit.). Whereas the application of the 1st MSchV was limited to ratione loci, materiae, personae et temporis, the 2nd MSchV extended the application of this bylaw to the whole Austrian state territory and generally included also large dwellings and subtenants under its scope regulation. The limitation ratione temporis of the 1st and 2nd MSchV was eliminated by the 3rd MSchV, and so the provisional rules of protection of the tenant changed into permanent rules. Also, the security of tenure ("Kündigungsschutz") for the subtenant was made equal to the tenants' standard, new rules against prohibited one-off payments ("verbotene Ablösen") and excessive commissions were introduced, the security of tenure was made equal for tenancy contracts limited and unlimited in time, and the system of certain reasons for the dismissal of a tenant was substantiated.

One main aspect of the 1st MSchV was the introduction of tenancy bureaus ("Mietämter") in municipalities with home rule ("Stadtrecht") or with more than 20,000 inhabitants. By request of the landlord or the tenant, a senate of three members was appointed to decide whether a rent increase was acceptable (§ 10 of 1st MSchV).[222] In other municipalities without tenancy bureaus, the district court ("Bezirksgericht") had the authority to decide. In Austria, this institutional splitting between the jurisdiction of tenancy bureaus and of district courts still exists.[223]

In 1922 the "Mietengesetz 1922"[224] (MG) came into effect and was qualified as the first systematic, permanent tenancy statute in Austria. The MG was the result of a hard fought political compromise between the two main political forces in Austria at that time- the Socialist Party ("Sozialdemokratische Arbeiterpartei")[225] and the Christian-Social Party ("Christlichsoziale Partei Österreichs")[226] which led to a highly complicated,

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[221] See Stampfer, *Die Anfänge des Mieterschutzes in Österreich* (Wien: Manz, 1995), 39 et seq. and Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (96 et seq.) for details.

[222] One curious aspect of the 1st MSchV was that designated members of the municipal departments had to pay penalties of up to 200 Austrian Krones if they refused the call of the municipal council to come into office at all (§ 15 par 1 of 1st MSchV). Also, members of the senate were fined if they did not attend senate hearings without proper excuse or arrived with delay (§ 15 par 2 of 1st MSchV). Nota bene these members of the senate just worked voluntarily and only got their cash outlays reimbursed!

[223] See § 39 MRG for details.

[224] BGBl. Nr. 872/1922.

[225] Since 1991 known as "Sozialdemokratische Partei Österreichs" (SPÖ).

[226] The Christian Social Party is named as the ancestor party of the 1945 new founded "Österreichische Volkspartei" (ÖVP), notwithstanding main differences in the political programme before and after World War II.

unclear and incomprehensible statute.[227] The aim of the MG was on the one hand to guarantee a high standard of protection for tenants and on the other hand to guarantee the continuing maintenance of premises. Apart from stricter reasons for the termination of tenancy agreements (§ 19 MG) and stricter regulation of the possibility to conclude contracts limited in time (§ 23 MG), the limitation of rents by law ("gesetzlicher Mietzins") referring to a specific comparison of the amount of rent before and after the First World War – the peace rent ("Friedenszins" or "Friedenskronenzins") – was introduced (§ 2 MG). More precisely, this peace rent compared the amount of rents to the standard of 1 August 1914[228] and so fixed a very low level of rents by law. For urgently required maintenance measures the landlord had the possibility of raising the rent to a level which enabled him to meet his demands (§ 7 MG). In case of the death of the tenant of a dwelling, family members who were living in the same household as the decedent were granted a right to enter into the existing tenancy contract (§ 19 par. 2 fig. 11 MG).

In the period between the world wars, several amendments and bylaws of the MG were passed, most importantly in 1929[229] and 1933[230]. The strict "Friedenszins"-system was at first decontrolled to give the landlords financial incentives for maintenance measures. After a substantial increase of rents by the landlords, the rules were again changed to provide a lower level of rents for the tenants by law. This "pendulum" in rent policy can be seen as typical in Austrian tenancy law through today.[231]

With the "Anschluss" of Austria to the German Reich in the year 1938, the Austrian tenancy law was adapted to the German tenancy law system of formation of prices and price control by the state.[232] In 1939 the protection of Jewish tenants in relation to non-jewish landlords was removed[233]. In 1940, the German „Wohnungsgemeinnützigkeitsgesetz 1940" (ger. WGG)[234] became effective in Austria which included rules for cooperative tenancy agreements.

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[227] Stabentheiner calls these characteristics the "trademark" of the Austrian tenancy law (apart from the ABGB); Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (99).

[228] For each Austrian Krone of the yearly amount of rent in 1914 a regionally different amount of Austrian Groschen (hundredth of an Austrian Krone) was set up by law.

[229] Chapter III. of the „Wohnbauförderungs- and Mietengesetz 1929" (BGBl. Nr. 200/1929).

[230] „Mietengesetznovelle 1933" (BGBl. 325/1933).

[231] Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (100).

[232] Erste Verordnung des Reichsstatthalters über die Mietzinsregelung im Lande Österreich, GBl 1938/ 159.

[233] „Gesetz über Mietverhältnisse mit Juden" (dt. RGBl I, S. 864).

[234] dt. RGBl. I, S. 438; see also the by-law „Verordnung zur Durchführung des Gesetzes über die Gemeinnützigkeit im Wohnungswesen" (dt. RGBl. I S. 1012).

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After World War II, the MG was re-enacted[235] in 1945 and amended several times. Apart from the MG and its various amendments, new special statutes to limit the amount of rent for various types of tenancy agreements were passed.[236] The most important reforms of the MG were issued in 1955[237], 1967[238] and 1974[239]. With the amendments of the MG in 1955 and 1967, the rather strict limitations for rents ("Friedenszins") were again liberalized, and for many premises a free rent agreement between landlord and tenant was permitted by law. In 1974 the former reforms were superseded once again, and new limitations for rents were reintroduced for sub-standard apartments[240].

The "Wohnungsgemeinnützigkeitsgesetz 1979" [241] (WGG) superseded the ger. WGG and nearly equalized cooperative tenancy agreements to regular tenancy agreements following the rules of the MG.

In 1982 the MG was formally[242] superseded by the "Mietrechtsgesetz 1982"[243] (MRG). In general, basic principles of the MG – such as the protection of tenants against unwarranted eviction and rent control – were inherited in the MRG as well, although the system of rent control was changed substantially. The "Friedenszins" of the MG was replaced by the "Kategoriemietzins" (category rent), a normative system that divides premises into different classes (category A-D) depending on their condition.[244] Besides that, another rent control system for other premises that were not covered by the "Kategoriemietzins" was introduced. For these premises tenants had to pay an adequate rent ("angemessener Hauptmietzins"), depending on size, type, location, maintenance condition, and furniture of the dwelling. For each category a maximum monthly rent was

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[235] Art. V lit. 5.) of the „Gesetz vom 3. Oktober 1945 über Maßnahmen zur Wiederherstellung der österreichischen bürgerlichen Rechtspflege", StGBl. Nr. 188/1945.

[236] like the „Wohnhaus-Wiederaufbaugesetz 1948" (BGBl. Nr. 130/1948, last amendment BGBl. I. Nr. 111/2010), the „Preisregelungsgesetz 1949" (BGBl. Nr. 166/1949, meanwhile repealed), the „Zinsstopgesetz 1954" (BGBl. Nr. 132/54, meanwhile repealed).

[237] „Mietengesetznovelle 1955", BGBl Nr. 241/1955.

[238] „Mietrechtsänderungsgesetz 1967", BGBl Nr. 281/1967.

[239] „Bundesgesetz vom 12.07.1974 über die Änderung mietrechtlicher Vorschriften und über Mietzinsbeihilfen", BGBl Nr. 409/1974.

[240] In accordance with the new "Stadterneuerungsgesetz 1974" (BGBl. Nr. 287/1974, last amendment BGBl. I Nr. 2/2008), which allows municipal authorities to declare parts of the municipal area as regeneration area ("Stadterneuerungsgebiete").

[241] BGBl. Nr. 139/1979, last amendment BGBl. I Nr. 135/2009; the WGG regulates the building and performance of non-commercial housing societies and sets up cost-based rents for tenants.

[242] Substantively the MG is due to §§ 43 et seq. MRG still relevant today.

[243] BGBl. Nr. 520/1981.

[244] For a premises of category A–best category-a minimum size of 30 m², one living room, one anteroom a toilet, a bath, a heating and a hot-water boiler was required and the premises had to be in adequate condition. A premises of category D–bottom or sub-standard category–was defined as premises, where a toilet or bathroom were not included or not in an adequate condition. For each category a maximum rent was fixed per m² by law; see § 16 par 2 MRG (original version of BGBl. Nr. 520/1981) for further details.

fixed per square meter by law,[245] which led in general to a lower level of rents but caused one-off payments for premises to skyrocket. Although these one-off payments for premises were prohibited by law and could be redemanded from the landlord (§ 27 MRG), the tenant had significant problems procuring evidence in court.[246]

Since 1982 the MRG has been amended several times[247], most importantly by the "2. Wohnungsrechtsänderungsgesetz 1991"[248], the "3. Wohnungsrechtsänderungsgesetz 1993"[249], the "Wohnrechtsnovellen" of 1997[250] and 2000[251], the "Mietrechtsnovelle 2001"[252], the "Wohnrechtliches Außerstreitbegleitgesetz 2003"[253], and recently the "Wohnrechtsnovellen" of 2006[254] and 2009[255]. The "2. Wohnrechtsänderungsgesetz 1993" revised § 10 MRG, which allowed the tenant to claim compensation for expenses for considerable improvements of the premises, set stricter limits for rent increases and revised the relationship between MRG and WGG. The "3. Wohnungsrechts-änderungsgesetz 1993" liberalized the strict control of rents for premises and especially allowed rent increases for premises of commercial use. The existing two MRG-systems of rent control ("Kategoriemietzins" and "angemessener Hauptmietzins") were partly superseded by a new, third system of rent control within the MRG: the benchmark rent ("Richtwertmietzins"). According to this system a standard premises was defined by a special statute ("Richtwertgesetz 1994"), and for this standard premises a certain basic rent per square meter was fixed in bylaws. Surcharges and deductions to this basic rent, depending on size, kind, location, maintenance condition and furniture, have to be taken into account. With the "3. Wohnungsrechtsänderungsgesetz 1993" the legislator also started to reform the rules for contracts limited in time, the reform of which was continued with the "Wohnrechtsnovelle 1997". The "Wohnrechtsnovelle 2000" again revised the existing system of time limitations for tenancy agreements, so that on the one hand the setting of time limits was eased for premises of commercial use and on the other hand a minimum contract period of three years was introduced for single and double family houses and new built dwellings. The applicability of the MRG on tenancy agreements for one and double family houses was changed by the "Mietrechtsnovelle

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[245] § 16 par 2 MRG (original version of BGBl. Nr. 520/1981).

[246] Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (101).

[247] Last amendments: BGBl. I Nr. 120/2005, BGBl. I Nr. 124/2006, BGBl. I Nr. 25/2009, BGBl. I Nr. 30/2009, BGBl. I Nr. 29/2010.

[248] BGBl. Nr. 68/1991.

[249] BGBl. Nr. 800/1993.

[250] BGBl. I Nr. 22/1997.

[251] BGBl. I Nr. 36/2000.

[252] BGBl. I Nr. 161/2001.

[253] BGBl I Nr. 113/2003.

[254] BGBl. I Nr. 124/2006.

[255] BGBl. I Nr. 25/2009.

2001"[256]. The "Wohnrechtliches Außerstreitbegleitgesetz 2003", in force on 1 January 1995, adopted several procedural norms of the MRG for the rules of the new "Außerstreitgesetz 2003"[257] (AußStrG) and integrated in the "Exekutionsordnung 1896"[258] (EO) a completely new possibility for landlords to get interim legal protection: In certain cases the tenant could be obliged by court order to pay an interim rent[259] ("einstweiligen Mietzins") until the end of the legal proceedings. The landlords' obligation to provide adequate maintenance for premises was extended due to the "Wohnrechtsnovelle 2006". The "Wohnrechtsnovelle 2009" basically enshrined explicit rules for deposits and their assessment (§ 16b MRG) and for energy performance certificates.

In summary, it can be stated that the principal reforms of Austrian tenancy law often involved a change of the norms for the limitation of rents, whereas the norms for protection against unwanted eviction remain today basically unchanged since 1917.[260] The regulations for contracts limited in time also were untouched by the legislator since 1917 until 1994.[261]

- ***Human Rights:***
    - ***To what extent and in which fields was tenancy law since its origins influenced by fundamental rights enshrined in***
    - ***the national constitution***
    - ***international instruments, in particular the ECHR***
    - ***Is there a constitutional (or similar) right to housing (droit au logement)?***

(i) National constitutional law:

National constitutional law influences Austrian tenancy law in various ways. The distribution of competences, the constitutional regulatory instruments and particularly the fundamental rights are important determinants for the Austrian tenancy law legislator.[262]

Despite these determinants for the legislator, the influence of constitutional law with respect to Austrian tenancy law in practice is negligible. In Austria a constitutionally

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[256] See Böhm, 'Die Mietrechtsnovelle 2001', *bbl*, (2002), 95 for details.

[257] BGBl. I Nr. 111/2003, last amendment BGBl. I Nr. 111/2010.

[258] RGBl. Nr. 79/1896, last amendment BGBl I. Nr. 50/2012.

[259] § 382f EO.

[260] Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (100 et seq.).

[261] First changes of the regulations for contracts limited in time were introduced by the „3. Wohnungsrechtsänderungsgesetz 1993", BGBl. Nr. 800/1993; Stabentheiner, 'Das ABGB und das Sondermietrecht – die Entwicklung der vergangenen 100 Jahre', *wobl* (2012), 91 (101 et seq.).

[262] Holoubek, 'Verfassungsrechtliche Grundlagen des Wohnrechts', *JBl* (2000), 349.

guaranteed right to housing for an individual does not exist,[263] and judgements of the "Verfassungsgerichtshof" (VfGH, Constitutional Court) therefore had only little effect with reference to Austrian tenancy law.[264]

(ii) EU-law:

Austria joined the EU in 1995 and since then there have been few changes[265] of the legal situation concerning national housing matters. EU law has especially influenced national legislation on time-sharing of immovable property, anti-discrimination, consumer protection, and energy saving, which will be explained in detail in chapter 8 below.

"The Charter of Fundamental Rights of the European Union" (CFREU)[266] does also not provide an explicit right of housing,[267] but according to Art 34 par. 3 leg. cit.[268] the EU recognizes and respects the right to housing assistance.

(iii) ECHR and other international treaties:

The "European Convention of Human Rights" (ECHR) was incorporated in 1958. [269] Since 1964[270] the ECHR has a constitutional amending status so that traditionally the decisions of the "European Court of Human Rights" (ECtHR) have a high influence on Austrian human rights law development. With reference to tenancy law the influence of the ECtHR is limited in Austria up to today, as a subjective right to housing has not yet been derived from the ECHR.

The ECHR does not determine the core of private tenancy now, but rather the regulatory context in which private contracts or land law rules and principles are embedded. More

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[263] Schober, 'Das Recht auf Wohnen', *wobl* (2012), 5 et seq.; Gutknecht, 'Das Recht auf Wohnen und seine Verankerung in der Österreichischen Rechtsordnung', *JBl* (1982), 173 et seq.

[264] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 3.

[265] *Lurger et al.* with reference to *Eilmansberger* even speak back in 2004 of "almost no changes at all"; see Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 3 and Eilmansberger, 'Der Einfluss des Gemeinschaftsrechts auf nationales Wohnrecht', in *Erneuerung des Wohnrechts*, ed. Bundesministerium für Justiz (Wien: Verlag Österreich, 2000), 59.

[266] OJEU 2012/C326/02.

[267] Schober, 'Das Recht auf Wohnen', *wobl* (2012), 5 (7).

[268] Art. 34 par. 3 CFREU lit.: „In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices."

[269] BGBl Nr. 210/1958 (last amendment BGBl III Nr. 47/2010).

[270] BGBl. Nr. 59/1964.

than 70 judgements of the ECtHR affecting landlord and tenant relations have been delivered so far including case law on communication rights, non-discrimination rights, the protection of the private sphere and family life, due process rights and the landlord's property rights.[271] With reference to Austria, two decisions of the ECtHR had direct reference to tenancy law: *Mellacher and others v. Austria*[272] (landlord´s property rights) and *Karner v. Austria*[273] (non-discrimination).

In the *Mellacher* case, landlords who owned or had an ownership interest in multiple apartment buildings complained that introduction of a statutory reduction in rent in the new MRG 1982 was an unjustified interference of their right to peaceful enjoyment of their property and violated Art 1 of Protocol 1 ECHR. The Court accepted that the rent reductions under the MRG amounted to an interference with property rights of owners according to Art 1 of Protocol 1 ECHR, but stated that the MRG has not been disproportionate to the aim pursued and did not violate Art 1 of Protocol 1 ECHR. The ECtHR recognized the wide margin of appreciation of the Austrian lawmakers in both identifying a problem of public concern (too high rents) and in determining the measures needed to further the social and economic policies adopted to address it (rent reduction by statute).[274]

In the *Karner* case a non-married homosexual partner of a deceased tenant claimed a right to enter into the existing tenancy contract of his partner after his partner's death according to § 14 MRG.[275] The Austrian Supreme Court had refused an entry right by stating that the notion of "life companion" ("Lebensgefährte") of § 14 MRG had to be interpreted as at the time the statute had been enacted and that the intention of the legislator at that time had not been to include persons of the same sex. The applicant[276] complained successfully a violation of Art 14 ECHR (prohibition against discrimination) and Art 8 ECHR (right to respect to private and family life). The ECtHR rejected the argument that particularly grave reasons exist to allow different treatment due to sexual orientation and considered the Austrian regulation to be a disproportional measure to the legitimate aim of protecting the traditional family unit.[277]

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[271] Schmid & Dinse, 'Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court on Human Rights on Tenancy Law', *ZERP Working Paper* 1 (2013), 6.

[272] Application no. 10522/83, 11011/84, 11070/84, Mellacher and others v. Austria of 19/12/89.

[273] Application no. 40016/98, Karner v. Austria of 24/7/03.

[274] Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht', *ÖJZ* (1999), 741; Schmid & Dinse, 'Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court on Human Rights on Tenancy Law', *ZERP Working Paper* 1 (2013), 14 et seq.

[275] BGBl. Nr. 520/1981 (as amended in BGBl. Nr. 800/1993).

[276] Respectively his heirs after the applicants' death.

[277] Schmid & Dinse, 'Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court on Human Rights on Tenancy Law', *ZERP Working Paper* 1 (2013), 11 et seq.

"The International Covenant on Economic, Social and Cultural Rights"[278] (ICESCR), which was ratified by Austria in 1978, recognizes in Art 11 par 1 leg. cit.[279] a right of everyone to an adequate standard of living for himself and his family, including housing, and to the continuous improvement of living conditions. Also the (revised) "European Social Charter"[280] (ESC), which was ratified by Austria in 2011, protects the right of housing due to Art 31 leg. cit.[281] as a fundamental social human right. Both treaties were implemented by Austria as international treaties, which do not have a constitutional amending status ("nicht verfassungsändernde Staatsverträge") and address political assignments to the Austrian legislator rather than granting any personal right of housing. Austria has furthermore officially rejected that it is obliged to implement these rights of housing according to Art 11 par 1 ICESCR and Art 31 ESC into its national legal order ("gesetzlicher Erfüllungsvorbehalt").[282]

6. Tenancy regulation and its context

6.1 General introduction

- ***As an introduction to your system, give a short overview over core principles and rules governing the field (e.g. basic requirements for conclusion, conditions for termination of contracts by the landlord, for rent increase etc.; social orientation of tenancy law in force; habitability (i.e. the dwellings legally capable of being leased))***

In Austria, a tenancy is based on an (oral or written) agreement between landlord and tenant (§ 1090 ABGB). According to § 1094 ABGB, no special words are required if an offer capable of acceptance has been placed by one of the contractual parties.[283] Any

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[278] „Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte samt Anhang und Erklärung der Republik Österreich" (BGBl 590/1978, last amendment BGBl. Nr. 297/1994).

[279] Art. 11 par 1 ICESCR lit.: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including ad equate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

[280] „revidierte Europäische Sozialcharta samt Anhang und Erklärung der Republik Österreich 2011" (BGBl. III Nr. 112/2011); see Piffl-Pavelec & Florus, 'Die Europäische Sozialcharta', *RdA* (2011), 584 et seq. for details.

[281] Art. 31 ESC lit.: "With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1. to promote access to housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; 3. to make the price of housing accessible to those without adequate resources."

[282] See Gutknecht, 'Das Recht auf Wohnen und seine Verankerung in der Österreichischen Rechtsordnung', *JBl* (1982), 173 et seq. for further details; note, that this article deals with the original „Europäische Sozialcharta samt Anhang und Erklärung der Republik Österreich 1969" (BGBl Nr. 460/1969).

[283] A response to a request for information is not an offer capable of acceptance but an invitation to treat ("invitatio ad offerendum"); Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004),

words which express the intention of giving and taking exclusive possession for a certain period of time are sufficient for the conclusion of a tenancy agreement. Acceptance may also be given by conduct (§ 863 ABGB).[284]

Essentialia negotii of a tenancy agreement are rent object and rent (§ 1094 ABGB). For the conclusion of the contract the transfer of the rented object is not necessary. The conclusion of tenancy agreements and payment of rent are subject to the same regulations as purchase agreements (§ 1092 ABGB).[285]

A tenancy agreement in Austria can be concluded for a fixed term (contracts limited in time) or open-ended term (contracts unlimited in time). Depending on the scope of application of ABGB and MRG to the individual tenancy contract limited or unlimited in time, different rules of law for termination of contracts by the landlord, for rent increase, etc. apply.

In Austria, every dwelling is in principle legally capable of being leased, even objects that are sub-standard or unusable or that do not fulfill certain regulatory law requirements, e.g. lack of a permission of usage by the local construction authorities ("baubehördliche Benützungsbewilligung")[286]. Only with regard to dwellings that are used as secondary homes is the landlord's freedom of contract substantially restricted if a tenancy contract does not fulfil special regulatory requirements of regional development planning ("Raumordnung") or of transfer of land ("Grundverkehr"). It is especially common in attractive tourism areas of Austria that statutes enacted by the Länder prohibit landlords to give certain dwellings in tenancy as secondary homes without permission of the authorities. A tenancy contract about such a dwelling is–without permission of the authorities-invalid ex tunc.[287]

- ***To what extent is current tenancy law state law or infra-national law (if legislative jurisdiction is divided: what is the allocation of competencies and for which subject matters)?***

As mentioned in Part I, Arts 10-15 of the Austrian Constitution of 1920, the "Bundes-Verfassungsgesetz"[288] (B-VG), divide the spheres of competences between Bund ("Bund") and regions ("Länder"). Mixed competences in legislation and execution

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<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 4.

[284] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 4.

[285] Koziol & Welser, Grundriss des bürgerlichen Rechts, 13th ed., vol. II (Wien: Manz, 2007), 216 et seq.

[286] Although the lack of a permission of use by the state can certainly be claimed by the tenant.

[287] Prader, *MRG,* 3.15 ed., § 1090 ABGB E 29 et seq. (1.4.2013, www.rdb.at)

[288] BGBl. Nr. 1/1920 (reannounced i.a. BGBl. Nr. 1/1930 and StGBl. Nr. 4/1945, last amendment BGBl. I Nr. 65/2012).

between the Bund and Länder are common, not exceptional.[289] In so far as a matter is not expressly assigned by the B-VG to the Bund for legislation or also execution, it remains within the autonomous sphere of competence of the Länder (Art 15 par. 1 B-VG). Municipalities ("Gemeinden") in the Austrian legal system are self-governing bodies, which act either by instruction ("weisungsgebunden") or free of instruction ("weisungsfrei"), but under supervision of the Bund or Länder (Arts 115-120 B-VG).[290]

Although Austrian tenancy law is mainly federal (national) law,[291] powers are separated in some important political matters.

- ***Is the position of the tenant also considered as a real property right (and therefore also governed by property law) or (only) as a personal (obligatory) right?***

In comparison to other European private law systems, the position of the tenant in Austrian private law is formally not considered as a real property right, but an obligatory right and is thus not governed by property law.[292]

However, the OGH[293] has interpreted various ABGB and MRG provisions in a way that led to the creation of a quasi in rem position ("quasi-dingliches Recht") of the tenant. This quasi in rem position entitles the tenant active legitimization to claim against disturbances and infringements by third parties, just like the landlord. [294]

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[289] Bundesministerium für Wirtschaft und Arbeit (ed.), 'Kompetenzgefüge im österreichischen Wohnungswesen', (2008), 10, <http://www.iibw.at/deutsch/portfolio/wohnen/downloads/Kompetenzgefuege%20Wohnen%200811201%20fuer%20web.pdf>, 15 March 2014.

[290] See Öhlinger, *Verfassungsrecht*, 4th ed. (Wien: WUV-Univ.-Verlag, 1999), 545 et seq. for details.

[291] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 7.

[292] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 9.

[293] i.e. OGH 7 Ob 654/89.

[294] Ris-Justiz RS0010655; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 9.

The tenant has the following options to take remedial action:

- possessory action ("Besitzstörungsklage", § 339 ABGB, § 454 ZPO)[295]; the aim of the possessory action is to verify in a fast track procedure illegal disturbances with the tenants' possession of rented property, to recover the legal status ex ante the disturbance and to prohibit further disturbances by injunction.
- actio publiciana ("Klage aus dem rechtlich vermuteten Eigentum", § 372 ABGB)[296]; the aim of the actio publiciana is to surrender the tenants' dwelling or to prohibit illegal disturbances by injunction.
- immission control action ("Immissionsschutzklage", § 364 ABGB, § 364a ABGB)[297]; the aim of the immission control action is to prohibit illegal disturbances of noise, smells, or by trees and other plants, which deprive light and air, by injunction.
- damages claim against a third tortfeasor ("Schadenersatzklage", § 1295 ABGB)[298]; the aim of the damages claim is to receive compensation for damages culpably caused by a third tortfeasor.
- claim on account of unjust enrichment ("Klage wegen ungerechtfertigter Bereicherung", § 1041 ABGB)[299]; the aim of the claim on account of unjust enrichment is to receive compensation for the use of the dwelling by a third party.

- ***To what extent is the legislation divided up into general private law and special statutes? To what extent are these rules mandatory and dispositive? Does the relationship between general and special rules work properly so as to create legal certainty?***

In comparison to Germany and Switzerland, where large amounts of tenancy law matters are covered by one general civil code (BGB and "Schweizerisches Zivilgesetzbuch"), the legislation in Austria is further divided. As mentioned above, the Austrian legal system has two main sources of tenancy law, the ABGB and the MRG. Furthermore various other special statutes for tenancy law matters of subordinate importance exist, like the WGG, RichtWG, HeizKG, etc.

The ABGB only provides two mandatory norms with respect to tenancy law: § 1096 par. 1 sentence 3 ABGB and § 1117 sentence 2 ABGB. According to § 1096 par. 1 sentence 3 ABGB, the tenant has a right of partial or complete exemption of his contractual

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[295] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. I (Wien: Manz, 2006), 274 et seq.

[296] Ris-Justiz RS0106815; Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. I (Wien: Manz, 2006), 278 et seq.

[297] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. I (Wien: Manz, 2006), 283 et seq.

[298] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 299 et seq.

[299] Ris-Justiz RS0106815.

obligation to pay rent ("Mietzinsminderung" or "Mietzinsbefreiung") in case of partial or complete unusability of a rented dwelling. § 1117 sentence 2 ABGB provides the tenant a right of termination of a tenancy contract in case a rented dwelling causes damage to his health. All other norms of the ABGB with respect to tenancy law are mandatory. The ABGB norms are also subsidiary to regulations of the MRG or other of special statutes.

Contrary to the ABGB norms, the MRG norms are (almost exclusively) mandatory in favour of the tenant, and the application of the MRG cannot be excluded by agreement of the contracting partners at all. Some landlords therefore try to circumvent obligatory norms of the MRG by using other forms of contracts of lawful possession ("Leihe", "Prekarium", etc.) or contracts sui generis.[300] To prevent such circumventions of obligatory norms, the OGH presumes that the MRG is fully applicable for all (lease-like) contracts about dwellings.[301] All exceptions of this legal presumption have to be proved in court by the contractual party that claims a partial- or non-applicability of the MRG, which in most cases will be the landlord.[302]

The interdependecies between ABGB, MRG and other special statutes are complex and constantly cause problems to be solved by the OGH.

For citizens, the extreme inhomogeneity and inconsistency of the whole Austrian tenancy law system cause legal uncertainty, and tenancy law in Austria therefore has the (dubious) reputation of being a "secret science"[303]; especially the rules of application of the MRG (§ 1 MRG), the different rent limits for different types of dwellings (§ 16 MRG), and the problematic inter-temporal tenancy law (§ 43 par. 1 MRG) are without profound help of legal experts barely understandable.

- ***What is the court structure in tenancy law? Is there a special jurisdiction or is the ordinary one competent? What are the possibilities of appeal?***

In proceedings which have as object rights in rem, immovable property or tenancies of immovable property, the ordinary court – so called "Bezirksgericht" (District Court) – has generally exclusive jurisdiction rationae materiae according to § 49 par. 2 lit. 5 Jurisdiktionsnorm 1895[304] (JN), § 37 par. 1 MRG. Rationae loci, one of currently[305] 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 (§ 49 par. 2 lit. 5 JN, § 37 par. 1 MRG).

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[300] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde, 2012), 21; Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 31 et seq.

[301] OGH 5 Ob 120/10y; wobl 2005/70.

[302] The tenant has the burden of proof e.g. in cases of "temporary rent" according to § 382 et seq. EO; Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde, 2012), 21; Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 31 et seq.

[303] Stabentheiner, 'Legistische Betrachtungen zum Mietrechtsgesetz', *wobl* (2012), 260 (263).

[304] RGBl. Nr. 111/1895, last amendment BGBl. I Nr. 35/2012.

[305] 1 July 2013.

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In some municipalities like Vienna, Graz, or Salzburg,[306] "Schlichtungsstellen" (arbitrational boards for housing) are authorized to settle specific tenancy law cases in first instance.[307] Characteristics of these arbitrational boards are that:

- they are only competent to settle cases for which the MRG is fully applicable and which are explicitly listed in § 37 par. 1 MRG or cases for which an explicit reference to §§ 39, 40 MRG by other special statutes[308] exists; typical cases are a tenant's claim to force the landlord to carry out maintenance works ("Erhaltungs- und Verbesserungsarbeiten", § 37 par. 1 fig. 2 MRG) or a tenant's claim to review the adequacy of an agreed or demanded rent according to the rent limits set out by law ("Angemessenheit des vereinbarten oder begehrten Hauptmietzinses", § 37 par. 1 fig. 8 MRG);

- their members are civil servants or employees of the municipality who are professionally qualified in tenancy matters (§ 39 par. 1 MRG) and who act according to § 39 par. 3 MRG on basis of special procedural norms for tenancy law of the AußStrG and the MRG only, otherwise on the "Allgemeine Verwaltungsverfahrensgesetz 1991" (AVG), i.e. administrative procedural law;

- no appeal against their decisions is possible (§ 39 par. 4 MRG). However, a delegation of competence of decision to the District Court is possible for any party within 4 weeks after notification of the board's decision (§ 40 par. 1 MRG). The arbitrational board's decision becomes ineffective ex nunc and a regular civil law trial at the District Court is started;[309]

- in their trials legal representation of the parties is facultative and

- in their trials there is no fee for the parties or any obligation to reimburse the costs of the opponent's representative in the event of losing a case.[310]

In cases, where arbitrational boards are authorized to settle, a party has no right to claim its interest directly at the ordinary court. The party can only proceed to court:

- by delegation of competence after the arbitrational board's decision (§ 40 par. 1 MRG) or

- if the arbitrational board is not able to settle the concrete case within a period of three months (§ 40 par. 2 MRG) or

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[306] Other arbitrational boards for housing are located in Innsbruck, Klagenfurt, Leoben, Linz, Mürzzuschlag, Neunkirchen, St. Pölten and Stockerau, see BGBl 1979/299.

[307] For a first historic overview see Mayr, 'Die Entwicklung der wohnrechtlichen Schlichtungsstellen', *wobl* (2003), 349.

[308] E.g. § 25 par. 2 HeizKG, § 22 par. 4 WGG, § 52 par. 3 WEG.

[309] This legislative method is called „sukzessive Kompetenz des ordentlichen Gerichts", i.e. successibly authority of the ordinary court and has been chosen by the legislator to avoid conflicts with constitutional law like the right to a trial before a legal judge (§ 83 par. 2 B-VG and Art 6 ECHR); for details see Mayr & Rath-Kathrein, 'Verfassungsrechtliche Fragen der wohnrechtlichen Schlichtungsstellen', *wobl* (2013), 67 (68 et seq.).

[310] § 39 par. 3 sentence 2 MRG; in ordinary court trials according to § 37 par. 1 fig. 17 MRG a reimbursement of costs of the opponents representative for reasons of equity ("nach Billigkeit") is possible.

- if together with a regular interest (§ 37 par. 1 MRG) an interim injunction is claimed (§ 37 par. 3 fig. 20 MRG).

Against a District Court's decision, a party has a right of appeal to the second instance, one of currently[311] 16 "Landesgerichte" (Courts of Appeals) and in limited cases[312] also a right of appeal to the third instance, the OGH.

- ***Are there regulatory law requirements influencing tenancy contracts***

- ***E.g. a duty to register contracts; personal registration of tenants in Eastern European states (left over of soviet system)***

A duty to register tenancy contracts in Austria only exists with reference to tax law. Facultatively, a registration of a tenancy agreement into the land registry is possible. Furthermore, tenants have to register themselves into the central registry of residence ("Zentrales Melderegister") at the residents' registration office ("Meldebehörde").

- ***Regulatory law requirements on – new and/or old – habitable dwellings capable of being rented - e.g. on minimum size, number of bathrooms, other mandatory fittings etc.***

Regulatory law requirements on new and/or old habitable dwellings are enacted in construction statutes ("Baugesetze")[313] and regional development statutes ("Raumordnungsgesetze")[314] of the nine Austrian Länder or other statutes of relevance in particular cases like the federal monumental protection statute ("Denkmalschutzgesetz 1953")[315].

Although the construction statutes of the nine Austrian Länder differ in some significant aspects, they all usually provide rules for planning and execution of construction works, for hygienic, health and environment protection, for security reasons, for energy saving, heat insulation and heating systems in general, for parking lots or garages.[316]

For the construction of new buildings and major adaptation or improvements of buildings or dwellings, a building permit ("Baubewilligung") is required. The authorities consider the aforementioned provisions for planning and execution of construction works, etc. in proofing the construction plans according to the actual common standards of construction. Furthermore, a valid permission of usage by the local construction

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[311] 1 July 2013.

[312] See Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde, 2012), 140 et seq. and Rechberger & Simotta, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren*, 8th ed. (Wien: Manz, 2010), 1038 et seq. for details.

[313] E.g. in Styria „Steiermärkisches Baugesetz 1995", LGBl. Nr. 59/1995, ast amendment LGBl. Nr. 83/2013; in Vienna „Bauordnung für Wien 1929", LGBl. Nr. 11/1930, last amendment LGBl. Nr. 64/2012.

[314] E.g. in Styria „Steiermärkisches Raumordnungsgesetz 2010", LGBl. Nr. 49/2010, last amendment LGBl. Nr. 44/2012; in Vienna „Bauordnung für Wien 1929", LGBl. Nr. 11/1930, last amendment LGBl. Nr. 64/2012.

[315] BGBl. Nr. 533/1923, last amendment BGBl. I Nr. 92/2013.

[316] See e.g. §§ 43 et seq. Steiermärkisches Baugesetz 1995, §§ 87 et seq. Bauordnung für Wien 1929.

authorities ("baubehördliche Benützungsbewilligung") for new constructed buildings after completion and for existing buildings is required.

- ***Regulation on energy saving***

The EU Directive 2010/31/EU on the energy performance of buildings,[317] which replaced the former Directive from 2003, has been implemented in Austria following the separation of competences in federal civil law and construction law of the nine Austrian Länder.

The civil law part of the Directive 2010/31/EU on energy performance certificates (Art. 11 and Art. 12), which part is especially important for rental agreements, has been integrated into a federal "Energieausweisvorlagegesetz 2012"[318] (EAVG 2012).[319] Before the conclusion of a tenancy contract, the landlord has according to § 4 par. 1 EAVG 2012 a duty to present an energy performance certificate of the dwelling offered for rent or of the whole building, in which the dwelling is located. Within 14 days after conclusion of the rental agreement a full copy of the energy performance certificate in question has to be submitted to the tenant. The landlord furthermore is obliged in case of pre-advertising of the dwellings in the media, to provide two key figures for energy performance, one figure for the need of heating energy and one figure for total energy efficiency, in these ads (§ 3 EAVG 2012).[320]

In case the data provided in the energy performance certificates are wrong, the tenant has legal warranty rights against the landlord, e.g. a right to reduce the rent and additionally can claim damages against the landlord. Furthermore, he can directly claim damages against persons or institutions which were responsible for the wrong provision of the data (§ 6 EAVG 2012).[321]

In case the landlord neglects his duty to handover the energy performance certificate in time, he is liable for an average total energy efficiency of the building with regard to the age and quality of building (§ 7 par. 1 EAVG 2012). The tenant furthermore can request the handover of the energy performance certificate in court or can commission this performance to someone of his choice and claim damages for his expenses (§ 7 par. 2 EAVG 2012).[322]

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[317] OJEU L 153/13.

[318] BGBl. I Nr. 27/2012.

[319] See for details Stabentheiner, 'Der wohnrechtspolitische Sologeher dieses Berichtszeitraums: das Energieausweis-Vorlage-Gesetz 2012', Jahrbuch Wohnrecht (2012), 7; Marzi, 'Das Energieausweis-Vorlage-Gesetz 2012', *wobl* (2012), 182; Hüttler & Marzi, 'Chap. 20' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[320] Hüttler & Marzi, 'Chap. 20.3.2' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[321] Hüttler & Marzi, 'Chap. 20.3.5' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[322] Hüttler & Marzi, 'Chap. 20.3.5' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

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6.2 Preparation and negotiation of tenancy contracts

- ***Freedom of contract***

- ***Are there cases in which there is an obligation for a landlord to enter into a rental contract?***

In Austria, a landlord has to accept singular succession of his contractual partner without (ordinary) possibility of termination of the contract in various situations:

(i) All contracts (full, partial and non-applicability of the MRG):

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 (§ 87 par. 1, § 88 Ehegesetz 1938) or a registered partner (§ 30 Eingetragene-Partnerschafts-Gesetz 2009). The tenancy right in question has to be part of the matrimonial property proceedings after divorce ("nacheheliches Aufteilungsverfahren").[323]

(ii) Full or partial applicability of the MRG:

Landlords also have to accept a new contractual partner after the death of a tenant. His 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 according to § 14 par. 2 and 3 MRG, if they have been living in the rented dwelling at the time of the tenant's death and have an urgent need of accommodation.[324] § 14 par. 2 MRG at the same time 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 (§ 14 par 3 sentence 2 MRG). All these benefitted persons can declare within 14 days after the death of a tenant, not to enter into the existing tenancy agreement (§ 14 par. 2 MRG).[325]

(iii) Full applicability of the MRG:

A landlord is furthermore obliged to accept a new contractual partner if his tenant leaves the dwelling and at the same time declares according to § 12 MRG the transfer of his tenancy rights to his spouse, registered partner, relatives in direct ascending (e.g.

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[323] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 107 et seq.

[324] In case the rented dwelling of the deceased tenant is a special dwelling for elderly people ("Seniorenwohnung"), he has been more than 60 years old at the time of conclusion of the agreement and personal assistance for elderly people ("Altenhilfe") has been part of the tenancy agreement, § 14 par 3 and § 12 par 3 MRG furthermore prohibit the entrance of relatives in descending line into the tenancy contract.

[325] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 107; Bach-Kresbach & Höllwarth, 'Die Crux mit dem Eintrittsrecht', *ecolex* (2013), 218; Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 250

parents) or descending lines (e.g. children) or his siblings.[326] For all benefitted persons it is additionally required that they either have moved in together with the leaving tenant or have lived in the rented dwelling for at least the last two (spouses, direct ascending or descending relatives)[327] or five (siblings) years before the tenant's leaving.[328]

In contrast to the above mentioned ex lege entry mortis causa (§ 14 par. 2 and 3 MRG), a transfer of tenancy rights to an unregistered partner inter vivos is not possible.

Apart from dwellings that are used for living purposes only, in Austria there is also an entry right for buyers or lessees of companies into a tenancy agreement for business premises (§ 12a MRG).

- ***Matching the parties***

- ***How does the landlord normally proceed to find a tenant?***

Private landlords who only own one or few dwellings often advertise their immovable property for rent themselves via Internet or local newspapers. Some private landlords also hire estate agents or ask their property management or circle of friends and acquaintances for help in finding a new tenant. In many cases, former tenants who move out find replacements to which landlords often agree.

Commercial landlords also in general advertise their offers via Internet or local newspapers and either delegate their own employees to find a new tenant or hire estate agents as well.

Most municipalities or public companies 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, age of the applicants (e.g. young family, elderly persons), and income are taken into account. Furthermore, priority allocation exists e.g. for criminal victims, evicted citizens with urgent need for allocation, and for handicapped people.[329]

Municipalities and public companies, especially the Wohnservice Wien[330], invest a reasonable amount of money for advertisement of their services and promote free dwellings of the municipal dwellings stock in the media-

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[326] In case the rented dwelling of the deceased tenant is a special dwelling for elderly people ("Seniorenwohnung"), the same restrictions of entrance rights for relatives in descending line apply (§ 12 par. 3 MRG) as for the entry ex lege mortis causa (§ 14 MRG).

[327] Time periods shorter than two years are allowed for spouses and children, if they have been living together with the leaving tenant in the same dwelling since marriage / birth; see § 12 par. 1 MRG for details.

[328] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 115; Bach-Kresbach & Höllwarth, 'Die Crux mit dem Eintrittsrecht', *ecolex* (2013), 218.

[329] E.g. for the allocation method in Vienna see Ottermayer & Zwettler, 'Skriptum Wohnungsvormerkung, Wohnungsvergabe', (2010); in Graz see „RL der Stadt Graz für die Zuweisung von Gemeindewohnungen GZ.: A21/I-K-34/1989 vom 6.4.2000".

[330] <https://www.wohnservice-wien.at/>, 8. September 2015.

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.

Limited-profit housing associations usually have so many requests for a dwelling that no advertisement to find a new tenant is needed. Dwellings that are subject to the applicability of the WGG cannot even be offered by estate agents.

- ***What checks on the personal and financial status are lawful and usual? In particular: May the landlord ask for a salary statement? May he resort to a credit reference agency and is doing so usual?***

- ***How can information on the potential tenant be gathered lawfully? In particular: Are there blacklists of "bad tenants"? If yes, by whom are they compiled? Are they subject to legal limitations e.g. on data protections grounds?***

According to § 1 par. 1 Datenschutzgesetz 2000 (DSG) a tenant (like everyone) has a right of protection of his or her personal data if a legitimate interest for the confidentiality of this data exists. This legitimate interest for the confidentiality is missing for example if this data is publicly available (land cadastre, commercial register, etc.). Self-disclosure of data also limits the tenant's right of protection of data (Art 1 par. 2 DSG).[331]

In comparison to Germany where a broad discussion about self-disclosure of personal and financial status data of tenants ("Mieterselbstauskunft") has been going on for years, such a discussion has not been seen in Austria so far. At the moment, no Supreme Court decision or research article with regard to this phenomenon can be found in the common legal databases or journals.[332] This indicates that checks on the personal and financial status are still not very common and/or hardly cause problems between landlords and tenants in Austria.

It is assumed that a landlord may ask every 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 (§ 1 par. 1 DSG). 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 creditworthiness of a prospective tenant if the landlord can claim an overriding legitimate interest in the disclosure of this data (§ 8 par. 1 fig. 4 and par. 3 fig. 4 DSG). The tenant however has in many cases a right of withdrawal of such data without giving any reason (§ 28 par 2 DSG).[333]

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[331] Dohr et al., *Datenschutzgesetz*, 2nd ed. , § 1 et seq. (17 April 2013, www.rdb.at).

[332] <www.ris.bka.gv.at>, <http://www.rdb.at>, 26 August 2013.

[333] OGH 6 Ob 195/08g, 6 Ob 156/09y and 6 Ob 41/09m; see Grassner, 'Das Widerspruchsrecht bei Wirtschaftsauskunfteien', *ÖJZ* 2010/95 for details.

- ***What checks may and does the tenant carry out on the landlord (e.g. to avoid being trapped by a swindler landlord)***

Although in the last years some cases of swindler landlords have been reported publicly[334], this phenomenon is hardly known in Austria. Usually a tenant only informs himself about a landlord by questioning a prior tenant. Tenants of course may check the landlord's ownership of the dwelling in the land registry but this is rather uncommon. In practice, it is presumed that only barristers ("Rechtsanwälte") who legally support tenants in pre-contracting stage do check the validity of the ownership of a certain landlord.

With reference to online tenancy-fraud warning notices are occasionally provided by tenants or consumers associations (like "Mieterschutzverband Österreich" or "Verein für Konsumenteninformation").[335]

- ***Services of estate agents (please note that this section has been shifted here)***

- ***What services are usually provided by estate agents?***

- ***To what extent are estate agents regulated? In particular: are there rules on how an agent should present a house, i.e. on the kind of information which needs to be given?***

- ***What is the usual commission they charge to the landlord and tenant? Are there legal limitations on the commission?***

In Austria, estate agents in the area of rental housing provide their services according to the norms of the "Maklergesetz 1996"[336] (MaklerG, Estate Agents Statute), the "Gewerbeordnung 1994" (GewO, Trade Regulation Statute), the ABGB and – with respect to consumers – the KSchG. Additional sources of law are two statutory orders in accordance with the GewO enacted by the federal ministry of economy, the "Immobilienmaklerverordnung 1996"[337] (IMV, Estate Agents Statutory Order) and the "Immobilientreuhänder-Verordnung 2003"[338], as well as customary business practices for estate agents[339] enacted by the "Wirtschaftskammer Österreich" (WKO, Austrian Federal Economic Chamber).

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[334] E.g. <http://derstandard.at/1256255942866/Vermieter-im-Ausland-Vorsicht-vor-Online-Betruegern>.

[335] <http://www.mieterschutzwien.at/index.php/3719/wohnungsbetrug-auf-internetplattformen/. http://www.konsument.at/>, 26 August 2013.

[336] BGBl. Nr. 262/1996, last amendment BGBl. I Nr. 34/2012.

[337] „Verordnung des Bundesministers für wirtschaftliche Angelegenheiten über Standes- und Ausübungsregeln für Immobilienmakler", BGBl. Nr. 297/1996, last amendment BGBl. II Nr. 268/2010.

[338] „Verordnung des Bundesministers für Wirtschaft und Arbeit über die Zugangsvoraussetzungen für das reglementierte Gewerbe der Immobilientreuhänder (Immobilienmakler, Immobilienverwalter, Bauträger)", BGBl. II Nr. 58/2003.

[339] ‚Allgemeine Richtlinien für Immobilientreuhänder', <http://www.wkimmo.info/i/wko/service/allg_rl.pdf>, 7 March 2013; ‚Besonderen Standesregeln für Immobilienmakler', <https://www.wko.at/Content.Node/

The MaklerG provides in §§ 1 to 15 leg. cit. general regulations for all kind of agents (estate, commercial, insurance and personal loan agents). In §§ 16 to 18 MaklerG special norms for estate agents are enacted. According to §§ 1, 16 MaklerG an estate agent is a person who intercedes business transactions regarding immovable property with third parties for his principal pursuant to a private-law agreement (brokerage contract).

As already mentioned, an estate agent is mandated by the landlord to find an adequate tenant, contacts potential tenants individually, and then acts as a double-sided agent ("Doppelmakler") according to § 5 MaklerG. As a double-sided agent he is theoretically obliged to preserve the interests of both parties, adopt a neutral position, and treat both parties equally. Especially with respect to private rent objects, this is in fact a rather difficult task, because although the estate agent in Austria typically is mandated by the landlord, the tenant usually pays the commission fee.[340]

An estate agent has to inform about all costs, advantages, disadvantages and circumstances of the prospective object in rent, and he or she is liable as an expert for any lack of information or other mistakes ("Sachverständigenhaftung", § 3 par. 4 sentence 1 MaklerG and § 1299 ABGB). In case of a breach of fundamental obligations of the brokerage contract by the estate agent, the principal has furthermore a right to reduction or – in very serious instances[341] – even a right to elimination of the commission fee ("Provisionsmäßigungsrecht", § 3 par. 4 sentence 2 MaklerG).[342]

Most provisions of the MaklerG with regard to estate agents are dispositive. Only some provisions about the principal's freedom of conclusion of a business transaction arranged by an estate agent (§ 4 par. 2 MaklerG), about the commission fee (§§ 6 and 7 MaklerG), and about the cancellation of a brokerage contract unlimited in time (§ 13 MaklerG) are mandatory and cannot be changed in disfavour of the principal (§ 18 MaklerG).[343] With respect to consumers as per § 1 par. 2 KSchG, the information obligations of the estate agent are stricter (§ 30b KSchG), and the contractual freedom between principal and estate agent is even more limited by mandatory norms that cannot be changed in disfavour of the consumer (§ 31 par. 2 KSchG).[344] Especially the consumer's right to compensation for damages and to reduction of commission fees (§ 3 MaklerG) cannot be restricted by any contractual term.

The practice of estate agents is limited to licensed estate agents that have to comply with regulatory law requirements of the GewO, the IMV and the "Immobilientreuhänder-Verordnung 2003". In addition to general admission criteria like minimum age, legal

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branchen/oe/sparte_iuc/ImmoVermoegen/wko_immo_standesregeln_2011s_2.pdf>, 7 March 2013; see Kothbauer, 'Neue Standesregeln für Immobilienmakler', *immolex* (2012), 324 et seq. for details.

[340] Limberg, 'Immobilienmakler im Interessenskonflikt', *ecolex* (2011), 287.

[341] Bydlinski, 'Chap. 10.6.4.1.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[342] See in detail: Kriegner, *Immobilienmakler – Pflichten und vertragliche Haftung* (Wien: Manz, 2007), 1 et seq.

[343] Bydlinski, 'Chap. 10.9.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[344] Bydlinski, 'Chap. 10.10.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

competence or character evidence of the agent, also a certain qualification certificate ("Befähigungsnachweis") and professional liability insurance is required. [345]

Moreover, the provisions of the IMV set professional legal standards for estate agents and limits of commission fees for the brokerage of tenancy agreements (§ 19 et seq. IMV). According to § 2 IMV an estate agent has to act as a scrupulous and prudent businessman and has to avoid any professional misconduct. This professional misconduct is any behaviour in business transactions towards principals and other estate agents that damages the reputation and interests of the professional group of estate agents en bloc (§ 3 IMV). § 4 par. 1 IMV lists examples for professional misconduct of estate agents towards principals, i.e. providing brokerage services without consent of the holder of the right in disposal (fig. 1 leg. cit.) or without revealing his or her profession as real estate agent, the obligation to pay commission fees for the principal and the expected costs (fig. 2 leg. cit.), concluding brokerage contracts without written confirmation of the essential contents of contract for the principal (fig. 3 leg. cit.), or receiving payments or prepayments of commission fees by the principals before conclusion of a contract effective in law (fig. 7, 2 case leg cit.).

The professional legal standards of the IMV are supplemented by standards for customary business practice by the WKO, including standards for education and training of estate agents, a general code of practice towards principals and other estate agents, and guidelines for the cooperation of two or more estate agents working on the same business transaction.[346]

In Austria, the general services an estate agent provides in the area of rental housing according to the WKO[347] 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 showings , and providing all relevant information of the object and its usage
- consulting both contractual parties about all legal and economical aspects of the tenancy, mediating the balancing interests of the landlord and the tenant, and participating in the clearing and settlement of the tenancy agreement.

As previously stated, in Austria an estate agent is typically mandated by the landlord and the tenant usually pays the commission fee. The competition between estate agents is

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[345] In Austria, the limitation of the freedom of trade by regulatory law ("reglementierte Gewerbe") still is very common also for other professions.

[346] The WKO even wants the new customary business practice standards that entered into force on 1 October 2012 to be the basis for an amendment of the IMV by the federal ministry of economics, to increase the legally binding status of these customary business practice standards as statutory order.

[347] Fachverband der Immobilien- und Vermögenstreuhänder, 'Die Vermittlung von Wohnungen. Was ein Makler leistet. Und was er kostet.' (Information sheet, last amended 20 May 2012 and available online at <http://portal.wko.at/>).

rather tough, therfore landlords are able to find estate agents that do not charge them any commission fee.[348]

Without any special agreement with landlord and/or tenant, the estate agent as double-sided agent can, according to the MaklerG and the IMV, claim a commission fee from both parties of the tenancy agreement, but its amount is limited due to §§ 20 et seq. IMV. Curiously, only commission fees for renting a castle, palace or monastery are not limited by law (§ 11 IMV).

With respect to tenancy agreements, the calculation basis for the commission fee is usually[349] the so-called "Bruttomietzins" (BMM). According to § 24 par. 1 IMV this BMM consists of the monthly amount of rent or sub-rent ("Haupt- und Untermietzins") plus overheads, service charges and (possible) monthly amount of rent for furnishing, but not of the VAT.[350] For rent objects to which the MRG fully applies, heating costs are also excluded from the BMM (§ 24 par. 2 IMV).

For non-commercial premises, the commission fee for tenancy contracts due to § 20 IMV is limited in the following way:[351]

	Tenant	**Landlord**
Contract unlimited in time	2 BMM	3 BMM
Contract limited in time; duration > 3 years	2 BMM	3 BMM
Contract limited in time; duration < 3 years	1 BMM	3 BMM
Extension of a contract limited in time	max. ½ BMM	max. ½ BMM
Transformation of a contract limited in time into a contract unlimited in time	max. ½ BMM	max. ½ BMM

Additionally special regulations about commission fees exist for estate agents that at the same time are caretakers of the object in rent, in which case the commission fee of the tenant for tenancy contracts is halved, and the commission fee for the landlord for tenancy contracts is reduced to 2 BMM (§ 21 IMV).

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[348] *Madl* criticizes this competition and hopes, that rather a quality competition equipollent to a careful selection of tenants than a prize competition takes place in the future to motivate landlords to pay for the estate agents' services; Madl, 'Immobilienmaklerverordnung – erste Erfahrungen mit der Novelle 2010', *ecolex* (2011), 291.

[349] In case of a sub-tenancy of singular rooms, the pure monthly rent (not the "Bruttomietzins") is due to § 23 IMV the basis for the commission fee.

[350] In the view of the author, the wording "Bruttomietzins" is a typical legislative drafting failure because usually the word „brutto" as expression from tax law means that all taxes are included whereas the "Bruttomietzins" explicitly excludes the VAT.

[351] Figure inspired by Rainer, 'Editorial', *immolex* (2010), 229.

In case the estate agent is a contractual party of the tenancy himself or herself, he or she is not allowed to earn any commission fee (§ 6 par 4 sentence 1 MaklerG). Moreover, in case of an unrevealed close personal or economical relationship to one of the negotiating parties, the estate agent can lose his or her contractual interest to earn any commission fee (§ 6 par 4 sentence 3 MaklerG).[352]

- ***Ancillary duties of both parties in the phase of contract preparation and negotiation ("culpa in contrahendo" kind of situations)***

A tenancy agreement in Austria is not settled while the parties are still negotiating and no congruent intent of both parties to enter into a legally binding relationship exists (§ 861 sentence 2 ABGB). However, a break-up of negotiations can lead to a liability culpa in contrahendo of one negotiating party,

- if one party neglects pre-contractual duties of information, e.g. to withhold well-known or foreseeable hindrances or own reservations for the conclusion of the tenancy agreement and at the same time to lull the other party into a sense of security that a conclusion of the agreement is very close or

- if one party at first culpably or inculpably lulls the other party into a sense of security and then refuses to conclude the tenancy agreement without any valid reason.[353]

The liable party is obliged to pay compensation for pre-contractual damages according to § 1293 et seq. ABGB. Predominantly[354], the OGH grants the aggrieved party compensation for the "Vertrauensschaden" ("negatives Vertragsinteresse")[355], i.e. compensation for damages which occur if someone trusts in the validity of a declaration of or in the conclusion of the agreement by the other party. With respect to tenancy law, typical "Vertrauensschäden" are useless pre-contractual expenses of the aggrieved party for the modification of dwellings, ordering of removal services, legal representation or contract establishment.

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[352] See Limberg, 'Immobilienmakler im Interessenskonflikt', *ecolex* (2011), 287 (288 et seq.) for details.

[353] Lukas, 'Der Abbruch von Vertragsverhandlungen', *JBl* (2009), 751 (752); Wiebe, '§ 861', in ABGB-ON, 1.01 ed., ed. Kletečka & Schauer, 33 et seq. (www.rdb.at, 27 August 2013).

[354] Wiebe, '1.01 § 861', in *ABGB-ON*, ed. Kletečka & Schauer, Rz 47 (www.rdb.at, 27 August 2013).

[355] In contrast to the compensation for "Vertrauensschaden", compensation for the „Nichterfüllungsschaden" („positives Vertragsinteresse") is a compensation for damages in the same way, as if the agreement would have been concluded. The "Nichterfüllungsschaden" is usually higher than the "Vetrauensschaden"; see Kodek, '§ 1293', in *ABGB-ON*, 1.01 ed., ed. Kletečka & Schauer, 28 et seq. (www.rdb.at, 27 August 2013) for details.

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Summary table for 6.2 Preparation and negotiation of tenancy contracts

(+) – true (-) – untrue (*) – with exceptions

	Rental tenancies with a public task		Rental tenancies without a public task / Private rental tenancies		
	Limited-profit rental housing tenancies	**Municipal rental tenancies**	**MRG fully applicable**	**MRG partially applicable**	**MRG not applicable**
Choice of tenant	**Waiting lists / Criteria of eligibility for tenants**	**Selection Procedure / Criteria of eligibility for tenants**	**Free**	**Free**	**Free**
Obligation for a landlord to enter into a rental contract::					
1) Court order in post-divorce trials	+	+	+	+	+
2) ex lege entry mortis causa	+	+	+	+	-
3) ex lege entry inter vivos	+	+	+	-	-

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6.3 Conclusion of tenancy contracts

- ***Tenancy contracts***

- ***distinguished from functionally similar arrangements (e.g. licence; real right of habitation; Leihe, comodato)***

This section will at first describe the main characteristics of a tenancy agreement and then explain eleven other forms of lawful possession of a dwelling which are functionally similar to tenancy agreements.

(i) "Bestandvertrag" – Tenancy agreement as per §§ 1090 et seq. ABGB

§§ 1090 et seq. ABGB define a tenancy agreement ("Bestandvertrag") as the "synallagmatic" contract between lessor and lessee about the use or usufructuary use of property for a certain time for value. Essentialia negotii of a tenancy agreement as per §§ 1090 et seq. ABGB are the rental object and the rent (§ 1094 ABGB). For the conclusion of the contract, the transfer of the rented object is not necessary. In general, all inconsumable ("unverbrauchbare"), visible or invisible ("körperliche" oder "unkörperliche")[356], movable or immovable objects can be objects for rent, i.e. cars, books, companies, rights and – of course – premises. The rent usually is paid in money. The conclusion of tenancy agreements and payment of rent are subject to the same regulations as purchase agreements (§ 1092 ABGB).[357]

(ii) "Leihe" – loan, §§ 971 et seq. ABGB

"Leihe" (loan, commodatum) according to §§ 971 et seq. ABGB is an agreement between lender and borrower about the use of inconsumable, visible, movable or immovable objects without payment for a certain time. Apart from the agreement on the loaned object and time limit, the transfer of the loaned object is mandatory for the conclusion of the contract, because a loan in Austrian law is not considered to be a consensual contract ("Konsensualvertrag"), but a contract in rem ("Realvertrag").[358] Also, dwellings or parts of dwellings can be objects of loan.[359]

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[356] According to § 292 ABGB, "körperliche Sachen" are objects that can be experienced by your senses, i.e. cars, books, houses. "Unkörperliche Sachen" are objects that cannot be experienced by your senses, i.e. rights.

[357] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 216 et seq.

[358] Significant for a contract in rem is that in addition to a consensual agreement of the parties, an actual handover, e.g. a dwelling or specific performance of a service is additionally required.

[359] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 202 et seq.

(iii) "Prekarium" – precariat, § 974 ABGB

"Prekarium" (precariat) due to §§ 974 ABGB is a special form of loan under which the lender can claim restitution of the loaned object at any time.[360]

(iv) "obligatorisches Wohnrecht" – obligatory right of housing, § 521 ABGB

The obligatory right of housing (§ 521 ABGB) is an anomalous servitude based on a contractus innominatus between lessor and lessee about the non-transferable and non-inheritable right of a lessee to use or usufructuary use premises for a certain time, often for the rest of his/her life. This form of lawful possession has been highly developed significantly by the judgments of the OGH[361] and usually is only effective inter partes.[362]

(v) "dingliches Wohnrecht" – right of housing in rem, § 521 ABGB

The right of housing in rem (§ 521 ABGB) is a servitude based on a contract between lessor and lessee about the non-transferable and non-inheritable right of a lessee to use premises for a certain time, often for the rest of his/her life. In contrast to the obligatory right of housing, a right of housing in rem is effective erga omnes. Therefore, a singular successor of the lessor is bound to the lessee's right of housing in rem in case of assumption of the contract. Usually, but not necessarily, this right of housing in rem is entered in the land register.[363]

(vi) "Wohnungsfruchtgenussrecht" – usus fructus, §§ 509, 521 ABGB

Usus fructus according to §§ 509, 521 ABGB is also a servitude effective erga omnes and usually registered in the land register. In contrast to the right of housing in rem, the usus fructus is a right of enjoyment that enables a holder to derive profit or benefit from property. Usus fructus allows the holder to use the premises without limitations, even if this use exceeds his personal requirement of accommodation. He or she can also transfer this right to use the premises to others and receive payments from them.[364]

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[360] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 203 et seq.

[361] Ris-Justiz RS0011840.

[362] Kiendl-Wendner, '§ 521', in *Praxiskommentar zum ABGB*, vol. II, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2004) note 4.

[363] Kiendl-Wendner, '§ 521', in *Praxiskommentar zum ABGB*, vol. II, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2004) note 1 et seq.

[364] Kiendl-Wendner, '§ 509', in *Praxiskommentar zum ABGB*, vol. II, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2004) note 1 et seq. and § 521 note 1 et seq.

(vii) "Ausgedinge" or "Leibrente" – life tenancy or life annuity, § 1269 ABGB

The life tenancy or life annuity is another form of lawful possession of premises common in rural areas, especially among farmers' families. In a special aleatoric contract ("Übergabsvertrag") the new owner of the farm grants the former owner the right to use the premises, to receive other continuing services (provisioning, caregiving, etc.), or money until his death.[365]

(viii) "genossenschaftlicher Nutzungsverträge" – cooperative tenancy agreements as per §§ 1 et seq. WGG

A cooperative tenancy agreement as per § 1 et seq. WGG is a contract sui generis like that of a regular tenancy agreement, for which the regulations of the MRG apply in general according to § 1 par. 1 and 3 MRG. Significant for a cooperative tenancy agreement is that the landlord must always be a limited profit housing association which has been founded and is governed according to the strict limitations of the WGG[366].

(ix) "familienrechtliche Benützungsverhältnisse" – Usage of dwellings by family members

The use of dwellings by family members is often not based on a contractual relationship under the law of obligations like "Bestandvertrag", "Leihe" or "Prekarium", but simply a use *de facto.* This familial use of dwellings usually exists between spouses or between parents and their children based on matrimonial or maintenance obligations.[367]

(x) "Teilzeitnutzungsverträge" – time sharing agreements

"Time sharing" in general signifies joint ownership or rental of property by several persons, who take turns occupying the property.[368]

With respect to joint rental of property, a time sharing agreement grants the lessee an exclusive right of use of immovable property, such as a vacation condominium, for a significant time.[369] For time sharing agreements between commercial landlords and consumers (§ 1 KSchG), the "Teilzeitnutzungsgesetz 2011"[370] (TNG) is applicable, as

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[365] Binder, '§ 1090' in *Praxiskommentar zum ABGB*, vol. V, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2006), § 1269 note 8 et seq.

[366] Binder, '§ 1090' in *Praxiskommentar zum ABGB*, vol. V, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2006), § 1090 note 20 et seq.

[367] Binder, '§ 1090' in *Praxiskommentar zum ABGB*, vol. V, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2006), § 1090 note 27 et seq.

[368] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 246 et seq.

[369] Binder, '§ 1090' in *Praxiskommentar zum ABGB*, vol. V, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2006), § 1090 note 110.

[370] BGBl. I Nr. 8/2011, based on the EU Directive 2008/122/EC.

well as norms regarding special advertising and information obligations of the landlord (§§ 3 to 5 TNG), formal requirements (§§ 6, 7 TNG), and rights of the lessee to withdraw from the time sharing agreement (§ 8 et seq. TNG).

(xi) "Immobilienleasingverträge" – real estate leasing agreements

Real estate leasing agreements are contracts sui generis about the valuable use of immovable property, which combine elements of purchase and tenancy agreements all at once. In the ABGB, specific regulations for real estate leasing agreements do not exist, so that the individual contract either can be treated by the regulations for contracts for the sale of goods (§§ 1053 et seq. ABGB) or for tenancy contracts (§§ 1090 et seq. ABGB).[371]

(xii) "Nutzungsverträge für Dienst-, Werks- oder Naturalwohnungen von Arbeitnehmern" – company housing agreements

Agreements between employer as landlord and employee as lessee regarding dwellings for housing purposes are considered either as part of a contract of employment ("Dienstvertrag", § 1151 ABGB) or as tenancy agreement as per §§ 1090 et seq. ABGB. The strict regulations of the MRG are not applicable at all to a company housing agreement qualified as part of a contract of employment (§ 1 par. 2 fig. 2 MRG). In case of expiration of the lessee's contract of employment, the company housing agreement usually is terminated. Special rules exist for janitors ("Hausbesorger") according to the "Hausbesorgergesetz 1970"[372].

- ***specific tenancy contracts, e.g. contracts on furnished apartments; student apartments; contracts over room(s) only (e.g. student rooms); contracts over rooms or apartments located in the house in which the landlord lives himself as well. Please describe the legal specificities in these cases.***

For student apartments, contracts concerning room(s) only and contracts concerning rooms or apartments located in the house in which the landlord lives himself as well, the same regulations apply as for other tenancy agreements. The crucial questions remain whether the MRG is fully, partially, or non-applicable (§ 1 MRG) and / or other special statutes exist.

To illustrate the Austrian system once again, the MRG is e.g. for a student's apartment or room[373]

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[371] Rainer, 'Der Immobilienleasingvertrag', *immolex* (2005), 166 et seq.; Binder, '§ 1090' in *Praxiskommentar zum ABGB*, vol. V, 3rd ed., ed. Schwimann (Wien: LexisNexis Österreich, 2006), § 1090 note 71 et seq.

[372] BGBl. Nr. 16/1970, last amendment BGBl. I Nr. 111/2010.

[373] According to § 1 par. 1 MRG for a room as part of a dwelling ("einzelner Wohnungsteil") the MRG is applicable in general.

- fully applicable if the apartment/room is located in a building which has been constructed with public funding (due to § 1 par. 1 MRG, if no other exception of § 1 par. 2-5 MRG applies)
- partially applicable if the apartment/room is located in a building that has been newly constructed without public funding with a building permit dated after 30.06.1953 (due to § 1 par. 4 fig. 1 MRG, if no other exception of § 1 par. 2, 3 or 5 MRG applies)
- not applicable if the apartment/room is located in students' residences (due to § 1 par. 2 fig. 1 MRG).

Other special statutes for tenancy contracts over student apartments or rooms are not enacted in Austria; therefore, no legal specificities for these tenancy contracts exist.

Even for contracts on furnished apartments, also the distinction of full, partial or non-applicability of the MRG is crucial; if the MRG is

- fully applicable, the rent for movables that have been rented together with a dwelling ("mitvermietete Einrichtungsgegenstände") is according to § 15 par. 1 fig. 4 MRG part of the rent ("Hauptmietzins") and strictly limited by law. According to § 25 MRG, the landlord can only claim an adequate amount of money ("angemessenes Entgelt") for these movables. This adequate amount of money represents the objective value of the movable at the time of conclusion of the agreement and is calculated by taking into account the acquisition costs, age and state of the movable, remaining useful life ("Restnutzungsdauer") and a profit surcharge of 12 % on average.[374] As movables are part of the "Hauptmietzins" (§ 15 par. 1 fig. 4 MRG), the 25 % deduction for contracts limited in time (§ 16 par. 7 MRG) has to be considered in the calculation of the rent for movables as well. If certain movables like kitchen, toilet, etc. are part of the category standard (§ 15a MRG), extra rent for these movables cannot be charged at all;

- partially or non-applicable, both parties can agree freely on the rent for movables.

- ***Requirements for a valid conclusion of the contract***

According to § 861 et seq. ABGB, 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.[375]

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.[376] There must be an offer capable of acceptance by one of the parties,

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[374] OGH 7 Ob 42/07p.

[375] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 13.

[376] Generally, see Bydlinski, *Bürgerliches Recht Band I. Allgemeiner Teil*, 2nd edition (Wien: Springer, 2002), 6/6 et seq.

i.e. a simple response to a request for information is not an offer but an invitation to treat ("invitatio ad offerendum").[377]

Essentialia negotii of a tenancy agreement as per §§ 1090 et seq. ABGB are rent object and rent (§ 1094 ABGB). For the conclusion of the contract the transfer of the rented object is not necessary. The conclusion of tenancy agreements and payment of rent are subject to the same regulations as purchase agreements (§ 1092 ABGB).[378]

- ***- formal requirements***

(i). No written form

The written form for tenancy contracts is not a formal requirement in Austria in general. Nevertheless, some provisions of the MRG explicitly demand the written form.

The following provisions explicitly demand the written form:

- limitation in time of a tenancy agreement (§ 29 par. 1 fig. 3 and par. 4 MRG);
- (additional) important reasons for giving notice to the tenant (§ 30 par. 2 fig. 13 MRG);
- use of a dwelling as secondary home in cases of § 1 par. 2 fig. 3 lit. b MRG;
- selected subsequent agreements about the rent level (§ 16 par. 1 fig. 5 MRG, § 16 par. 1 fig. 10 MRG);
- reasons for surcharges for top locations (§ 16 par. 4 MRG);
- temporarily extraordinary increase of rents (§ 16 Abs 11 MRG);
- agreements of the majority of tenants about the costs for a useful modernisation of the building (§ 4 par. 3 fig. 2 MRG).[379]

The absence of the written form does not affect the validity of the whole agreement, but leads to an invalidity of the specific clause. For example, in case of an invalid limitation-in-time-clause, a tenancy agreement is treated as a contract unlimited in time according to § 29 par. 3 lit a) MRG and par. 4 MRG.

(ii) Statutes for the transfer of land ("Grundverkehrsgesetze")

Formal requirements for a valid conclusion of tenancy contracts in Austria exist according to specific statutes enacted by the Länder for the transfer of land

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[377] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 13.

[378] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 216 et seq.

[379] Oberhammer & Domej, 'Kap 2.1.6' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

("Grundverkehrsgesetze")[380]. Besides contracts of purchase, lease, usufructury lease and others, also tenancy agreements are legal transactions which in specific circumstances need permission ("grundverkehrsbehördliche Genehmigung") of the authorities responsible for the transfer of land ("Grundverkehrsbehörde").[381] If permission with regard to a tenancy agreement is required by law, the agreement is provisionally invalid ("schwebend unwirksam") until the decision of the authorities.[382] If the permission is rejected by the authorities, the tenancy agreement is invalid ex tunc.[383]

The main aim of the "Grundverkehrsgesetze" is to limit the transfer of land for specific reasons of common good or public interest. Although the "Grundverkehrsgesetze" of the nine Austrian states differ in various ways, in general they regulate three different categories of transfer of land (including buildings and parts of buildings):

- transfer of land for agricultural or forestry use ("Grüner Grundverkehr")
- transfer of construction land, especially for secondary homes ("Grauer Grundverkehr")
- transfer of land with foreigners ("Ausländergrundverkehr").

Limits for the transfer of land for agricultural or forestry use are enacted to secure a basis for productivity of farmers and agricultural industry according to the structural and natural circumstances of the specific Austrian region[384]. With respect to transfer of construction land, limits are enacted to secure the use of land for secondary homes according to existing regional development law ("Raumordnung") and zoning law ("Flächenwidmung").[385] The transfer of land with foreigners should, according to the "Grundverkehrsgesetze", in general only be legal if national policy measures are not contradicted and public interests, especially in economic, cultural and social aspects, are respected.[386] Please note that a foreigner is defined by the "Grundverkehrsgesetze" as citizen or organisation of countries (e.g. Russia, China, etc.) that are not on equal terms to Austrian citizens or organisations according to EU law or public international law.[387]

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[380] E.g. „Steiermärkisches Grundverkehrsgesetz 1993", LGBl. Nr. 124/1993, last amendment LGBl. Nr. 22/2013; „Salzburger Grundverkehrsgesetz 2001", LGBl. Nr. 9/2002, last amendment LGBl. Nr. 70/2012; „Tiroler Grundverkehrsgesetz 1996", LGBl. Nr. 61/1996, last amendment LGBl. Nr. 150/2012.

[381] See et al § 5 par. 1 fig. 5, § 16 par. 1 fig. 4, § 25 Steiermärkisches Grundverkehrsgesetz 1993, § 3 par. 1 lit. d), § 11 par. 1 lit. d), § 13c par. 1 fig. 6 Salzburger Grundverkehrsgesetz 2001.

[382] OGH 4 Ob 114/01w.

[383] § 29 par. 2 Steiermärkisches Grundverkehrsgesetz 1993.

[384] § 1 Steiermärkisches Grundverkehrsgesetz 1993, § 1 par. 2 Salzburger Grundverkehrsgesetz 2001, § 6 par. 1 lit. a) Tiroler Grundverkehrsgesetz 1996.

[385] § 12 Steiermärkisches Grundverkehrsgesetz 1993, § 13a par. 2 Salzburger Grundverkehrsgesetz 2001, § 14 Tiroler Grundverkehrsgesetz 1996.

[386] § 28 par. 1 Steiermärkisches Grundverkehrsgesetz 1993, § 8 par. 2 Salzburger Grundverkehrsgesetz 2001, § 13 par. 1 lit. c) Tiroler Grundverkehrsgesetz 1996.

[387] § 22 par. 2 Steiermärkisches Grundverkehrsgesetz 1993, § 9 Salzburger Grundverkehrsgesetz 2001, § 2 par. 7 Tiroler Grundverkehrsgesetz 1996.

- ***- is there a fee for the conclusion and how does it have to be paid? (e.g. "fee stamp" on the contract etc)***
- ***- registration requirements; legal consequences in the absence of registration***
- ***Note: If relevant, please distinguish the various existing registers, e.g. land register, tax register, register of domicile.***

As already mentioned above, a duty to register tenancy contracts does not exist in Austria. Only with reference to tax law do the fiscal authorities have to be informed about the transaction.

According to § 15 et seq. and § 33 TP 5 Gebührengesetz 1957 (GebG), every written tenancy agreement with a duration of more than 3 months is subject to a 1 % transfer tax. The basis of assessment is

- the yearly amount of rent (incl. all overheads, VAT) plus single payments, which a tenant has to pay e.g. for investments, and

- the duration of the contract.

Although both contracting parties are liable for the payment of this transfer tax (§ 28 par. 1 lit. a GebG), the notification of the tax authorities of the agreement and the actual payment of the tax to the authorities is often carried out by the landlord or his legal representative after conclusion of the contract. The tenant usually pays the full tax costs to the landlord before or at beginning of the rent agreement together with the demanded deposit.

As the rent also constitutes an income of the landlord, this income has to be reported to the tax authorities and compulsory VAT and income tax has to be paid by the landlord.[388]

Facultatively, a registration of a tenancy agreement into the land registry is possible according to § 1095 ABGB, § 9 Allgemeines Grundbuchsgesetz 1955 (GBG). In this case, the position of the tenant is considered as an "absolute right" with effect against third parties, i.e. the buyer of the dwelling cannot terminate the lease merely with the reference to the fact of sale (§ 1120 ABGB).

In practice, a tenancy agreement concerning a dwelling to which the MRG partially or fully applies is not registered in the land registry. Pursuant to § 2 par. 1 sentence 4 MRG, a successor of the landlord is bound to the tenancy agreement between the predecessor and his tenant ex lege, even though this tenancy agreement has not been registered into the land registry. Tenancy agreements about dwellings to which the MRG does not apply are occasionally registered but registration is common for agreements on usufructuary lease ("Pachtverträge"), right of housing in rem ("dingliches Wohnrecht") and usus fructus ("Wohnungsfruchtgenussrecht").

According to the Meldegesetz 1991, a general obligation also exists for everyone to inform the authorities of his / her habitual residence and changes thereof. Therefore,

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[388] §§ 6, 10 Umsatzsteuergesetz 1994, § 28 Einkommensteuergesetz 1988, "Einkünfte aus Vermietung und Verpachtung"; Lurger 21.

tenants are also obliged to register themselves into the central registry of residence ("Zentrales Melderegister") at the residents' registration office ("Meldebehörde") within 3 days after moving in. The registration form of the tenant needs to be signed by the landlord before his request of registration (§ 8 par. 1 Meldegesetz 1991).[389]

- ***Restrictions on choice of tenant – antidiscrimination issues***

- EU directives (see enclosed list) and national law on antidiscrimination

Restrictions on choice of tenant do not play an important role with regard to Austrian tenancy law. In practice, hardly any cases of discrimination in housing matters have been reported so far in Austria.[390]

Before Austria joined the EU, the former "Gleichbehandlungsgesetz 1979"[391] (Anti-Discrimination Statute) was changed in various parts to fulfill the common EC law standards of that time.[392] The EU Anti-Discrimination Directives of 2000[393] and 2002[394] then led to the new "Gleichbehandlungsgesetz 2004"[395] (GlBG) which was fundamentally amended in 2011[396] and 2013[397] with respect to housing matters.

§ 31 par. 1 GlBG regulates that discrimination based on sex, ethnical background, or family status 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 (§ 38 par. 1 GlBG), consequently a tenant who is not considered in the choice-of-tenant-procedure because of discrimination can claim damages.[398]

§ 36 GlBG furthermore forbids discriminatory advertisement of dwellings whereby a violation of this provision can lead to a claim for damages (§ 38 par 1 GlBG) and a fine of up to EUR 360 by regional Länder authorities (§ 37 par. 1 GlBG).[399]

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[389] E.g. in Germany the naming of the landlord's name in front of the authorities is sufficient.

[390] Wolf, 'Das Gleichbehandlungsgesetz und das Mietrecht. Überlegungen aus Anlass der Novelle des Gleichbehandlungsgesetzes', *wobl* (2013), 281.

[391] BGBl Nr. 108/1979.

[392] Especially due to the second (BGBl Nr. 419/1990) and third (BGBl Nr. 833/1992) amendment of the GlBG 1979; Hopf, Mayr & Eichinger, 'Historische Entwicklung - Gleichbehandlung in Österreich und in der EU', in *GlBG* (2009), 59 et seq, note 5.

[393] 2000/43/EC, 2000/78/EC.

[394] 2002/73/EC.

[395] BGBl I Nr. 66/2004 (last amendment BGBl. I Nr. 120/2012).

[396] BGBl I Nr. 7/2011.

[397] BGBl I Nr. 107/2013.

[398] Wolf, 'Das Gleichbehandlungsgesetz und das Mietrecht. Überlegungen aus Anlass der Novelle des Gleichbehandlungsgesetzes', *wobl* (2013), 281 et seq.

[399] See Hopf, Mayr & Eichinger, *GlBG* (2009), § 36 note 1 et seq. for details.

- ***Limitations on freedom of contract through regulation***

- *mandatory* provisions in rental contracts, in particular: mandatory minimum requirements of what needs to be stated in a tenancy 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, the minimum requirements for the valid conclusion of a contract are for example a statement about rent object and rent (§ 1094 ABGB).

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.

- ***control of contractual terms (EU directive and national law); consequences of invalidity of contractual terms***

According to § 879 par. 1 ABGB a contractual term which contravenes legal prohibitions ("gesetzliche Verbote") or bonos mores ("gute Sitten") is null and void.

Legal prohibitions include violations of mandatory norms based on Austrian law and of directly applicable EU law.[400] With regard to tenancy law, violations of mandatory norms of the MRG are especially relevant.

A contractual term is contra bonos mores if it is obviously illegal from an overall impression of the agreement without contravening mandatory law. In terms of a dynamic system, all relevant conditions have to be considered and it must be proven whether the term severely violates legally protected interests of one party or causes an unreasonable disproportionality of legal interests between the parties.[401]

The control of contractual terms is especially relevant with regard to general terms and conditions or standard terms, since those terms are usually not the result of negotiations and typically are provided by the landlord and not read by the tenant.[402]

In contrast to terms of individual tenancy agreements, standard terms are subject to much stricter control by courts in a three-stage process.[403]

Firstly an "integration control" ("Einbeziehungskontrolle") checks whether standard terms of one party become part of the contract at all. Standard terms are checked as a whole and become only a valid part of the contract by assentio mentium of the parties. Implied

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[400] Kletečka & Schauer (ed.), '§ 879' in *ABGB-ON*, 1.01 ed., Rz 14 et seq.

[401] Ris-Justiz RS0113653; Ris-Justiz RS0022866.

[402] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 39.

[403] Bydlinski, *Bürgerliches Recht Band I. Allgemeiner Teil*, 2nd edition (Wien: Springer, 2002), Rz 6/23 et seq.

approval of the tenant is sufficient according to § 863 ABGB. This stage of control is usually no significant barrier with regard to tenancy agreement.[404]

Secondly, each individual term within standard terms – and not the standard terms as a whole – is subject to a "validity control" ("Geltungskontrolle", § 864a ABGB). Unusual clauses do not become part of the contract if the other party could not expect such provisions under the circumstances and if the clauses are (cumulative) unfavourable to the other party.[405]

Thirdly, each individual term within standard terms which does not affect the main performance of one of the parties ("Nebenleistungspflichten") is subject to "content control" ("Inhaltskontrolle", § 879 par. 3 ABGB). Those clauses which worsen the position of the other party unreasonably are null and void.[406]

In consumer contracts, § 6 par. 1 KSchG lists demonstratively forbidden unfair contract clauses that are null and void e.g. clauses that include disproportional binding period of an offer (fig. 1 leg. cit.), silent declarations are equivalent to consent (fig. 2 leg. cit.), deemed reception of a declaration (fig. 3 leg. cit.), qualified methods of declaration and consent (fig. 4 leg. cit.), unilateral price increase (fig. 5 leg. cit.), prohibitions of denying performance/ payment (fig. 6 leg. cit.), prohibitions of the right of retention (fig. 7 leg. cit.), prohibitions of set-off clauses (fig. 8 leg. cit.), liability exclusions (fig. 9. leg. cit.), other-directed control of performance (fig. 10 leg. cit.), shift of burden of proof (fig. 11 leg. cit.), short expiry date for right on movables, which have been given for treatment (fig. 12 leg. cit.), invalid interest clause (fig. 13 leg. cit.), restrictions on the right to claim compensation for errors (fig. 14. leg. cit.) or disproportional costs for debt enforcement and bankruptcy agencies (fig. 15 leg. cit.).

Furthermore § 6 par. 2 KSchG lists forbidden unfair contract clauses that are null and void if they have not been explicitly agreed on at time of conclusion of the contract.

§ 6 par. 3 KSchG furthermore declares any untransparent or incomprehensible clause in standard terms null and void.

Since 2006, the role of consumer law in tenancy law with respect to standard terms has been a controversial issue both in OGH decisions and in academic discussion in

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[404] Bydlinski, *Bürgerliches Recht Band I. Allgemeiner Teil*, 2nd edition (Wien: Springer, 2002), Rz 6/24; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 39.

[405] Bydlinski, *Bürgerliches Recht Band I. Allgemeiner Teil*, 2nd edition (Wien: Springer, 2002), Rz 6/26; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 39.

[406] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 39.

Austria.[407] The OGH has declared a great number of standard clauses of tenancy contracts with consumers null and void in various claims for injunction by consumer associations according to § 28, 29 KSchG ("Verbandsklagen").[408]

- ***- statutory pre-emption rights of the tenant***

The tenant has no statutory pre-emption right in tenancy contracts to which only the provisions of the ABGB or MRG apply.

In case of limited-profit housing and when the WGG is applicable, the tenant has, according to § 15c WGG, a statutory right of subsequent transfer of ownership for dwellings in condominiums ("Anspruch auf nachträgliche Übertragung in das Wohnungseigentum") under certain conditions, if the construction of the rented dwelling had been subsidized by the state and the subsidization still continues and, most importantly, the tenant contributed to the financing of the dwelling at the beginning of the contract with funds above 67.97 EUR /m² usable floor (since 1.4.2015, updated yearly). The tenant can apply for the transfer of ownership for dwellings in condominiums at the earliest after 10 years duration of his tenancy contract, but not later than 15 years duration (§ 15e par 1 WGG). The limited-profit housing association (LPHA) has to make a sale offer, which is a lump sum calculated within certain limits (§ 15d par. 1 WGG). In case of disputes about the offered lump sum, the court is authorized to settle the award (§ 15d par. 2 and par. 3 WGG). The tenant furthermore can refuse the offer and then has a pre-emption right to buy the dwelling within the next five years (§ 15f WGG).[409]

- ***- are there provisions to the effect that a mortgagor is not allowed to lease the dwelling (charged by the mortgage) or similar restrictions?***

In Austria, there are no provisions to the effect that a mortgagor is not allowed to lease the dwelling or similar restrictions.

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[407] Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 127 et seq.; Böhm, 'Literaturübersicht zu den Klauselentscheidungen und zur aktuellen Diskussion über Erhaltung/Instandhaltung im Mietrecht', *immolex* (2009), 214.

[408] OGH 7 Ob 78/06f; OGH 1 Ob 241/06g; OGH 6 Ob 81/09v; OGH 2 Ob 73/10i; see Vonkilch, 'Mietverträge im Fokus des Verbraucherrechts. Eine Zwischenbilanz nach den ersten beiden Verbandsprozessen', *wobl* (2007), 185 et seq and Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 127 et seq. for details.

[409] Prader, *Wohnungsgemeinnützigkeitsgesetz*, 2.04 ed., § 15 c Anm 1 et seq.; Friedl, 'Neuregelung der Kaufpreise für gemeinnützige Mietwohnungen durch die WRN 2006', *immolex* (2006), 301; Österreicher & Sommer, 'Die Liebe zu den Modellen', *wobl* (2010), 191; Sommer, 'Wohnungspolitisches „Plädoyer" gegen ein striktes „entweder kaufen oder nicht!" bei Wohnungseigentumsoptionen aufgrund des WGG', *wobl* (2011), 121.

Summary table for 6.3 Conclusion of tenancy contracts

	Rental tenancies with a public task		Rental tenancies without a public task / Private rental tenancies		
	Limited-profit rental housing tenancies	Municipal rental tenancies	MRG fully applicable	MRG partially applicable	MRG not applicable
Requirements for valid conclusion	Agreement on rental object and the rent permission ("grundverkehrsbehördliche Genehmigung") of the authorities responsible for the transfer of land ("Grundverkehrsbehörde"), if necessary				

6.4 Contents of tenancy contracts

- ***Description of dwelling; indication of the habitable surface (and consequences in case of the provision of wrong data)***

Objects of rental contracts are inconsumable goods (§ 301 ABGB), i.e. goods that cannot be consumed by usage in accordance with the contract. The extent of the rent object depends on the concrete agreement between the parties and can differ from the allocation in rem.[410]

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.[411]

In case the provided description of the dwelling is wrong, the tenant has legal warranty rights against the landlord, e.g. a right to reduce the rent, and additionally can claim damages against the landlord.

[410] Würth, '§ 1094' in *Kommentar zum ABGB. 1. Band*, 3rd ed., ed. Rummel (Wien: Manz, 2000), 13 et seq.

[411] See e.g. Rainer (ed.), *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012), Muster 1.1 – Muster 1.5.

- ***Allowed uses of the rented dwelling and their limits***
  - In particular: to what extent are mixed (residence/commercial) contracts lawful and usual (e.g. having a shop, a legal office or a doctor's studio in the dwelling)

§ 1298 ABGB allows the tenant the use of the rented dwelling according to the provisions of the tenancy agreement. If the form and the substance of the allowed use by the tenant cannot be determined by the concrete provisions of the contract, the purpose of the contract ("Vertragszweck") and the ordinary usage or local customs ("Verkehrssitte" or "Ortsgebrauch") have to be considered.[412] Furthermore, administrative rules (e.g. lock of the common front door), uncontradicted long-standing routine or additional court ruling in unanticipated cases are relevant.[413]

Existing house rules ("Hausordnung") have to be considered if they have been legally included into the tenancy agreement according to the rules for general business terms ("Allgemeine Geschäftsbedingungen", AGB).[414]

The allowed use of the rented dwelling can be limited to housing or commercial purposes only; even a limitation to certain branches of businesses is lawful.[415] Mixed contracts (residence / commercial) are also lawful, but in the author's opinion rather unusual.

In case of unauthorized use of the rented dwelling, e.g. for commercial purposes, the landlord can file a claim for injunction. Also, there may be a reason to give notice to the tenant under certain circumstances (e.g. § 30 par. 2 fig 7 MRG).[416]

- ***Parties to a tenancy contract***

- ***- Landlord: who can lawfully be a landlord?***

According to § 1093 ABGB, every proprietor is allowed to let his immovable property. In case the right to use the immovable property has been transferred to a third party according to another agreement (usus fructus, obligatorial right to use), this third party is entitled to conclude tenancy contracts (and not the proprietor).[417]

In case of joint ownership, all co-owners are involved in the conclusion of the contract according to the rules of § 833 to § 835 ABGB.[418] This means that in general, the conclusion of a tenancy agreement with a third party to common terms and conditions is part of the ordinary management of the property and the majority of co-ownership

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[412] Riss, '§ 1098' in *ABGB-ON*, 1.01 ed., ed. Kletecka & Schauer, Rz 1 (www.rdb.at, 3 December 2013).

[413] Rainer (ed.), *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012), Chap. 5.4.2.1.

[414] Riss, '§ 1098' in *ABGB-ON*, 1.01 ed., ed. Kletecka & Schauer, Rz 2 (www.rdb.at, 3 December 2013).

[415] Riss, '§ 1098' in *ABGB-ON*, 1.01 ed., ed. Kletecka & Schauer, Rz 3 (www.rdb.at, 3 December 2013).

[416] Riss, '§ 1098' in *ABGB-ON*, 1.01 ed., ed. Kletecka & Schauer, Rz 3 (www.rdb.at, 3 December 2013).

[417] Würth, '§ 1094' in *Kommentar zum ABGB. 1. Band*, 3rd ed., ed. Rummel (Wien: Manz, 2000), 7 et seq.

[418] Riss, '§ 1092-1094' in ABGB-ON, 1.01 ed., ed. Kletecka & Schauer, Rz 3 (www.rdb.at, 3 December 2013).

shares is needed.[419] In cases of extraordinary management – e.g. the rental of a dwelling to a co-owner or the rental to third parties under uncommon terms and conditions, such as very low rent level or long duration of the contract – usually the agreement of all co-owners is demanded.[420]

- ***- does a change of the landlord through inheritance, sale or public auction affect the position of the tenant?***

(i) Inheritance:

The death of the landlord does not affect the position of the tenant according to § 1116a ABGB. This principle of inheritance of tenancy rights applies similarly to landlords being corporate bodies. The universal successor enters ex lege into the existing tenancy agreement.[421]

(ii) Sale:

non- and partial applicability of the MRG:

A buyer of an immovable property enters as landlord into an existing tenancy agreement due to assumption of contract ex lege (§ 1120 ABGB). The singular successor of the immovable property is in general bound to all clauses of the existing agreement, but not to the duration of the agreement, the notice periods ("Kündigungsfristen"), or dates of termination ("Kündigungstermine").[422] As a consequence, the termination of the tenancy agreement by the landlord is possible.

If the tenancy agreement has been registered into the land registry, the buyer is also bound to the agreed duration of the tenancy agreement between predecessor and tenant (§ 1095 ABGB, § 9 GBG), and consequently a termination of the agreement before effluxion of time is impossible.[423]

full applicability of the MRG:

According to § 2 par. 1 sentence 4 MRG, the singular successor of the landlord is bound to all clauses of the existing agreement except unusual side agreements, but including the agreed duration of the contract, even though the contract has not been registered

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[419] Böhm, '§ 833' in *ABGB-ON*, 1.01 ed., ed. Kletecka & Schauer, Rz 34 et seq. (www.rdb.at, 3 December 2013).

[420] Böhm, '§ 834 and § 835' in *ABGB-ON*, 1.01 ed., ed. Kletecka & Schauer, Rz 10 et seq. (www.rdb.at, 3 December 2013).

[421] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 107.

[422] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 111 et seq.

[423] Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 94 et seq.; Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 112.

into the land registry.[424] Therefore a termination of the tenancy agreement by the landlord is – without exceptional grounds like personal need – impossible.

(iii) Public Auction:

non-applicability of the MRG:

A buyer of an immovable property through public auction also enters as landlord into an existing tenancy agreement and the same rules essentially apply for public auctions as for sales (§ 1120 ABGB). The main difference is the legal treatment of tenancy agreements that have been registered into the land register.

In a public auction of immovable property, a tenancy agreement is treated as servitude (§ 1121 ABGB), which means that also for tenancy agreements registered into the land cadastre, the prior rank of the tenancy agreement in comparison to other incorporated charges (mortgages, etc.) is decisive. Only in case the buyer is not obliged to continue the obligations of the tenancy agreement due to insufficiency of the highest bid ("Meistbot") and subordinance of rank is he allowed to terminate the tenancy contract (§ 1120 sentence 2 ABGB).[425]

full applicability of the MRG:

The rules of § 2 par. 1 sentence 4 MRG also apply to buyers through public auctions and therefore a landlord is bound to the tenancy agreement and a termination is – without exceptional grounds like personal need – impossible.

- ***- Tenant:***

- ***- Who can lawfully be a tenant?***

A tenant can lawfully be every natural (or legal) person of legal capacity. Also, a group of natural and/or juristic persons (e.g. married or non-married couple, registered partners, associations, public or private limited companies etc.) can be contractor of a tenancy agreement.

[424] Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 94 et seq.; Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 113.

[425] Prader, *Mietrechtsgesetz*, 4.01 ed. , § 1121 ABGB E 1 et seq. (www.rdb.at 15 March 2014).

- ***- Which persons are allowed to move in an apartment together with the tenant (spouse, children etc)?***

A specific legal norm governing which persons are allowed to move into 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.[426]

In any case, 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, § 14 par. 3 MRG indicates 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.

- Changes of parties: in case of divorce (and equivalents such as separation of non-married and same sex couples); apartments shared among students (in particular: may a student moving out be replaced by motion of the other students); death of tenant

(i) Divorce:

In case of divorce the classification of a dwelling as "Ehewohnung" according to § 81 par 2 Ehegesetz 1938 (EheG) is decisive for the legal possibility of a unilateral change of a tenant as contracting partner. "Ehewohnung" is the dwelling where the married couple before or at the time of divorce had their common household. These objects are according to § 87 EheG granted special treatment in the post-matrimonial property law procedure ("nacheheliches Aufteilungsverfahren"), as by court ruling a change of a tenant can be ordered against the possibility of a landlord to intervene.[427]

For other dwellings which are not classified as "Ehewohnung", e.g. secondary homes, such court rulings and a unilateral change of a tenant as contracting partner is not possible.

(ii) Termination of a registered partnership:

In case of a termination of a registered partnership § 30 Eingetragene-Partnerschaft-Gesetz (EPG) provides for a "partnerschaftliche Wohnung", which is legally equivalent to a "Ehewohnung" (§ 81 par. 2 EheG). Also, special treatment in the post-partnership property law procedure, as by court ruling a change of a tenant, can be ordered against the possibility of a landlord to intervene.

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[426] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 18.

[427] A landlord can only intervene if the court ruling is outside of the limits of § 87 par 2 EheG; Höllwerth, 'Die (Miet-)Wohnung in der nachehelichen Aufteilung', *immolex* (2013), 134 (135 et seq.).

(iii) Separation of non-married / non-registered couples:

For non-married or non-registered couples, no special provisions are enacted so that in case of separation a unilateral change of the contractual partner is not possible. The main tenant can even claim eviction against his or her ex-partner.[428]

(iv) Death of tenant:

non applicability of the MRG:

According to § 1116a ABGB a tenancy agreement is not annulled automatically on the death of a lessee, but can be terminated by the landlord and the tenant's heirs at particular dates for giving notice within usually a notice period of four weeks (§ 560 ZPO).[429]

Full or partial applicability of the MRG:

§ 14 par. 1 MRG – similar to § 1116a ABGB – provides that a tenancy agreement is not annulled automatically on the death of a lessee. Furthermore, it can only be terminated by the landlord if the provisions of § 14 par. 2 and par. 3 MRG do not apply.

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 according to § 14 par. 2 and 3 MRG if they have been living in the rented dwelling at the time of the tenant's death and have an urgent need of accommodation.[430]

§ 14 par. 2 MRG at the same time 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 (§ 14 par 3 sentence 2 MRG).

Within 14 days after the death of a tenant, all these benefitted persons can declare not to enter into the existing tenancy agreement (§ 14 par. 2 MRG).[431]

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[428] Deixler-Hübner, 'Rechtliche Regelungen für Lebensgemeinschaften im Innenverhältnis. Überlegungen de lege lata und de lege ferenda', *iFamZ* (2012), 193 (194).

[429] Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 250 et seq.; Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 107.

[430] In case the rented dwelling of the deceased tenant is a special dwelling for elderly people ("Seniorenwohnung"), he has been more than 60 years old at the time of conclusion of the agreement and personal assistance for elderly people ("Altenhilfe") has been part of the tenancy agreement, § 14 par 3 and § 12 par 3 MRG furthermore prohibit the entrance of relatives in descending line into the tenancy contract.

[431] Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 250 et seq.; Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 107; Bach-Kresbach & Höllwarth, 'Die Crux mit dem Eintrittsrecht', *ecolex* (2013), 218.

(v) Apartments shared among students:

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 in the tenancy agreement.

- ***Subletting: Under what conditions is subletting allowed? Is subletting being abused e.g. with the aim of circumventing the legal protection of tenants (when the tenant is offered not an ordinary lease contract but a sublease contract only)?***

non applicability of the MRG:

§ 1098 ABGB provides that a main tenant can sublet his rented dwelling (or parts of it) for any period less than his own term[432] 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 subtenant.[433]

In practice, the right of subletting of the main tenant without consent of the landlord is often restricted by special agreement.

partial or full applicability of the MRG:

§ 11 par. 1 MRG partly derogates § 1098 with respect to the validity of a contractual agreement between landlord and main tenant about the prohibition of subletting. Such an agreement is only valid if the landlord can show an "important reason" ("wichtiger Grund"), which would e.g. be

- a complete sublease of the rented object (§ 11 par. 1 fig. 1 MRG);

- a disproportionally high sub-rent in comparison to the main-rent (§ 11 par. 1 fig. 2 MRG);

- if the number of lodgers would exceed the number of available rooms (§ 11 par. 1 fig. 3 MRG);

- if there exists a threat that the new subtenant would disturb the household community (§ 11 par. 1 fig. 4 MRG).[434]

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[432] A consent with the landlord is needed for subletting for a term equal to or greater than the principal tenants' own term because it is qualified as an assignment of the principal tenants' term and not as subletting; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 20.

[433] See Oberhammer & Domej 'Kap 2.7.4' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012) for further details.

[434] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 20.

In the past, landlords tried to circumvent the legal protection of tenants by only offering sublease contracts. The legislator reacted in 2001 by introducing a special rule against circumvention (§ 2 par. 3 MRG), so that a subtenant can now file a declaratory action against the landlord to be accepted as main tenant ("Anerkennung als Hauptmieter", § 37 par. 1 fig. 1 MRG). Such circumvention is especially indicated if a main-tenant completely subleases more than one dwelling in a building or a complete sublease in case of an existing contract limited in time between landlord and main-tenant.[435]

- ***Is it possible, and if yes under what conditions, to conclude a contract with a multiplicity of tenants (e.g. group of students)?***

In Austrian tenancy law, it is possible to conclude a contract with a multiplicity of principal tenants. Such a "Mitmietverhältnis" or "Gesamtmietverhältnis" is considered as a unitary tenancy agreement and does not consist of several competing tenancy agreements. The multiplicity of tenants is one legal community ("Rechtsgemeinschaft") according to § 825 et seq. ABGB.[436]

- ***Duration of contract***

- ***- Open-ended vs. limited in time contracts***

As aforementioned, tenancy contracts in Austria can be concluded either unlimited or limited in time.

- ***- for limited in time contracts: is there a mandatory minimum or maximum duration?***

non-applicability of the MRG:

Both parties are free to agree on any duration for the tenancy. Mandatory minimum or maximum duration rules do not exist.[437]

partial or full applicability of the MRG:

The systematic of the MRG clearly follows the preference of the legislator for the conclusion of contracts unlimited in time.[438] This preference serves the protection of the tenant, because contracts unlimited in time are only terminable by the landlord under exceptional circumstances. § 30 MRG contains strong limitations of notice of termination, which is only possible by virtue of important grounds.[439]

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[435] Oberhammer & Domej 'Kap 2.7.1 and 2.7.3' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[436] Ris-Justiz RS0101118, RS0013191.

[437] Rainer (ed.), 'Kap 2.4' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[438] Rainer (ed.), 'Kap 2.5' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[439] Dirnbacher, *MRG 2013* (Wien: ÖVI Verlag, 2013), 473 et seq.;

A landlord can only limit the duration of a tenancy agreement to three or more than three years (§ 29 par. 1 fig. 3 lit. b MRG) and has to do that explicitly in written form (§ 29 par. 1 fig. 3 lit. a MRG). In contrast to the requirements found in German tenancy law, no particular reason for the limitation in time has to be mentioned.

If the limitation in time is invalid, e.g. a limitation in time of two years only, the contract is treated as contract unlimited in time (§ 29 par. 3 lit a MRG). An agreement for more favourable terms for the tenant, e.g. a right to terminate the contract before expiry of time or contract duration of more than 3 years, is effective.[440]

- ***Other agreements and legal regulations on duration and their validity: periodic tenancies ("chain contracts", i.e. several contracts limited in time among the same parties concluded one after the other); prolongation options; contracts for life etc.***

non-applicability of the MRG:

Both parties can agree on "chain contracts", prolongation options, contracts for life, etc., if mandatory regulatory law for the transfer of land is not circumvented.

For contracts limited in time a tacit prolongation ("stillschweigende Erneuerung") of the tenancy is possible according to § 1114 ABGB if the tenant continues to use the rental object after the expiry of time and the landlord does not take any action within 14 days (§ 569 ZPO) to get rid of him.[441] The renewed contract contains – with some exceptions – clauses identical with those in the original contract (§ 1115 ABGB).[442]

Tenancy contracts for life are interpreted as denying the landlord the right to give notice of termination.[443]

partial or full applicability of the MRG:

§ 30 par. 4 MRG allows the prolongation of contracts limited in time if the duration of the renewed contract at minimum is another three years. The conclusion of "chain contracts" or the implementation of prolongation options into tenancy contracts for a period of three or more years is therefore possible.

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[440] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 6; Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde, 2012) (2012), 152.

[441] Oberhammer & Domej, 'Kap 4.13.2 et seq' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[442] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 25.

[443] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 26.

In case a contract limited in time is not renewed or terminated after the expiry of time, it is subject to a one-time prolongation for three years according to § 29 par. 3 lit. b MRG. If after these three years the contract limited in time still is not renewed or terminated, the contract is treated as contract unlimited in time (§ 29 par. 3 lit. b sentence 2 MRG).

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 (§ 29 par. 3 lit. b MRG).

Tenancy contracts for life are treated as contracts unlimited in time and can be terminated by the landlord if an important ground for termination exists (§ 30 MRG).[444]

- ***Rent payment***

- ***In general: freedom of contract vs. rent control***

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.[445]

- date of conclusion of the rent agreement;[446]

- 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.

Again, great differences exist between tenancy contracts to which the MRG fully applies and such contracts to which the MRG does not apply or only partially applies. Apart from that, the rules of the WGG and various other rules, which were in force only temporarily, have to be considered.

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[444] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 26.

[445] Following Kunnert & Baumgartner, 'Instrumente und Wirkungen der österreichischen Wohnungspolitik', (2012), 67, with slight changes by the author.

[446] Please note, that the time of conclusion of the rent agreement (and not the tenancy agreement itself) is relevant, although often these dates do not differ, see Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 74.

- ***Rent control: how is it legally framed; when does it apply; who carries it out; what are the consequences when the parties agree on an excessive rent?***

Following the distinction of types of rental tenures, the general system of rent control can be classified in the following way:

(i) Private rental housing in dwellings owned by private landlords:

The rent is either

- limited by provisions of the MRG (or by provisions of anterior statutes like the MG), which had been in force at the time of conclusion of the rent agreement, if the MRG is fully applicable or

- unlimited by any provisions of the MRG (or by provisions of anterior statutes like the MG), if the MRG is partially or non-applicable. Rent control is only exercised by general restrictions for contracts in the ABGB, laesio enormis ("Verkürzung über die Hälfte", § 934 ABGB), usury ("Wucher", § 879 par. 2 fig. 4 ABGB) or bonos mores (§ 879 par. 3 ABGB).[447]

(ii) Limited-profit rental housing in dwellings owned by limited profit housing associations ("gemeinnützige Bauvereinigungen");

The rent is limited by provisions of the WGG and the criteria for subsidies for construction and modernisation of dwellings ("Wohnbauförderung") which had been in force at the time of application for the subsidies.[448]

(iii) Municipal rental housing in dwellings owned by municipalities or non-profit municipal bodies ("Gemeindewohnungen").

The rent is limited by provisions of the MRG (or former MG) which had been in force at the time of conclusion of the rent agreement. As an act of voluntarily self-restriction ("freiwillige Regulierung"), municipalities furthermore often provide tenants a rent level even below the rent limits of the MRG (or MG).[449] In Vienna, for example, for first allocations of dwellings between 1982 and 2003 usually the category rent ("Kategoriemietzins") and since 2004 the benchmark rent ("Richtwertmietzins") without surcharges and minus 10 % was common,[450] which provided the tenant a rent level not only below market rent but also below the legal limits set by the MRG.

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[447] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 73; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 7.

[448] Kunnert & Baumgartner, *Instrumente und Wirkungen der österreichischen Wohnungspolitik*, (2012), 67.

[449] Kunnert & Baumgartner, *Instrumente und Wirkungen der österreichischen Wohnungspolitik*, (2012), 67.

[450] Kunnert & Baumgartner, *Instrumente und Wirkungen der österreichischen Wohnungspolitik*, (2012), 67.

non- and partial-applicability of the MRG:

As aforementioned, rent control is only enforced by general restrictions for contracts in the ABGB, laesio enormis ("Verkürzung über die Hälfte", § 934 ABGB) or usury ("Wucher", § 879 par. 2 fig. 4 ABGB).[451]

Laesio enormis (§ 934 ABGB):

If the rent agreed between landlord and tenant does exceed double the objective value of the lease or use ("wahrer Wert der Anmietung oder der Benutzung") at the time of conclusion of the contract, the tenant can claim cancellation of the contract ex tunc. The landlord can either accept the cancellation, or offer the value difference as facultas alternativa.[452] Laesio enormis is not applicable, if the tenant actually is aware of the objective value at the time of conclusion of the contract or wants to pay an excessive rent because of special preference ("besondere Vorliebe") for the rented dwelling.[453]

§ 934 ABGB is a dispositive norm, if the KSchG is not applicable.

Usury (§ 879 par. 2 fig. 4 ABGB):

If the criteria of an objective disproportion between agreed rent and the dwelling standard, an element of weakness of the tenant (e.g. imprudence, distress, inexperience in business transactions), and an element of reprehensible behaviour by the landlord are fulfilled in common, the tenant can claim cancellation of the contract ex tunc.[454] Furthermore, he can also choose contractual performance ("relative Nichtigkeit").[455]

§ 879 par. 2 fig. 4 ABGB is a mandatory norm.[456]

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[451] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 73; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 7.

[452] E.g. Both parties have agreed on a rent of EUR 1,500 for a specific dwelling. The objective value of rent is only 749 EUR, so the tenant can claim immediate cancellation of the tenancy contract. Instead of cancellation of the contract, the landlord can offer a rent reduction of 751 EUR, so that the tenant only has to pay 749 EUR.

[453] Koziol & Welser, *Grundriss des bürgerlichen Rechts*, 13th ed., vol. II (Wien: Manz, 2007), 82 et seq.

[454] E.g. a first-year nursing student is offered a dwelling in a student residence, which usually is rented by the landlord for 400 EUR. As only one day to the start of the lectures is left and the dwelling is the last dwelling available in the student residence, the landlord offers the dwelling for 750 EUR.

[455] Bydlinski, *Bürgerliches Recht Band I. Allgemeiner Teil*, 2nd edition (Wien: Springer, 2002), Rz 7/39 et seq.

[456] Krejci, '§ 879' in *Kommentar zum ABGB. 1. Band*, 3rd ed., ed. Rummel (Wien: Manz, 2000), 240.

(ii) full applicability of the MRG:

Three different systems of rent control are relevant for contracts to which the MRG fully applies and the rent agreement has been concluded after 31 December 1981:

- "Angemessener Mietzins" (adequate rent)
- "Kategoriemietzins" (category rent)
- "Richtwertmietzins" (benchmark rent)

All three systems of rent control have in common, according to § 16 par. 7 MRG, that for contracts limited in time, an additional discharge of 25 % for this limitation in time ("Befristungsabschlag") has to be considered after the maximum legal rent level has been determined.

1. "Angemessener Mietzins" (adequate rent, §§ 16 par. 1, 46c MRG):

The adequate rent ("angemessener Hauptmietzins") is a normative rent control system that limits free market rents depending on size, type, location, maintenance condition, and furniture of a dwelling.

For the following dwellings or tenancy agreements, the adequate rent is relevant:

- leased property in edifices which have been newly constructed (or newly shaped through modification, e.g. attic) with a building permit dated after 08 May 1945;
- leased property in edifices under monumental protection, if the proprietor has invested a reasonable amount of personal equity to preserve the edifice;
- flats of category A or B (§ 15a MRG) with a size above 130 m²;
- tenancy contracts unlimited in time with rent agreements in written form where the transfer of the rented dwelling has taken place more than one year ago.[457]

In pending court cases, a property valuer as court expert first evaluates the common rent ("ortsübliche Miete") 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, § 273 ZPO).[458]

2. "Kategoriemietzins" (category rent, § 15a MRG):

The "Kategoriemietzins" (category rent) limits free market rents through classification of dwellings according to their equipment level (standard).

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[457] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 77; see also with more details Rainer (ed.), 'Chap. 3.1.1' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[458] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 76 et seq.

As already mentioned above, 4 categories ranging from A (best category) to D (worst category, sub-standard) are relevant: [459]

A: Dwellings with inside bathroom, toilet, heating and hot water supply, 30 m² minimum living space

B: Dwellings with inside toilet and bathroom

C: Dwellings with inside toilet and some form of inside water supply

D: Dwellings lacking inside water supply and/or inside toilet

For each category, a maximum monthly rent is fixed per m² and enacted by decree of the ministry of justice (§ 15a par. 3 and par. 4 MRG); the category rents per m² today[460] are EUR 3.25 (A), EUR 2.44 (B), EUR 1.62 (C) and EUR 0.81 (D).[461]

For the following dwellings or rent agreements the category rent is relevant:

- rent agreements which have been concluded between 1 January 1982 and 28 February 1994;

- rent agreements which have been concluded since 1 March 1994 regarding a category D-dwelling.[462]

3. "Richtwertmietzins" (benchmark rent, § 16 par. 2 MRG):

According to this system of rent control, a standard dwelling ("mietrechtliche Normwohnung") is defined by a special statute (§ 2 par. 1 Richtwertgesetz 1994) and for this standard premises a certain basic rent per m² and month is fixed for the Länder separately in bylaws. In Vienna, for example this basic rent is currently[463] EUR 5.16 per m² /month, in Styria EUR 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.

For the following dwellings or rent agreements the benchmark rent is relevant:

- rent agreements which have been concluded since 1 March 1994 regarding all category A, B, or C–dwellings for which the provisions of the adequate rent do not apply.[464]

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[459] See § 16 par 2 MRG (original version of BGBl. Nr. 520/1981) for further details.

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

[461] Please note that category D is under certain circumstances even divided into two subcategories of inhabitable ("brauchbar") and uninhabitable ("unbrauchbar"), see § 16 MRG for details.

[462] Rainer (ed.), 'Chap. 3.1.1' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[463] Since 1 April 2012, BGBl II 2012/82.

[464] Stabentheiner, 'Kap 3.2.4.1' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

(iii) Rent control by WGG and "Wohnbauförderung der Länder"

The rent control by WGG is based on the cost covering principle, which means that the rent of the tenant is continuously changed, raised or diminished depending on changes in annuity to cover the costs effectively incurred.[465] The amount of rent is calculated according to the complex rules of § 13 et seq. WGG and bylaws.[466]

§ 14 par. 1 WGG governs which amount of rent the LPHA can lawfully demand from the tenant. Agreements in disfavour of the tenant are null and void.[467] According to § 14 par. 1 WGG the rent calculation has to include

- an amount for 'decreasing balance depreciation for wear and tear'; that is, the use of depreciation rates higher than those used for straight line depreciation during the early stages of the depreciation period, which is provided for in the fiscal treatment of immovable property in Austrian tax law (fig. 1 leg. cit.);
- interest charges for loan capital including public loans (fig. 2 leg. cit.);
- interest charges for equity capital (fig. 3 leg. cit.);
- development project interest ("Bauzins"), in case a right of construction of the building without owning the land has been granted (fig 4. leg. cit.);
- costs for maintenance and improvement deposits (fig. 5 leg. cit.);
- management fees (fig. 6 leg. cit.);
- costs for general expenses according to the MRG, common facilities and public charges (fig. 7. leg. cit.);
- reserve funds (fig. 8. leg. cit.);
- value added tax (fig. 9. leg. cit.).

In case public subsidies according to the "Wohnbauförderungsgesetze der Länder" are granted, rules of these statutes for the rent calculation are lex specialis to the rules of the WGG as long as the public subsidy is actually granted.[468]

- ***Maturity (fixed payment date); consequences in case of delayed payment***

(i) non- and partial-applicability of the MRG:

§ 1100 sentence 2 ABGB provides that the rent of premises has to be paid monthly and is due on every 5th day of the month. Alternative payment clauses are possible, as § 1100 ABGB is a dispositive norm. In practice, the parties often agree on a monthly prepayment of the rent for every 1st day of the month.

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[465] Prader & Malaun, 'Wie setzt sich das kostendeckende Entgelt für Mietwohnungen zusammen?', *immolex* (2009), 110; Prader & Malaun, 'Die Auswirkungen des Kostendeckungsprinzips auf den Mieter', *immolex* (2009), 242.

[466] „Entgeltrichtlinienverordnung 1994", BGBl. Nr. 924/1994 (last amendment BGBl. Nr. 90/2013).

[467] Prader, *WGG*, 2.04 ed., § 14 E 14 (Stand 1 October 2013, www.rdb.at).

[468] Prader, *WGG*, 2.04 ed., § 14 E 19/1 (Stand 1 October 2013, www.rdb.at).

If the rent is paid by bank transfer, the total amount of the rent has to be credited to the bank account of the landlord as of the day the rent is due. In case the landlord is an entrepreneur and the tenant a consumer (§ 1 par. 1 KSchG), it is sufficient that the tenant has placed the transfer order by the due date.[469]

In case of delayed payment the landlord can dun the tenant and set a reasonable period of grace. The written form of the dunning is not required, although it is certainly recommended due to the burden of proof of the landlord.[470]

If the tenant has not paid the rent within the next rent period, for example one month since maturity (§ 1118 ABGB)[471], and the period of grace has past, the landlord can formlessly declare the immediate termination of the tenancy agreement due to so called "qualified rent delay" ("qualifizierter Mietzinsrückstand").[472]

Alternatively, the landlord can directly file an eviction claim instead of sending a dunning letter to the tenant, but this bears the risk that the tenant could simply pay the rent within the reasonable period of grace after service of the claim and the court would then have to dismiss the eviction claim.[473]

(ii) full applicability of the MRG:

According to § 15 par. 3 MRG, the rent is due on every 5th day of the month and the day of maturity cannot be antedated but can be postponed by an individual rent payment clause. The landlord has to announce a common bank account ("verkehrsübliches Bankkonto").[474]

In case of delayed payment, the landlord is also obliged to dun the tenant and set a period of grace of minimum 8 days (§ 30 par. 1 fig. 1 grace period or the grace period that the landlord has previously given ("übliche oder ihm bisher zugestandene Frist", § 30 par. 1 fig. 1 leg. cit.) of 8 days minimum, the landlord can give notice of termination of the tenancy agreement due to rent delay. In comparison to the ABGB, only a notice of termination by the landlord filed to the court ("gerichtliche Aufkündigung") is possible,

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469 Stabentheiner, 'Chap. 3.4.1.1' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

470 Oberhammer & Domej, 'Chap. 4.10.1.2' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

471 E.g. 5 January 2014 is the due date for the rent for January 2014, and it has not been paid by the tenant until 5 February 2014.

472 Oberhammer & Domej, 'Chap. 4.10.1.2' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

473 Reiber, 'Mietzinsrückstand als Kündigungsgrund', *ecolex* (2013), 607 (612); for possibilities of payment of the rent by the tenant until the end of the court trial to prevent the termination of the tenancy agreement see Oberhammer & Domej, 'Chap. 4.3.3' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

474 See for details Stabentheiner, 'Mietrechtliche Implikationen des Zahlungsverzugsgesetzes', *immolex* (2013), 102 and Pesek, 'Die Regierungsvorlage des Zahlungsverzugsgesetzes aus mietrechtlicher Perspektive', *wobl* (2013), 36.

according to § 33 par 1 MRG, and an eviction claim cannot replace the obligatorily dunning of the tenant.[475]

- ***May the tenant exercise set off and retention rights over the rent payment? (i.e. the tenant withholding the rent or parts of it when the landlord does not respect his contractual duties, e.g. does not repair a defect);***

Set off rights of the tenant can in general be exercised extrajudicially by the tenant before the declaration of termination of the tenancy agreement by the landlord.[476]

If the landlord does not respect his contractual duties to repair a defect, the tenant is according to the mandatory provision of § 1096 par. 1 sentence 3 ABGB, ex lege (partially) free from his obligation to pay the rent, depending on the massiveness of the deficiency. This ex-lege-rent reduction is not considered as a retention right because the obligation of the tenant to pay the (full) rent does not even come up. [477] The ex-lege-rent reduction right of the tenant derogates the general retention right of the tenant according to § 1052 ABGB.[478] Consequently, the tenant can exercise retention rights not for outstanding debts, but for future debts, for example to force the landlord to arrange objectively necessary major maintenance works of the building in the future.

In any case the tenant is obliged to file a notice of defection before exercising his rent reduction or retention rights.[479]

- ***May claims from rental agreements be assigned to third parties (i.e. may the landlord assign his rent claim to a bank?)***

(i) non- and partial-applicability of the MRG:

According to § 1395 et seq. ABGB, a landlord can assign claims from rental agreements to third parties (e.g. banks) without consent of the tenant. The landlord only has to inform his tenant about the new obligee, as otherwise the tenant can still pay the rent to the landlord with the effect of discharging the debt (§ 1396 ABGB).

(ii) full applicability of the MRG:

§ 42 par. 2 MRG generally prohibits assignments of rental agreements to third parties. Exceptions exist only for the assignment of rents to cover loans for maintenance or improvements of the building.[480]

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[475] See Reiber, 'Mietzinsrückstand als Kündigungsgrund', *ecolex* (2013), 607 et seq. for details.

[476] If the tenant instead of dunning the tenant has directly filed an eviction claim against him, then an exercise of set off rights is possible until the beginning of the next rent period, see Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 157 et seq.

[477] Helmich, 'Volle Zurückbehaltung des Mietzinses bei Mangelhaftigkeit der Wohnung?', *ecolex* (2003), 395.

[478] Ris-Justiz RS0119040.

[479] Helmich, 'Volle Zurückbehaltung des Mietzinses bei Mangelhaftigkeit der Wohnung?', *ecolex* (2003), 395.

- ***May a rent payment be replaced by a performance in kind (e.g. reparation, renovation)? Does the tenant have a statutory right to this effect? Could a lien of the "tenant-contractor" create problems in that case? (a lien is a statutory right of a contractor to ensure his being paid for his performances, e.g. improvements to the house, e.g. § 648 BGB)***

A rent payment in Austria may only be replaced by a performance in kind by special agreement of the parties. A statutory right to this effect does not exist.

- ***Does the landlord have a lien on the tenant's (movable) property in the house (Vermieterpfandrecht as in § 562 BGB, which functions as a guarantee for the payment of the rent by the tenant)? If yes, what is the scope of this right? How is it enforced?***

The landlord has a lien on all 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 ("gesetzliches Bestandgeberpfandrecht", § 1101 ABGB). 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.[481] 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")[482].

To enforce his lien, a landlord in practice often files a request for attachment of property ("Antrag auf pfandweise Beschreibung"), which is similar to a request for an interim order,[483] together with a claim for rent payment and for eviction ("Mietzins- und Räumungsklage").

- ***Clauses on rent increase***

  - Open-ended vs. limited in time contracts

  - Automatic increase clauses (e.g. 3 % per year)

  - Index-oriented increase clauses

(i) non- and partial-applicability of the MRG:

According to the principle of freedom of contract, the parties are usually free to agree on any clause regarding rent increase. Nevertheless, there is no possibility for the landlord to increase the rent unilaterally, for example, by taking legal action for an "adequate"

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[480] Prader, *MRG*, 4.01 ed., § 42 E 17 (Stand 1 October 2013, Manz Wohnrecht in www.rdb.at).

[481] Riss, '§ 1101' in *ABGB-ON*, 1.01 ed., ed. Kletečka & Schauer, Rz 1 et seq. (www.rdb.at); Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 73.

[482] See § 250 EO for details which movables are unseizable.

[483] Würth, '§ 1101' in *Kommentar zum ABGB. 1. Band*, 3rd ed., ed. Rummel (Wien: Manz, 2000), 7; see §§ 378 to 402 EO for details.

increase of rent.[484] 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 (§ 1431 ABGB).[485]

(ii) full applicability of the MRG:

An agreement on rent increase by the parties is only valid within the strict limits of § 16 MRG. This means that the contracting parties are in principle free to agree on any clause regarding rent increase, but the rent after rent increase is, according to § 16 par 9 MRG, not allowed to exceed the limits for adequate rent (§§ 16 par. 1, 46c MRG), category rent (§ 15a MRG), or benchmark rent (§ 16 par. 2 MRG), depending which system of rent control is applicable to the concrete rented dwelling.[486]

For limited-profit housing, the provisions of § 14 WGG and of the "Wohnbauförderung" are relevant and leges specialis (§ 16 par. 12 MRG), so rent increases are not allowed to go beyond the limits set therein.[487]

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[484] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 30.

[485] This adequate compensation will be calculated in reference to the original motion of the landlord; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 30 et seq.

[486] Prader, *MRG*, 4.01 ed., § 16 E 203 et seq. (Stand 1 October 2013, Manz Wohnrecht in www.rdb.at).

[487] Prader, *MRG,* 4.01 ed., § 16 E 164 (Stand 1 October 2013, Manz Wohnrecht in www.rdb.at).

- ***Utilities***
- ***Describe the usual kinds of utilities (e.g. basic utilities like the supply of water, gas and electricity vs. additional utilities, i.e. services such as waste collection) and their legal regulation***
- ***Responsibility of and distribution among the parties:***
- ***Does the landlord or the tenant have to conclude the contracts of supply?***
- ***Which utilities may be charged from the tenant?***
- ***What is the standing practice?***
- ***How may the increase of prices for utilities be carried out lawfully?***
- ***Is a disruption of supply by the external provider or the landlord possible, in particular if the tenant does not pay the rent?***

In Austrian tenancy law, utilities can be understood in a double meaning, either referring to general expenses or operating costs ("Betriebskosten") and public charges ("öffentliche Abgaben"), or referring to expenses for maintenance works ("Erhaltungs-arbeiten") or improvement works ("Verbesserungsarbeiten").[488]

In this section, only the first meaning of utilities as general expenses ("Betriebskosten") and public charges ("öffentliche Abgaben") is relevant.

(i) non- and partial-applicability of the MRG:

Without special agreement between the parties, the rent is not divided into main rent, general expenses, and public charges. 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 (§ 1099 ABGB). [489]

Individual agreements on a different allocation of costs to the disadvantage of the tenant are lawful and standing practice. Contracts for supply can be concluded either by the landlord or the tenant.

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[488] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 36.

[489] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 36.

(ii) full applicability of the MRG:

In contrast to the ABGB, the rent is divided i.a. into main rent, general expenses, and public charges (§ 15 par. 1 fig. 1 and 2 MRG). General expenses ("Betriebskosten") are, according to § 21 par. 1 MRG, costs for

- water supply (fig. 1 leg. cit.);
- official calibration, maintenance and control of measuring devices, e.g. electric or water meter reader (fig. 1a leg. cit.);
- chimney sweep, canal dues, garbage collection and pest control (fig. 2 leg. cit.);
- lights in common parts of the building, e.g. stairwell, floors, house entrance (fig. 3 leg. cit.);
- fire insurance including insurance for demolition costs (fig. 4 leg. cit.);
- third party liability insurance and tap water damage insurance including insurance for damages through corrosion (fig. 5 leg. cit.);
- insurance for other kinds of damages, especially glass breakage or tornado (fig. 6 leg. cit.);
- administration (fig. 7 leg. cit.);
- facility management (fig. 8 leg. cit.).

According to § 21 par. 2 MRG, public charges may be passed on to the tenant except those which may not be passed on to the tenant because of express statutory prohibition. Taxes of the regions ("Landesabgaben") may be passed on to the tenant.[490]

Additionally, extraordinary costs ("besondere Aufwendungen") for common facilities like lifts, central heating, laundry room or green keeping have to be considered according to § 24 MRG if they exist and if the HeizKG is not applicable.

The above-mentioned general expenses, public charges, and extraordinary costs are expenses of the landlord[491], for which he is liable towards third parties. Nevertheless, the tenant must usually bear all the above-numerated expenses. Individual agreements in favour of the tenant are possible, but unlawful if they disfavour the tenant.[492]

These costs can be paid by the tenant to the landlord either every month according to the actual accounts ("Einzelabrechnung", § 21 par. 4 MRG) or alternatively as a flat rate

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[490] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 36 et seq.

[491] Cf. § 21 par. 1 MRG literally "vom Vermieter aufgewendete Kosten".

[492] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 83.

(lump sum) which is calculated by the costs of the previous year ("Jahres-pauschalverrechnung", § 21 par. 3 MRG).[493]

General expenses, public charges and extraordinary costs and their increase are also subject to price control by court (§ 37 par. 1 fig. 12 MRG), so these expenses have to be comparable to local market ("ortsüblich") prices.[494]

- ***Deposit:***
- ***What is the legal concept (e.g. is the deposit an advance rent payment or a guarantee deposit to cover future claims of the landlord)?***
- ***What is the usual and lawful amount of a deposit?***
- ***How does the landlord have to manage the deposit (e.g. special account; interests owed to the tenant?)***
- ***What are the allowed uses of the deposit by the landlord?***

As *Lurger et al.*[495] point out, the English expression "deposit" can cover two meanings in Austrian tenancy law. On the one hand, deposit as ger. "Kaution" refers to payments made by the tenant to the landlord as a guarantee deposit to cover possible future claims of the landlord because of contractually prohibited or illegal usage to the rented object (e.g. damages) or breach of contractual duties (e.g. loss of rent) by the tenant. On the other hand, the expression deposit as ger. "Mietzinsreserve" can also cover security payments of the tenant to the landlord that have to be put aside for necessary preservation works.

In this section, only the first meaning of deposit "Kaution" is relevant. As aforementioned, 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.

(i) non-and partial applicability of the MRG:

The contractual partners are free to agree on any clause for deposits. Amount, management, and allowed uses of the deposit are subject to the individual tenancy

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493 Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 37.

494 Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 83.

495 Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 35.

contract. Legal limits for extraordinarily high deposits exist only with reference to general provisions of private law (§ 879 par. 1 and par. 3 ABGB).[496]

(ii) full applicability of the MRG:

Although the payment of a deposit by the tenant has been common practice in Austria for a long time, the legislator only recently (in 2009) enacted an explicit norm for deposits in § 16b MRG.[497]

§ 16b par. 1 sentence 1 MRG states that the surrender of a deposit from the tenant to the landlord is legal for the coverage of all future claims of the landlord arising from the tenancy agreement. § 16b MRG refers only to a deposit paid either in cash or in the form of a surrender of a bankbook and interestingly not to the – also legal and quite often used in practice – form of a bank guarantee.[498].

If the deposit has been provided in cash, the landlord is obliged to invest the money in a savings account (bankbook) and notationally inform the tenant by request about the investment (§ 16b par. 1 sentence 2 MRG). 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 (§ 16b par. 1 sentence 3 MRG).

After termination of the tenancy agreement, the landlord is obliged to immediately pay back the deposit (plus interest) or give back the bankbook, according to § 16b par 2 MRG, insofar as the deposit is not used to cover justified claims of the landlord arising from the tenancy agreement.

Unlike § 551 par. 1 BGB in Germany, § 16b MRG does not provide any limits for the legal amount of the deposit. If the MRG is fully applicable, the OGH has declared in several decisions[499] that the amount of deposit has to be in an adequate relation to the guarantee interests of the landlord, depending i.a. on the property value and the size of the dwelling. An amount of deposit up to 6 months' rents including utilities and taxes is anyhow acceptable to the OGH.[500]

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[496] Stabentheiner, 'Die Wohnrechtsnovelle 2009. Zugleich auch ein kleiner Abriss über die dadurch neu geregelte Kaution im Mietrecht', *wobl* (2009), 97 (109).

[497] Stabentheiner, 'Kap 2.2.3.1' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[498] Stabentheiner, 'Die Wohnrechtsnovelle 2009. Zugleich auch ein kleiner Abriss über die dadurch neu geregelte Kaution im Mietrecht', *wobl* (2009), 97 (102).

[499] I.a. OGH 9 Ob160/02y; OGH 6 Ob13/08t.

[500] Prader, *MRG*, 4.01 ed., § 16 b Anm 1.

- ***Repairs***

- ***Who is responsible for what kinds of maintenance works and repairs? What kind of repairs or works may lawfully be assigned to the other party (especially the tenant)***

(i) non- and partial applicability of the MRG:

According to § 1096 par. 1 ABGB 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 ("bedungener Gebrauch") and according to accepted standards of use ("Verkehrssitte"). Without any specific agreement, the landlord has to provide a condition for medium standard of use ("mittlere Brauchbarkeit"),[501] 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 no general private law principles (bonos moros or laesio enormis) are implicated.[502]

(ii) full applicability of the MRG:

The MRG distinguishes between maintenance works ("Erhaltungsarbeiten", § 3 MRG) and improvement works ("Verbesserungsarbeiten", §§ 4 and 5 MRG) of the landlord.

§ 3 par. 1 MRG defines maintenance works of the landlord 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 damage to residents of the building.[503] This includes due to § 3 par. 2 MRG works for

- the maintenance of common parts of the building (fig. 1 leg. cit.);
- the maintenance of dwellings to rent, but only if these works are aimed to remove severe damages to the building ("ernste Schäden des Hauses") or substantial risks to health ("erhebliche Gesundheitsgefährdung") or alternatively are necessary to handover the dwelling in usable condition (fig. 2 leg. cit.);

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[501] Rainer (ed.), 'Kap 5.2.2.2' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012); Prader, *MRG*, 4.01 ed. § 1096 ABGB E 52 et seq. (Stand 1 October 2013, Manz Wohnrecht).

[502] OGH 9 Ob 57/08k.

[503] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 37.

- the economically justifiable[504] maintenance of plants serving common use of the residence e.g. central heating, lift or common laundry room (fig. 3 leg. cit.)[505];
- technical improvements or redesigns due to public law obligations, e.g. connection to water supply or waste water disposal system (fig. 4 leg. cit.);
- economically justifiable technical improvements to reduce energy consumption (fig. 5 leg. cit.);
- the installation of measuring devices, e.g. electric or water meter reader (fig. 6 leg. cit.)[506].

Improvement works of the landlord due to § 4 par. 1 MRG 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 to the rented dwelling.[507] According to § 4 par. 2 MRG, improvement works of the landlord are e.g.

- new construction or redesign of water, gas, electricity or heating lines and sanitation (fig. 1 leg. cit.);
- new construction or configuration of plants for the common use of the residents like lifts, central laundry room or panic room (fig. 2 leg. cit.);
- technical measures for noise prevention like change of windows, doors, etc. (fig. 3 leg. cit.);
- connection to long-distance heating (fig. 3a leg. cit.);
- initial construction of water intakes or toilets in dwellings (fig. 4 leg. cit.);
- technical redesign of one dwelling, especially the redesign of category D or C dwellings into C, B or A-dwellings (fig. 5 leg. cit.).

Furthermore the connection and technical redesign of two or more dwellings are considered as useful improvements, especially the redesign of category D or C dwellings into C, B or A-dwellings (§ 5 par. 1 MRG).

Apart from maintenance and improvement works of the landlord, the tenant is also allowed to do maintenance and improvement works within his dwellings in accordance with § 8 and § 9 MRG.

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[504] In case the preservation is economically unjustified, it has to be replaced by a new similar plant.

[505] Except if all tenants of the building have agreed on not to use these plants.

[506] But only if a written consent of 2/3 of the residents exists, according to § 17 par. 1a MRG.

[507] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 37.

- ***Connections of the contract to third parties***

- ***Rights of tenants in relation to a mortgagee (before and after foreclosure)***

Foreclosure in general does not change the rights and duties of the tenant at all. If a liquidator ("Insolvenzverwalter") has been appointed by court, he or she ex lege enters as landlord into the existing tenancy contract according to § 24 par. 1 Insolvenzordnung 1914[508] (IO, Insolvency Statute). The provisions regarding change of ownership according to public auctions, which have been explained in detail above, apply (§§ 1120 et seq. ABGB, § 2 par. 1 sentence 4 MRG). Therefore, a termination of the tenancy agreement by the (new) landlord is lawful only in limited cases in which 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).

Summary table for 6.4 Contents of tenancy contracts

	Rental tenancies with a public task		Rental tenancies without a public task / Private rental tenancies		
	Limited-profit rental housing tenancies	Municipal rental tenancies	MRG fully applicable	MRG partially applicable	MRG not applicable
Description of dwelling	General contract law				
Parties to the tenancy contract / landlord	limited-profit housing associations	municipalities or non-profit municipal bodies	Every natural or juristic person of legal capacity, i.e. private landlords, co-owners, third parties		
Parties to the tenancy contract / tenant	usually natural person of legal capacity				

[508] RGBl. Nr. 337/1914 (last amendment BGBl. I Nr. 109/2013).

Duration	Usually unlimited in time	Usually unlimited in time	Unlimited or limited in time, minimum binding period for landlords: 3 years / for tenants 12 months for tenants	Unlimited or limited in time, minimum binding period for landlords: 3 years and for tenants 12 months for tenants	Unlimited or limited in time, no minimum binding period
Rent	Rent regulation Cost-based rent according the WGG and Statutes on subsidies for construction and modernization	Rent regulation Usually Benchmark rent or category rent according the MRG; further voluntary restrictions	Rent regulation Adequate rent or benchmark rent or category rent according the MRG	Freedom of Contract No Rent regulation Restrictions by general contract law (laesio enormis / usury)	Freedom of Contract No Rent regulation Restrictions by general contract law (laesio enormis / usury)
Deposit	Adequate deposit up to 6 x rent/month (including utilities and taxes) depending i.e. on the property value and the size of the dwelling			Freedom of Contract No regulation for deposits Restrictions by general contract law (laesio enormis / usury)	Freedom of Contract No regulation for deposits Restrictions by general contract law (laesio enormis / usury)

Utilities	subject to price control by court general expenses, public charges and extraordinary costs are usually borne by the tenant	Freedom of Contract General expenses, public charges and extraordinary costs are usually borne by the tenant	Freedom of Contract General expenses, public charges and extraordinary costs are usually borne by the tenant
Repairs	Maintenance works: landlord responsible Improvement works: landlord or tenant responsible	Freedom of Contract	Freedom of Contract

6.5 Implementation of tenancy contracts

- ***Disruptions of performance (in particular "breach of contract") prior to the handover of the dwelling***
- ***In the sphere of the landlord:***
- ***Delayed completion of dwelling***

A tenancy agreement can also be concluded regarding an object that has not been built or redesigned at the time of conclusion of the agreement, as long as this object can be specified – e.g. by including construction plans into the tenancy agreement.[509] At the date of handover the landlord has to make available physical possession of the dwelling by the tenant, usually by surrender of the keys to the tenant.[510] If the landlord cannot keep the date of handover or is not able to handover the rent object in adequate condition ("nicht gehörige Übergabe"), the tenant can refuse the handover.[511]

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[509] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 48.

[510] Rainer (ed.), 'Kap 5.2.2.2' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[511] Alternatively he can accept the handover and give notice of defects. By acceptance of the handover the tenancy ("Mietverhältnis") begins, the tenant can exercise his rights of rent reduction ("Mietminderung") or

By refusing the handover, the landlord is delayed in performance and the tenancy ("Mietverhältnis") does not begin. In case the tenant is not responsible for the delay ("objektiver Verzug"), the tenant can claim fulfillment and compensation or withdraw ex tunc from the contract after a period of grace set by the tenant (§ 918 ABGB).[512] If the landlord is responsible for the delay ("subjektiver Verzug"), the tenant can claim fulfillment and damages for the delay[513] or withdraw from the contract ex tunc and claim damages because of non-performance[514] according to § 920 sentence 1 ABGB.[515]

- ***Refusal of handover of the dwelling by landlord (in particular: case of "double lease" in which the landlord has concluded two valid contracts with different tenants over the same house)***

In case the landlord refuses the handover of the dwelling, the landlord is again delayed in performance and the tenancy ("Mietverhältnis") does not begin. The above-mentioned rules of § 918 ABGB and § 920 sentence 1 ABGB apply.

The possibility of "double lease" ("Doppelvermietung") of one object is legally recognized in Austria and in general the principles for multiple sale of goods (§ 430 ABGB) apply.[516]

In case multiple valid rent contracts are concluded, the tenant who takes possession of the dwelling first enjoys priority, can keep the dwelling and can defend his rights against any other contractual partner of the landlord (§ 372 ABGB analog).[517] Nevertheless, the other rent contracts remain valid, and the other tenants can claim fulfilment of their contract unless the possibility of performance is not reasonable. The landlord could try to fulfil his contractual duties, i.e. to make available the physical possession of the dwelling to others by trying to withdraw the contract with the tenant in possession of the dwelling or by conclusion of a mutual termination agreement.[518]

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can withdraw from the contract ex nunc; Rainer (ed.), 'Kap 5.2.2.2.' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012); for details see the next section "Disruptions of performance (in particular "breach of contract") after the handover of the dwelling" below.

[512] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 48; Rainer (ed.), 'Kap 5.2.2.2' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[513] "Verspätungsschaden"; Gruber, '§ 918' in *ABGB-ON*, 1.01 ed., ed. Kletečka & Schauer, Rz 52.

[514] "Nichterfüllungsschaden"; Gruber, '§ 921' in *ABGB-ON*, 1.01 ed., ed. Kletečka & Schauer, Rz 1 et seq.

[515] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 48.

[516] Ris-Justiz RS0110222.

[517] Riss, '§§ 1092 - 1094' in *ABGB-ON*, 1.01 ed., ed. Kletečka & Schauer, Rz 10; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 47.

[518] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 47.

- ***Refusal of clearing and handover by previous tenant***

- ***Public law impediments to handover to the tenant***

Also, in case of refusal of clearing and handover by a previous tenant or public law impediments to handover to the tenant, the landlord is again delayed in performance and the tenancy ("Mietverhältnis") does not begin. The above-mentioned rules of § 918 ABGB and § 920 sentence 1 ABGB apply.

- ***In the sphere of the tenant:***

- ***refusal of the new tenant to take possession of the house***

By refusal of the new tenant to take possession, he is in default of acceptance ("Annahmeverzug") if the rented object at the agreed date of handover is ready for physical possession in a condition that complies with the tenancy contract. The tenant has a right to take possession of the dwelling and use it, but in general is not obliged to (§ 1098 ABGB).[519] Consequently, the landlord cannot claim specific performance of the tenant to take possession or to use the object for living purposes. Nevertheless, the refusal to use the rented dwelling is a lawful reason for the landlord to give notice if the MRG is partial or fully applicable, and can lead to a termination of the tenancy by the landlord (§ 30 par. 1 fig. 6, 7 MRG).[520]

[519] Riss, '§ 1098' in *ABGB-ON*, 1.01 ed., ed. Kletečka & Schauer, Rz 8; Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 47.

[520] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 47.

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- ***Disruptions of performance (in particular "breach of contract") after the handover of the dwelling***
- ***Defects of the dwelling***
- ***Notion of defects: is there a general definition?***
- ***Examples: Is the exposure of the house to noise from a building site in front of the house or are noisy neighbours a defect? What about damages caused by a party or third persons? Is the occupation of the house by third parties such as squatters considered as a defect in the legal terms?***
- ***Discuss the possible legal consequences: rent reduction; damages; "right to cure" (to repair the defect by the landlord); reparation of damages by tenant; possessory actions (in case of occupation by third parties) what are the relationships between different remedies; what are the prescription periods for these remedies***

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 ("tatsächliche Leistung") and contractual obligation ("vertraglich geschuldete Leistung").[521] The criterion for the assessment is the purpose of the tenancy contract.[522]

A defect according to the established case law of the OGH[523] 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 ("bedungener Gebrauch", § 1096 par. 1 ABGB). 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.[524] The amount of noise a tenant has to tolerate is determined per analogiam to § 364 par. 2 ABGB.[525] The exposure of the house to noise from a building site in front of the house[526] or from neighbours[527] 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. The tenant though has a right to rent reduction if

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[521] „Sachmangel", cf. Dullinger, *Bürgerliches Recht II Schuldrecht AT*, 2nd ed., Rz 3/66.

[522] OGH 8 Ob 90/10h.

[523] Ris-Justiz RS0020979.

[524] Ris-Justiz RS0118572, RS0021324, RS0107151, RS0021351.

[525] Ris-Justiz RS0010567.

[526] MietSlg 64.158, OGH 1Ob177/05v.

[527] MietSlg 46.107, MietSlg 53.144.

the volume of noise is too high.[528] Also, the occupation of the house by third parties such as squatters can be considered as a defect in the legal terms.

- ***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 (§ 1036 ABGB) like a fire or a burst water pipe.[529]

Furthermore, the landlord is allowed to enter the premises for important reasons ("wichtige Gründe", § 8 par. 2 MRG).[530] Important reasons are e.g. 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 premises by the tenant, but only in a way that respects the right of privacy of the tenant.[531]

Apart from § 8 par. 2 MRG, which is only relevant if the MRG is fully applicable, the OGH has established in its case law a similar right to entrance for the landlord according to § 1098 ABGB.[532]

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

No special rules or court decisions exist regarding 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 encroach upon any right of the tenant.[533]

- ***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 premises until the day of eviction.

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[528] Cf. A selection of case law in Lindinger, 'Parameter der Mietzinsminderung', *immolex* (2006), 70.

[529] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 54.

[530] Oberhammer & Domej, 'Kap 5.1.2.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[531] Oberhammer & Domej, 'Kap 5.1.2.1.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012); Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 44.

[532] Würth in *Kommentar zum ABGB. 1. Band*, 3rd ed., ed. Rummel (Wien: Manz, 2000), § 1098 ABGB, Rz 10; § 8 MRG, Rz 3.

[533] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 44.

- ***Rent regulation (in particular implementation of rent increases by the landlord)***

- ***Ordinary rent increases to compensate inflation/ increase gains***

non- and partial-applicability of the MRG:

As aforementioned, the parties are usually free to agree on every clause on rent increase.

In case a rent increase by index-clause has been concluded, the landlord has to inform the tenant about the rent increase. Otherwise, his non-action could be interpreted as renunciation for the past, but not for the future.[534]

full applicability of the MRG:

The rent can only be increased by the landlord within the strict limits of § 16 MRG, which have been explained in detail above.

In case the parties have agreed on a fixed flat rent ("Pauschalmietzins"), the rent can only exceptionally be increased by request of the landlord if the general expenses ("Betriebskosten") and public charges ("öffentliche Abgaben") have increased during several years. If the landlord does not request an increase of the flat rent despite the increase of general expenses ("Betriebskosten") and public charges ("öffentliche Abgaben"), an implied renunciation for the past, but not for the future, can be assumed.[535]

- ***Is a rent increase after renovation measures, e.g. upgrading the energy performance of the house, or similar lawful and dealt with in a special procedure?***

non- and partial-applicability of the MRG:

No special provisions exist for rent increase after renovation measures. So again, an increase of rent depends on the individual tenancy agreement. If no special clause was included, a unilateral increase of the rent by the landlord is not lawful.

full applicability of the MRG:

§§ 18, 19 MRG provide special provisions for a temporary rent increase to finance necessary greater maintenance works (§ 3 MRG).

An increase of rent is possible according to § 18 par. 1 MRG, if the special deposits for maintenance works ("Mietzinsreserve") of the last ten years and the future rent in a certain period of maximum 10 years ("Verteilungszeitraum") are not sufficient for their

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[534] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 44.

[535] Dirnbacher, *MRG 2013*, 265.

financing.[536] The landlord, the municipality in which the building is located, or the caretaker can request a temporary increase of rent in an official court procedure (§ 19 MRG).

- ***Rent increases in "housing with public task"***

With regard to municipal housing, usually the MRG is fully applicable, and so the rent increase is thus valid only within the strict limits of § 16 MRG, depending on which system of rent regulation applies. For limited-profit housing, the limits of § 14 WGG and of the "Wohnbauförderung" are relevant (§ 16 par. 12 MRG).[537]

- ***Procedure to be followed for rent increases***

- ***Is there some orientation at the market rent; if yes, how is the market rent measured/calculated (e.g. statistical devices such as a Mietspiegel [= rent statistics for a certain area])?***

A uniform procedure to be followed for rent increases does not exist in Austria.

Although the rent is not linked to an index by law, it is in practice common in many tenancy agreements to link the annual increase of the rent contractually to the average increase of the cost of living. A well-established index to be referred to is the "Verbraucherpreisindex" (VPI, Consumer Price Index) of the Statistic Austria, which is calculated similar to the Harmonized Index of Consumer Prizes (HICP) of the EU.[538]

Again, significant differences exist between contracts to which the MRG does not apply or partially applies and contracts to which the MRG fully applies.

<u>non- and partial-applicability of the MRG:</u>

The parties are generally free to agree on every clause on rent increase.

<u>full applicability of the MRG:</u>

An agreement on rent increase by the parties is only valid within the strict limits of § 16 MRG. Any part of the rent exceeding the upper limit of § 16 par. 1 – par. 7 MRG is null and void.

For tenancy contracts regarding a category D-dwelling to which the MRG fully applies, § 16 par. 6 MRG explicitly refers to the VPI and furthermore rules that fluctuations of the

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[536] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 31.

[537] Prader, *MRG*, 4.01 ed., § 16 E 164 (Stand 1 October 2013, Manz Wohnrecht in www.rdb.at).

[538] See <http://www.statistik.at/web_en/statistics/Prices/consumer_price_index_cpi_hcpi/index.html> for a detailed explanation of similarities and differences between VPI and HICP.

VPI of up to 5 % have to remain out of consideration for rent increases, whereas fluctuations above 5 % have to be taken into account in their entirety.[539]

- ***Possible objections of the tenant against the rent increase***

For contracts to which the MRG fully applies, the tenant has to put forward a claim within three years after conclusion of a specific clause of rent increase (§ 16 par 8 MRG).[540]

- ***Alterations and improvements by the tenant***
- ***Is the tenant allowed to make (objective) improvements on the dwelling (e.g. putting in new tiles)?***
- ***Must, and if yes under what conditions, improvements of the dwelling by the tenant be compensated by the landlord?***
- ***Is the tenant allowed to make other changes to the dwelling?***
- ***in particular changes needed to accommodate a handicap (e.g. building an elevator; ensuring access for wheelchairs etc)?***
- ***fixing antennas, including parabolic antennas***

<u>non- and partial-applicability of the MRG:</u>

The tenant is allowed to make changes or improvements on the dwelling within the limits of the individual tenancy agreement.

<u>full applicability of the MRG:</u>

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 must not be interfered with.[541]

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[539] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 33.

[540] For contracts limited in time, this three years period to put forward a claim does not start until a period of six months after termination of the contract has expired (§ 8 par. 8 sentence 3 MRG).

[541] Rainer (ed.), 'Kap 5.4.3.1.' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

For essential ("wesentliche") changes or improvements that exceed the above-mentioned criteria, certain requirements according to § 9 MRG have to be fulfilled by the tenant.[542]

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 (§ 9 par. 1 MRG).[543] The landlord cannot refuse his consent, if

- the changes correspond to the respective technological development (fig. 1 leg cit.);
- the changes are common and of important interest of the tenant (fig. 2 leg. cit.);
- the perfect workmanship of the changes is guaranteed by the tenant (fig. 3 leg. cit.);
- the tenant bears all costs for the changes (fig. 4 leg. cit.);
- no worthy interests of the landlord or other tenants of the same building are affected by the changes (fig. 5 leg. cit.);
- no damage to the building, especially to its outer appearance, is expected by the changes (fig. 6 leg. cit.) and
- the changes are no danger for the security of persons and goods (fig. 7 leg. cit.).

The landlord has a right to link his consent to 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 (§ 9 par. 3 MRG). Such a link is unlawful with regard to changes that are enumerated in § 9 par. 2 MRG. According to § 9 par. 2 MRG, 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 (fig. 1 leg. cit.);
- changes of the dwelling to reduce energy consumption (fig. 2 leg. cit.);
- changes of the dwelling that are public funded by the municipality (fig. 3 leg. cit.);
- installation of a telephone connection (fig. 4 leg. cit.) and
- 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.).

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[542] Rainer (ed.), 'Kap 5.4.3.2.' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[543] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 37.

- ***Maintenance measures and improvements, in particular upgrading the energy performance of the house by the landlord***
- ***What kinds of maintenance measures and improvements does the tenant have to tolerate?***
- ***What conditions and procedures does a landlord who wants to make renovations need to respect (e.g. giving adequate [i.e. sufficiently long] notice; offer an alternative dwelling; offer a rent reduction to compensate for disturbances)?***

non- and partial-applicability of the MRG:

The landlord is allowed to make maintenance measures and improvements on the dwelling within the limits of the individual tenancy agreement.

full applicability of the MRG:

The tenant has the duty to allow the temporary use and the change of his rented dwelling

- for maintenance and improvement works (§ 3, 4 MRG) on common parts of the building;
- for works to remove severe damages ("ernste Schäden") of the building or of other dwellings in the same building;
- for works in the rented dwelling or other rented dwellings in the same building to remove defects which are a severe danger to health and
- for improvement works in other rented dwellings.[544]

Improvement works of the landlord within the rented dwelling in general need the consent of the tenant. Without consent of the tenant only the installation of a water intake or a toilet in a category D-dwelling is lawful, which leads to a raise of category.

All works have to be performed in a way that takes care of the tenancy rights of the tenant as far as possible ("unter möglichster Schonung der Mietrechte"). The tenant has a right to rent reduction and additionally can claim damages, regardless of culpability of the landlord, if the interference into his tenancy right is significant.[545]

[544] Rainer (ed.), 'Kap 5.4.4.2.' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[545] Rainer (ed.), 'Kap 5.4.4.2.' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

- ***Uses of the dwelling***

- ***Keeping animals; producing smells; receiving guests; prostitution and commercial uses (e.g. converting one room in a medical clinic); removing an internal wall; fixing pamphlets outside.***

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 damage to the substance of the dwelling.[546]

In Austria, no special statutory norms exist for the keeping of animals in dwellings. Case law of the OGH[547] rules that the landlord cannot on the one hand prohibit the tenant from keeping small animals like goldfish, hamsters, or turtles that live in cages, aquariums or terrariums at all, if the other criteria mentioned above are fulfilled. On the other hand, the landlord can prohibit the keeping of medium-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.[548] Keeping dangerous or wild animals like crocodiles, poisonous snakes, or lions without explicit consent of the landlord is in any case unlawful.[549]

The tenant may not produce smells that exceed the local conditions and fundamentally interfere with the local common usage (§ 364 par. 2 ABGB per analogiam).[550] The right of the tenant to receive guests can generally not be limited by the landlord. Commercial uses of dwellings are allowed if the above-cited criteria are fulfilled.[551] With regard to prostitution, furthermore, administrative law requirements need to be fulfilled. [552]

- ***Is there an obligation of the tenant to live in the dwelling? Are there specificities for holiday homes?***

non- applicability of the MRG:

The tenant in general has no obligation to live in the rented dwelling, unless specific administrative law provisions are enacted that oblige citizens to use a dwelling as a main

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[546] Gaisbauer, 'Tierhaltung in der Mietwohnung', *ÖJZ* (1990), 669.

[547] OGH 6 Ob129/08a.

[548] OGH 6 Ob129/08a.

[549] Gaisbauer, 'Tierhaltung in der Mietwohnung', *ÖJZ* (1990), 669.

[550] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 52.

[551] OGH 1 Ob 52/97x.

[552] E.g. in Vienna: „Wiener Prostitutionsgesetz 2011", LGBl. Nr. 24/2011 (last amendment LGBl. Nr. 33/2013).

dwelling, which is common in touristic areas to prevent the establishment of too many secondary homes for rent only. Furthermore, an obligation of the tenant to live in the dwelling can be concluded in a tenancy agreement.

partial or full applicability of the MRG:

Also for contracts to which the MRG partially or fully applies, no explicit obligation for the tenant to live in the dwelling exists, unless other administrative law provisions are relevant. Nevertheless, it can be a valid reason for giving notice if the tenant or his cohabitee (§ 14 par. 3 MRG) do not use the dwelling regularly for living purposes (§ 30 par. 2 fig. 6 MRG).

- ***Video surveillance of the building***

- ***Is the surveillance of certain parts (e.g. corridors) of the building lawful and usual?***

Systematic, covered, and identifying video surveillance is generally considered as interference of the right to privacy of the individual.[553] § 16 ABGB protects the right to privacy against unjustified interferences by third parties; in individual cases – such as the surveillance of certain parts of the building – there has to be a balance between values and interests of the individual on the one hand and the values and interests of others or the common good on the other hand ("Güter- und Interessensabwägung").[554]

Video surveillance of certain common parts of the building (e.g. corridors) is lawful, if

- it is not an unjustified interference with the right to privacy of others – e.g. a video surveillance of entrance doors of multi-apartment buildings, car parks, or rubbish dumps may be justified by security reasons, but not a surveillance of entrance doors to individual dwellings by the landlord;
- it has been reported to the Data Protection Commission ("Datenschutzkommission") of the federal chancellery before activation in case such a report is according to §§ 17 and 50c DSG mandatory;
- the area of video surveillance is flagged (§ 50d DSG);
- the relevant permission or consent for the installation of video surveillance according to the rules of the WEG, MRG or WGG exists.[555]

Recently, the OGH[556] has even decided that the installation of video camera dummies by the tenant outside of his rented dwelling can interfere unjustifiedly with the right to

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[553] OGH 6 Ob 38/13a.

[554] Prader & Kuprian, 'Videoüberwachung im wohnrechtlichen Bereich (WEG, MRG, WGG)', *immolex* (2005), 230.

[555] See Prader & Kuprian, 'Videoüberwachung im wohnrechtlichen Bereich (WEG, MRG, WGG)', *immolex* (2005), 230 et seq. for details.

[556] OGH 8 Ob 125/11g.

privacy of others because these dummies create an unacceptable pressure of surveillance (“nicht hinzunehmenden Überwachungsdruck”).

Summary table on 6.5 Implementation of tenancy contracts

	Rental tenancies with a public task		Rental tenancies without a public task / Private rental tenancies		
	Limited-profit rental housing tenancies	Municipal rental tenancies	MRG fully applicable	MRG partially applicable	MRG not applicable
Breaches prior to handover	General contract law				
Breaches after handover	General contract law				
Rent increases	Rent increase limited by WGG or Statutes for subsidies for construction or modernization	Rent increase limited by MRG		Freedom of Contract No regulation Restrictions by general contract law (laesio enormis / usury)	Freedom of Contract No regulation Restrictions by general contract law (laesio enormis / usury)
Changes to the dwelling	Changes and improvements of the dwelling for landlords and tenants is regulated by the MRG			Freedom of Contract No regulation	Freedom of Contract No regulation

Use of the dwelling	General contract law		

6.6 Termination of tenancy contracts

- ***Mutual termination agreements***

The contractual parties are free to conclude a mutual termination agreement at any time for contracts to which the MRG does not apply. For contracts to which the MRG fully or partially applies, a mutual termination agreement has to secure that obligatory regulations of the MRG are not evaded – i.e. a landlord cannot circumvent the security of tenancy by forcing the tenant to sign an eviction agreement before or at the same time as the tenancy contract itself is concluded.[557]

- ***Notice by the tenant***

- ***Periods and deadlines to be respected***

With regard to periods and deadlines, period of notice ("Kündigungsfrist") and date of termination ("Kündigungstermin") are relevant in Austrian tenancy law. The notice period is the minimum term that has to elapse between the reception of the notice and the date of termination. The date of termination is the date on which the tenancy ends.[558]

<u>non-applicability of the MRG:</u>

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 (§ 560 par. 1 fig. 1 ZPO). Otherwise, the tenant has to comply with the period of notice and date of termination, which are regulated by law (§ 560 par. 1 fig. 2 lit. d ZPO). 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.[559]

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[557] Ris-Justiz RS0070116.

[558] Oberhammer & Domej, 'Kap 4.2.2.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[559] Oberhammer & Domej, 'Kap 4.2.2.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

A contract limited in time generally requires no notice to quit at the end of the term. The term simply expires by effluxion of time or on the occurrence of an event that is deemed to terminate the tenancy.[560]

partial or full applicability of the MRG:

The above-mentioned rules of § 560 ZPO also apply to contracts unlimited in time if the MRG is partially or fully applicable.

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 (§ 29 par. 2, par. 3 lit. b and par. 4 MRG).[561]

- ***May the tenant terminate the agreement before the agreed date of termination (in case of contracts limited in time); if yes: does the landlord then have a right to compensation (or be allowed to impose sanctions such as penalty payments)?***

non-applicability of the MRG:

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 ("bedungener Gebrauch", § 1117 sentence 1 ABGB) or the dwelling is in unhealthy conditions ("Gesundheitsschädlichkeit", § 1117 sentence 1). Culpability of the landlord for the unusableness or the unhealthy housing conditions is not required.[562] The tenant is not allowed to terminate the agreement if the reason for the unusableness of the dwelling lies within his own sphere.[563]

partial or full applicability of the MRG:

Apart of his right to terminate the tenancy contract for important reasons (§ 29 par. 1 fig. 4 MRG, § 1117 ABGB), the tenant can terminate his contract limited in time (ordinarily) 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

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[560] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 52.

[561] Oberhammer & Domej, 'Kap 4.2.2.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[562] Oberhammer & Domej, 'Kap 4.9.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012); Riss, '§ 1117' in *ABGB-ON*, 1.01 ed., ed. Kletečka & Schauer, Rz 1.

[563] Riss, '§ 1117' in *ABGB-ON*, 1.01 ed., ed. Kletečka & Schauer, Rz 1.

for sixteen months.[564] 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 (§ 29 par. 3 lit. b MRG).

The landlord has no right to compensation and is not allowed to put sanctions on the tenant (e.g. contractual penalty) if the tenant gives notice according to the provisions of § 29 par. 2 or § 29 par. 3 lit. b MRG.

- ***Are there preconditions such as proposing another tenant to the landlord?***

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

- ***Notice by the landlord***

- ***Ordinary vs. extraordinary notice in open-ended or time-limited contracts; if such a distinction exists: definition of ordinary vs. extraordinary (= normally related to fundamental breaches of the contract, e.g. in cases of massive rent arrears or strong antisocial behaviour)***

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.[565]

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 (§§ 1162 and 1210 ABGB).[566]

non-applicability of the MRG:

The landlord may terminate contracts unlimited in time by ordinary or extraordinary notice. Contracts limited in time may be terminated by extraordinary notice only.

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[564] E.g. a tenancy agreement has been concluded for a five year period beginning on 1 August 2013 and ending on 31 July 2018. On 1 August 2014 the tenant can declare his notice to terminate the tenancy agreement before the expiry of time for 30 November 2014, considering the date of notice (31 August 2014); Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 6; Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde, 2012) (2012), 152.

[565] Oberhammer & Domej, 'Kap 4.2.1.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[566] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 27.

Important reasons for the extraordinary notice are the harmful use of the dwelling ("erheblich nachteiliger Gebrauch") or arrears of rent (§ 1118 ABGB).

partial or full applicability of the MRG:

The landlord may terminate contracts unlimited and limited in time only by extraordinary notice (§ 29 par. 1, § 30 MRG). Important reasons are again the harmful use the dwelling or arrears of rent (§ 29 par. 1 fig. 5 MRG, § 1118 ABGB).

Furthermore, an extraordinary notice is lawful for one of the following sixteen cases, demonstratively listed in § 30 par. 2 MRG:

- Arrears of rent, after the tenant has been dunned and a grace period of at least 8 days has passed (fig.1 leg. cit.);
- Failure to perform a service, if a rent payment in the form of performance of service has been agreed (fig. 2 leg. cit.);
- 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[567] (fig. 3 leg. cit.);
- Illegal subletting (fig. 4 leg. cit.);
- Death of the tenant, if no one enters ex lege into the contract (fig. 5 leg. cit.);
- Non-use of the premises as dwelling (fig. 6 leg. cit.);
- Adverse use of business premises (fig. 7 leg. cit.);
- Personal need for housing of the landlord or of his descendants without requirement to provide the tenant an alternative dwelling; a weight of interests has to be in clear in favour of the landlords/descendants interests ("Eigenbedarf", fig. 8 leg. cit.);
- Personal need for housing of the landlord or of his ascendants or descendants with requirement to provide the tenant an alternative dwelling; no weight of interest is necessary ("Eigenbedarf mit Ersatzbeschaffung", fig. 9 leg. cit.);
- (The landlord's) employees need for company housing (fig. 10 leg. cit.);
- The need of Bund, Länder or municipality of using premises for administrative purposes with requirement to provide the tenant an alternative dwelling (fig. 11 leg. cit.);
- Termination of subleases by the main tenant, if he needs the dwelling for his own or his relatives living purposes or if living together with the subtenant is not acceptable any more (fig. 12 leg. cit.);

[567] The same reason applies if the tenant does not prevent people living in the same household from engaging in illegal conduct or performing criminal acts.

- An additional important reason for termination has been included in the tenancy agreement in written form (fig. 13 leg. cit.);
- Maintenance works are technically impossible or lack of finance with requirement to provide the tenant an alternative dwelling (fig. 14 leg. cit.);
- Deconstruction or alteration of the building in the public interest with requirement to provide the tenant an alternative dwelling (fig. 15 leg. cit.);
- If the tenant of a category D-dwelling refuses improvement works to raise the standard category C (fig. 16 leg. cit.).

- Statutory restrictions on notice:

(i) for specific types of dwellings, e.g. public dwellings; rental dwellings recently converted into condominiums (if there exists a special form of protection in this case as in German law) etc.

(ii) in favour of certain tenants (old, ill, in risk of homelessness)

(iii) for certain periods

In Austria, no such statutory restrictions on notice exist for the above-mentioned cases.

(iv) after sale including public auction ("emptio non tollit locatum"), or inheritance of the dwelling

For contracts to which the MRG fully applies, § 2 par. 1 sentence 4 MRG provides a statutory restriction on notice; the singular successor of the landlord after sale including public auction or inheritance of the dwelling is bound to all clauses of the existing tenancy agreement except unusual side agreements, but including the agreed duration of the contract, even though the contract has not been registered into the land registry.[568] Therefore, a termination of the tenancy agreement by the landlord is – without exceptional grounds like personal need – impossible.

- Requirement of giving valid reasons for notice: admissible reasons

As aforementioned, giving valid reasons for notice is obligatory in case of contracts unlimited in time and to which the MRG partially or fully applies. The admissible reasons have been listed in detail above.

- Objections by the tenant

The landlord is obliged to file a request of an order of termination by judicial decree ("gerichtliche Aufkündigung", § 560 et seq. ZPO) to the District Court even for contracts to which the MRG does not apply. Objections by the tenant can therefore only be considered by challenging the notice before court. For details see the section below.

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[568] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 113.

- ***Does the tenancy have "prolongation rights", i.e. the statutory right to stay for an additional period of time (outside the execution procedure)?***

non-applicability of the MRG:

Before the decision of the court regarding the eviction, the tenant cannot apply for an extension of the term.

partial or full applicability of the MRG:

Before the decision of the court regarding the eviction, the tenant can apply for an extension of the term up to 9 months for important reasons (§ 34 par. 1 MRG). Furthermore, a purported subtenant ("Scheinuntermieter") can claim to be accepted as main tenant ("Anerkennung als Hauptmieter"), during which procedure an eviction can be suspended (§ 34a MRG).[569]

- ***Challenging the notice before court (or similar bodies)***

As aforementioned, the landlord is obliged to file a claim for an order of termination by judicial decree ("gerichtliche Aufkündigung", § 560 et seq. ZPO) to the District Court. This order of termination is issued by the District Court – without a hearing for the tenant if the claim according to § 562 ZPO includes

- a description of the dwelling (location within the building, address), e.g. Top 1 of Hauptplatz 35, 8020 Graz);
- the date of termination ("Kündigungstermin"), e.g. 31 December 2015
- a specific request to handover the dwelling within fourteen days from the date of termination.[570]

In case the MRG is partially or fully applicable, the landlord is furthermore obliged to name the reasons for termination briefly (§ 33 par. 1 MRG).[571]

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[572] 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 Court's decision, the tenant has a right of appeal to the second instance, the Court of Appeal,

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[569] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 205 et seq.

[570] Oberhammer & Domej, 'Kap 4.6.5.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[571] Oberhammer & Domej, 'Kap 4.6.5.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[572] For details see Oberhammer & Domej, 'Kap 4.6.12.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

within four weeks, and in limited cases[573] also a right of appeal to the third instance, the OGH, within another four weeks after receiving the decision from the Court of Appeal.

- ***in particular claims for extension of the contract or for granting of a period of grace under substantive or procedural law***

As aforementioned, the tenant can apply for an extension of the term up to 9 months for important reasons (§ 34 par. 1 MRG) before decision of the court about the eviction, if the MRG is fully or partially applicable.

- ***Termination for other reasons***

- ***Termination as a result of execution proceedings against the landlord (in particular: repossession for default of mortgage payment)***

In Austria, execution proceedings against the landlord do not change the position of the tenant. Therefore an extraordinary termination of the tenancy for this reason is not possible.

- ***- Termination as a result of urban renewal or expropriation of the landlord, in particular:***
  - What are the rights of tenants in urban renewal? What are the rules for rehousing in case of demolition of rental dwellings? Are tenants interested parties in public decision-making on real estate in case of urban renewal?

In Austria, demolition of a rental dwelling includes cases of demolition de facto or de jure, e.g. the local construction authority withdraws a permission of usage because of the inferior condition of the building ("baubehördliche Benützungsbewilligung").[574] Expropriations (and urban renewal) have to be considered separately below.

A difference exists between demolitions for which the landlord is culpable and demolitions that happen by accident.

The tenant can always claim damages (or renewal of the dwelling and conclusion of a new contract) if the landlord is culpable for the demolition. If the demolition occurs by accident, then the following rules apply:[575]

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[573] See Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 140 et seq. and Rechberger & Simotta, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren*, 8th ed. (Wien: Manz, 2010), 1038 et seq. for details.

[574] Rainer (ed.), 'Kap 4.7' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[575] Rainer (ed.), 'Kap 4.7' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

non- or partial applicability of the MRG:

The tenancy agreement is terminated in case of demolition of the rental dwelling (§ 1112 ABGB), unless a contractual duty to renewal exists. Demolition of parts of the dwellings or mere non-usability of the dwelling is not sufficient for the termination of the tenancy.

full applicability of the MRG:

In case the rented dwelling was demolished or partly demolished by accident, the landlord is, according to § 7 MRG, obliged to renew it as far it is in practice possible, lawful under construction law and covered by an existing insurance.[576]

The expropriation of landlords, is lawful only in specific cases of public interest which are enumerated in the construction laws of the 9 Austrian Länder[577] or in other special statutes for expropriation, for example for railroads, streets or subways.[578] Urban renewal according to (new) zoning law is a public interest that in limited cases can justify expropriation.

Tenants are not involved as parties of the administration law procedure of an expropriation, but their tenancy rights have to be considered as a separate matter in the procedure and have to be compensated monetarily by the state.[579] The landlord represents the rights of the tenant in these procedures and is liable for any misrepresentation.[580]

[576] This obligation of renewal does not exist in case of extraordinary accidents like fire, war or plague (§ 1104 ABGB); Rainer (ed.), 'Kap 4.7' in *Handbuch des Miet- und Wohnrechts* (Wien: Manz, 2012).

[577] E.g. for Vienna: § 38 et seq. "Bauordnung für Wien 1929".

[578] Brunner, 'Die Enteignungs- und Entschädigungsbestimmungen von Eisenbahnenteignungsgesetz, Bundesstraßengesetz und Landesstraßengesetzen: Ein Überblick und Vergleich', *ÖJZ* (1993), 681.

[579] Ris-Justiz RS0053788.

[580] OGH 8Ob227/97h.

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Summary table on 6.6 Termination of tenancy contracts

<table>
<tr><td></td><td colspan="2">Rental tenancies with a public task</td><td colspan="3">Rental tenancies without a public task / Private rental tenancies</td></tr>
<tr><td></td><td>Limited-profit rental housing tenancies</td><td>Municipal rental tenancies</td><td>MRG fully applicable</td><td>MRG partially applicable</td><td>MRG not applicable</td></tr>
<tr><td>Mutual termination</td><td colspan="4">freedom of contract
unlawful, if mutual termination agreements is used to circumvent mandatory norms of the MRG</td><td>Freedom of contract</td></tr>
<tr><td>Notice by tenant / contract unlimited in time</td><td colspan="4">Ordinary or extraordinary notice
termination by written notice or by judicial decree</td><td>Freedom of contract, usually ordinary or extraordinary notice
termination by judicial decree</td></tr>
<tr><td>Notice by tenant/ contract limited in time</td><td colspan="4">ordinary notice after minimum period of 12 months
extraordinary notice
expires by effluxion of time /
termination by written notice or by judicial decree</td><td>Freedom of contract, usually extraordinary notice only
expires by effluxion of time / termination by judicial decree</td></tr>
</table>

Notice by landlord / contract unlimited in time	extraordinary notice only termination by judicial decree	Freedom of contract, usually ordinary or extraordinary notice termination by judicial decree
Notice by landlord / contract limited in time	extraordinary notice only expires by effluxion of time / termination by judicial decree	Freedom of contract, usually extraordinary notice only expires by effluxion of time / termination by judicial decree

6.7 Enforcing tenancy contracts

- ***Eviction procedure: conditions, competent courts, main procedural steps and objections***

To start an eviction procedure, the landlord needs legally enforceable documents or court orders ("Exekutionstitel" or "vollstreckbarer Räumungstitel"), such as

- orders of termination by judicial decree ("gerichtliche Aufkündigung", § 560 et seq. ZPO),
- orders about objections against termination by judicial decree (§ 562 ZPO),

- orders to handover or takeover the rented dwelling by judicial decree ("gerichtliche Übergabe- oder Übernahmeaufträge", § 567 ZPO),
- eviction orders ("Räumungsurteile", § 574 ZPO) or
- eviction settlement by judicial decree or notarial act ("Räumungsvergleich").[581]

The eviction can be requested by the landlord if the above mentioned orders or the eviction settlement have a confirmation of enforceability ("Vollstreckbarkeitsbestätigung" or "Vollstreckbarkeitsklausel"). The landlord has to file an action for eviction ("Exekutionsantrag") within 6 months after confirmation of the legal effects and of the enforceability of the court orders or of the eviction settlement (§ 575 par. 2 ZPO). Otherwise, the landlord will lose his right to eviction and has to file a new lawsuit. In that case, the tenant can himself challenge an eviction by filing an "Impugnationsklage". The tenancy itself is, however, not implicitly renewed, so that the tenant still has the duty to handover the dwelling to the landlord.[582]

The District Court ("Bezirksgericht") in which the immovable property or dwelling is located is competent to decide about the request for eviction of the landlord (§§ 18, 19 EO). The judge usually gives his decision without oral procedure solely on the basis of the information from the documents in the file.[583] If the judge permits the eviction ("Exekutionsbewilligung"), this permission is submitted to the landlord, the tenant and administrative bodies that are responsible for caretaking of homeless, ownership protection, and traffic disruption.[584] In case of expected problems, the youth welfare office ("Jugendamt") or the guardianship court ("Pflegschaftsgericht") can also be informed.[585] If the permission of eviction is legally binding, the landlord can request the execution of the title within 30 years.[586]

The eviction in practice then is enforced by the bailiff ("Gerichtsvollzieher") as agent of the landlord who has to remove persons and movable property of the tenant from the dwelling and hand it over to the landlord (§ 349 par. 1 EO). The bailiff must enter the premises and seize and subsequently secure all goods (§§ 253 et seq. EO). For the date of eviction the landlord has to provide workmen (locksmith and plumber, if a dishwasher, washing machine etc. actually have to be removed) and transportation.

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[581] Reckenzaun, 'Kap 4.12.1.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[582] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 201; Reckenzaun, 'Kap 4.12.3.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[583] Reckenzaun, 'Kap 4.12.5.' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[584] § 569 par 1 „Geschäftsordnung der Gerichte I und II. Instanz 1951" (Geo), BGBl. Nr. 264/1951 (last amendment BGBl 469/2013).

[585] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 204.

[586] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 202.

After seizure of the goods of the tenant, they can be offered by the court for sale if the tenant delays the takeover or does not pay the costs for custody (§ 349 par 2 EO).[587]

- ***Rules on protection ("social defences") from eviction***

Apart of general possibilities to challenge execution procedures in Austria, only rules on protection with the aim to extend the clearance term are in force[588]. The regular period of clearance in a court order is 14 days after the decision of the court.

non-applicability of the MRG:

Before decision of the court about the eviction, the tenant cannot apply for an extension of the term.

In case an enforceable court order or settlement exists, a prolongation of the eviction term or a suspension can be applied for the tenant according to the general rules for challenging foreclosure procedures (§ 42 EO).[589]

partial or full applicability of the MRG:

Before the decision of the court about the eviction, the tenant can apply for an extension of the term up to 9 months for important reasons (§ 34 par. 1 MRG). Furthermore, a purported subtenant ("Scheinuntermieter") can claim to be accepted as main tenant ("Anerkennung als Hauptmieter"), during which procedure an eviction can be suspended (§ 34a MRG).[590]

In case an enforceable court order or settlement exists, the tenant can, according to § 35 MRG, apply for an extension of the clearance period of usually 3 months in case of imminent danger of homelessness or other important reasons and the prolongation of the term has (cumulative) to be reasonable for the landlord.[591] A prolongation is in any case unreasonable if the landlord is not even able to pay the rent equivalent ("Benützungsentgelt") for the actual use of the dwelling.[592] In extraordinary situations, the clearance period can even be prolonged by the court two more times up to a total amount of 9 months (§ 35 sentence 3 MRG). If an extension of the clearance term has already been granted in the decision of the court before enforceability, another

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[587] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 211 et seq., Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 24.

[588] See below.

[589] Jakusch, '§ 42' in *Exekutionsordnung*, 2nd ed., Rz 1 et seq.

[590] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 205 et seq.

[591] No weight of interests between tenant and landlord.

[592] Wobl 1999/50.

extension of the clearance period in the foreclosure procedure is only lawful up to a maximum amount of altogether one year (§ 35 sentence 4 MRG).[593]

An order of the Ministry of Justice called the "snow-flake order" ("Schneeflocken-erlass")[594] recommends that tenants should not (or only exceptionally) be evicted in the cold period of the year, but this is only a non-binding recommendation. Therefore, tenants can also lawfully be evicted in winter.[595]

- ***May rules on the bankruptcy of consumers influence the enforcement of tenancy contracts?***

Bankruptcy of the tenant (and the imminent danger of not being able to pay the rent) alone does not affect the legal force of tenancy agreements and is also not an important reason to terminate the tenancy agreement. The parties also cannot agree on bankruptcy of the tenant being an important reason as per § 30 par. 2 fig. 13 MRG. After opening of insolvency proceedings, rent claims are bankruptcy expenses ("Masseforderungen", § 46 fig. 4 IO).[596]

Summary table on 6.7 Enforcing tenancy contracts

<table>
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<tr><td></td><td>Limited-profit rental housing tenancies</td><td>Municipal rental tenancies</td><td>MRG fully applicable</td><td>MRG partially applicable</td><td>MRG not applicable</td></tr>
<tr><td>Eviction procedure</td><td colspan="5">1. legally enforceable documents or court orders required
2. landlord has to file an action for eviction within 6 months
3. decision of District Court about eviction without oral procedure
4. decision enforced by the bailiff</td></tr>
<tr><td>Protection from eviction</td><td colspan="4">for important reasons:
extension of the term up to 9 months</td><td>general possibilities to challenge</td></tr>
</table>

[593] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 206 et seq.

[594] BMJ JMZ 13.462/1948.

[595] Klicka, '§ 349' in *Exekutionsordnung*, 2nd ed.

[596] Tanczos, *Mietrecht kompakt*, 2nd ed. (Wien: Linde 2012), 181.

	extension of the clearance period up to 9 months general possibilities to challenge execution procedures	execution procedures
Effects of bankruptcy of the tenant	after opening of insolvency proceedings: rent claims are bankruptcy expenses	

6.8 Tenancy law and procedure "in action"

- ***The practical role of private rented housing can only be realistically assessed when the practical functioning of the legal system in this field ("tenancy law in action") is taken into account:***
  What is the legal status and what are the roles, tasks and responsibilities of associations of landlords and tenants?

Associations of landlords and tenants are founded as registered societies ("Vereine", "Verbände"), often comprised of one federal umbrella society ("Dachverband") and nine independent societies, one in each Austrian region. These associations usually offer their members consultations in person, by telephone or by e-mail, which are free of charge.

Furthermore, representatives of associations of landlords and tenants are allowed to appear in court whenever it is not obligatory to be represented by an attorney ("absolute Anwaltspflicht", § 27 par. 1 ZPO). In some cases, representatives of associations of landlords and tenants are even allowed to represent tenants in OGH proceedings (§ 37 par 3. fig. 9 MRG, § 6 par. 4 AußStrG).

Self-regulatory public-law institutions like the "Wirtschaftskammer Österreich" (WKÖ, Austrian Chamber of Commerce) and the "Arbeiterkammer Österreich" (AK, Austrian Chamber of Labour) additionally have the possibility to claim an injunction against unfair clauses in standard terms of tenancy agreements with consumers according to § 28, 29 KSchG.

- ***What is the role of standard contracts prepared by associations or other actors?***

Landlords frequently propose standard contracts drafted by associations of landlords which are often accepted by the tenant. Standard contracts of associations of tenants

are not relevant in practice because they are often too unilateral to meet the consent of both parties.[597]

Standard contracts which can be bought in online stores in practice often cause legal problems for private landlords because these contracts are often used without prior individual legal advice and regularly do not consider mandatory norms of tenancy or consumer law, especially the MRG and KSchG, in an appropriate way for the dwelling actually rented out by the landlord.

- ***How are tenancy law disputes carried out? Is tenancy law often enforced before courts by landlords and tenants and/or are – voluntary or compulsory – mechanisms of conciliation, mediation or alternative dispute resolution used?***

In practice, tenancy law is often enforced before courts in Austria. Furthermore, arbitrational boards for housing have played a significant and important role in Austria since 1917,[598] although some doubts about the constitutional legitimacy of these boards still remain, especially in small municipalities with a limited number of cases.[599]

In many tenancy law cases, the arbitrational boards for housing are competent to decide in first instance (§§ 37 par. 1, 39 MRG), and a claim to an ordinary court in pending cases before the arbitrational board is lawful only if a minimum period of three months has passed by (§ 40 par. 2 MRG). The decisions of the arbitrational boards are binding and no appeal against their decisions is possible (§ 39 par. 4 MRG). However, a delegation of competence of decision to the District Court is possible for any party within four weeks after notification of the board's decision (§ 40 par. 1 MRG).[600]

In 2012, the arbitrational board for housing in Vienna decided 5,310 cases;[601] the arbitrational board for housing in Graz decided 361 cases.[602]

Other mechanisms of conciliation, mediation or alternative dispute have been discussed in the past also with regard to tenancy law[603], but are currently only obligatory with regard to disputes between neighbours about disturbances caused by trees and other plants, which deprive light and air (§ 364 par. 3 ABGB).[604] § 29 AußStrG offers

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[597] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 11.

[598] Mayr, 'Die Entwicklung der wohnrechtlichen Schlichtungsstellen', *wobl* (2003), 349 et seq.

[599] Mayr & Rath-Kathrein, 'Verfassungsrechtliche Fragen der wohnrechtlichen Schlichtungsstellen', *wobl* (2013), 67.

[600] See Chapter 6.1 for details.

[601] <http://www.wien.gv.at/statistik/leistungsbericht/ma50.html> (13 March 2014).

[602] <http://www.graz.at/cms/beitrag/10209773/5024432/> (13 March 2014).

[603] Stabentheiner, 'Überlegungen zum Einsatz von Mediation im Wohnrecht', *wobl* (2004), 291.

[604] For details see Roth & Stegner, 'Mediation in Austria', *Jahrbuch International Arbitration* (2013), 367 (369); Kerschner, 'Neues Nachbarrecht: „Recht auf Licht"', *RFG* 24 (2003); Kissich & Pfurtscheller, 'Der Baum am Nachbargrund – wirksamer Rechtsschutz durch das Zivilrechts-Änderungsgesetz 2004?', *ÖJZ* (2004), 44; Atzlinger, 'Es gibt ein Recht auf Licht!', *wobl* (2010), 93.

furthermore the possibility for a judge to stay a civil law process in tenancy law for up to six months if a settlement with support of an extrajudicial institution (e.g. a mediator) can be expected.[605] Before filing a claim, a party can also try to reach a so called "praetorian settlement" ("prätorischer Vergleich", § 433 ZPO) or a "praetorian mediation settlement" ("prätorischer Mediationsvergleich", § 433a ZPO).[606]

- ***Do procedures work well and without unreasonable delays? What is the average length of procedures? Are there peculiarities for the execution of tenancy law judgments (e.g. suspensions of, or delays for, eviction)?***

Procedures in Austria usually work well and without unreasonable delays. The average length of procedures in first instance is about 2-6 months.[607] Suspensions or delays of eviction are only lawful within the limits of § 42 EO or §§ 34 and 35 MRG if the court considers a specific claim or application of the tenant to be reasonable.[608] Otherwise, the period of clearance is fourteen days only.

- ***Are there problems of fairness and justice? Are there problems of access to courts especially for tenants? What is the situation concerning legal fees, legal aid and insurance against legal costs?***

Problems of fairness and justice with regard to concrete court trials cannot be seen in Austria due to the well respected work of the Austrian judiciary to guarantee fair trials in a relatively short period of time. Furthermore, most decisions in tenancy law are well-founded, even at District Court level.

The access to arbitrational boards and courts for tenants and landlords is fairly easy. In procedures in front of arbitrational boards, no legal fees are charged at all, and so only costs for a party's 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 tenants and landlords can always apply for legal aid ("Verfahrenshilfe") if they are not able to pay the legal fees or costs for their representation without endangering their existence (§ 64 ZPO).[609]

Additionally, District courts offer so called "Amtstage" ("Office days") once per week where legal counsel is provided by young lawyers ("Rechtspraktikanten") under supervision of a judge. At these occasions, citizens also have the possibility to file

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[605] Gitschthaler, '§ 29' in *AußStrG*, ed. Gitschthaler & Höllwerth, Rz 1 et seq. (Stand 1 November 2013, www.rdb.at); Stabentheiner, ‚Überlegungen zum Einsatz von Mediation im Wohnrecht', *wobl* (2004), 291.

[606] For details see Frauenberger-Pfeiler & Risak, 'Der prätorische Mediationsvergleich', *ÖJZ* 87 (2012).

[607] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 12.

[608] See Chapter 6.7 for details.

[609] Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 12.

requests for legal aid or can even file a lawsuit against another party orally.[610] The Austrian bar association offers a service so called "first legal counsel by a registered lawyer" ("Erste Anwaltliche Auskunft") free of charge once per week.[611]

- ***How about legal certainty in tenancy law? (e.g.: are there contradicting statutes, is there secondary literature usually accessible to lawyers etc?)***

Legal certainty in Austrian tenancy law is well established sensu strictu, as there are no contradicting statutes. Legal norms in their current and former version and all judgements of the Supreme Court (OGH), the Constitutional Court ("Verfassungsgerichtshof", VfGH) or the Supreme Administrative Court ("Verwaltungsgerichtshof", VwGH) as well as important judgements of subordinate courts can be found in the "Rechtsinformationssystem" (RIS) provided by the office of the Federal Chancellery of Austria, which can be freely accessed online (www.ris.bka.gv.at). Furthermore, various commentaries for tenancy law can be accessed through fee-based online services like the "Rechtsdatenbank" (www.rdb.at). Collections of secondary literature can also be found in university libraries or libraries located directly in court buildings.

In the broader sense of legal certainty, though, the inhomogeneity and inconsistency of Austrian tenancy law is problematic, especially the great difficulties for a citizen to find a way through the "jungle of regulations" ("Normendschungel") of MRG, ABGB or other special statutes without professional legal guidance.[612]

- ***Are there "swindler problems" on the rental market (e.g. flats fraudulently advertised on the internet as rental offers by swindlers to whom the flats do not belong)?***

As already mentioned above, "swindler problems" are an unknown phenomenon in Austrian jurisdiction, although in the last years some cases of swindler landlords have been reported in the media.[613]

- ***Are the areas of "non-enforcement" of tenancy law (such as legal provisions having become obsolete in practice)?***

Several provisions of the MRG remain a dead letter and unenforced for the time being, for example the rules for the exchange of dwellings ("Wohnungstausch", § 13 MRG), for an obligation of the landlord to offer a dwelling after adaptation and improvement of the dwelling to a main tenant (§ 5 par. 2 MRG), or for priority liens for maintenance works (§ 42a MRG).[614]

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[610] <https://www.help.gv.at/Portal.Node/hlpd/public/content/101/Seite.1010195.html> (17 March 2014).

[611] <http://www.rechtsanwaelte.at/www/getFile.php?id=53> (17 March 2014).

[612] For details see Chapter 6.1; Eberharter & Handler, 'Reformbedarf im Mietrecht – Forderungen an den Gesetzgeber', *juridikum* (2013), 231 et seq.

[613] E.g. <http://derstandard.at/1256255942866/Vermieter-im-Ausland-Vorsicht-vor-Online-Betruegern>.

[614] Stabentheiner, 'Legistische Betrachtungen zum Mietrechtsgesetz', *wobl* (2012), 260 (262 et seq.).

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- ***What are the most serious problems in tenancy law and its enforcement?***

The most serious problems in tenancy law and its enforcement in Austria are linked to the inhomogeneity and inconsistency of the legal system, in concreto

- the basic division of tenancy law into full, partial or non-applicability of the MRG;
- the casuistic and single-cases exceptions for objects to which the MRG partially applies;
- the different systems of rent regulation;
- the relevance of various other special statutes like WGG, HeizKG etc.;
- the intertemporal dimension of Austrian tenancy law.[615]

Furthermore, there exists a need to reform the regulations for maintenance and improvement works of the ABGB and MRG, as the OGH in various recent decisions highlighted the problematic approach with respect to standard terms in consumer contracts.[616]

- ***What kind of tenancy-related issues are currently debated in public and/or in politics?***

Before the recent elections of the first chamber of the Austrian parliament ("Nationalrat") took place on 29.09.2013, tenancy law was a focus of the attention of politicians and media. The two parties in power, SPÖ and ÖVP, provided several proposals for a reform of tenancy law, e.g. to clarify the duties of landlords and tenants for maintenance works. In the end, none of the proposals of the parties have been enacted before the elections.

Since June 2013, a working group of the Federal Ministry of Justice is authorized to elaborate main pillars of a major reform of tenancy law, but so far no results have been announced in public.

In the new government program for 2013-2018,[617] reforms with regard to tenancy law are also promised. Two political aims have been directly formulated.

The first aim of the new government program is to achieve a fair, understandable, transparent and affordable reform of housing laws ("Wohnrechtsreform"). This aim should be achieved by e.g.

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[615] Stabentheiner, 'Legistische Betrachtungen zum Mietrechtsgesetz', *wobl* (2012), 260 (263 et seq.); for additional aspects also see Vonkilch, '30 Jahre MRG – ein Grund zum Feiern?', *wobl* (2012), 244 (246 et seq.); Hausmann, '30 Jahre MRG – Lobens- und weniger Lobenswertes aus Sicht des Rechtsberaters', *wobl* (2012), 288 et seq.; Böhm, 'Das MRG und die Wissenschaft vom Mietrecht', *wobl* (2012), 272 et seq.; Weinberger, '30 Jahre Mietrechtsgesetz', *wobl* (2012), 300 et seq. and Eberharter & Handler, 'Reformbedarf im Mietrecht – Forderungen an den Gesetzgeber', *juridikum* (2013), 231 et seq.

[616] Eberharter & Handler, 'Reformbedarf im Mietrecht – Forderungen an den Gesetzgeber', *juridikum* (2013), 231 et seq.

[617] Bundeskanzleramt (ed.), 'Arbeitsprogramm der Österreichischen Bundesregierung für die Jahre 2013 bis 2018' (2013), 59 et seq., online available <http://www.bka.gv.at/DocView.axd?CobId=53264> (22 January 2014).

- the establishment of a uniform tenancy law reducing the existing inhomogeneity and number of exceptions;
- a reform of the tax fee for tenancy contracts, so that this fee is excluded for the first tenancy contract (main residence) of tenants that are under 35;
- the establishment of a clear catalogue and competences between landlords and tenants for the responsibility of maintenance and improvement works;
- the establishment of a simple and transparent way of determining the rent;
- the establishment of an obligation to warn the tenant before effluxion of time of a contract limited in time;
- a reform of the catalogue of general expenses or operating costs ("Betriebskosten");
- an extension of competences for arbitrational boards and a (possible) review of procedural law;
- a reform of construction law, the WGG and the WEG.[618]

The second aim of the new government program is the provision of new and affordable housing and efforts for renovation of existing buildings. This aim should be achieved by e.g.

- long term guarantees for subsidies ("Wohnbauförderung") and examination of the dedication of subsidies by the Länder;
- reform of rent-to-buy options
- continuation of the existing tax-exemptions for housing construction convertible bonds;
- establishment of new financing mechanisms for affordable housing;
- new incentives for renovation, especially with regard to thermal rehabilitation of buildings and barrier-free housing.[619]

[618] See Bundeskanzleramt (ed.), 'Arbeitsprogramm der Österreichischen Bundesregierung für die Jahre 2013 bis 2018' (2013), 59 et seq. for details (22 January 2014).

[619] See Bundeskanzleramt (ed.), 'Arbeitsprogramm der Österreichischen Bundesregierung für die Jahre 2013 bis 2018' (2013), 59 et seq. for details (22 January 2014).

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7. Effects of EU law and policies on national tenancy policies and law

7.1 EU policies and legislation affecting national housing policies

The core of housing policy in Europe still lies within the competence of the EU member states; however, a significant influence of the EU to the design of national housing policy nowadays exists.

Reasons for this influence of the EU on national housing matters have their roots in certain policy areas, which are regulated community-wide, and certain political aims, which are pursued at community level. These regulations and policies of the EU have a direct or indirect impact on national housing policy (e.g. competition and state aid law or the "Lisbon strategy" of the EU). Nevertheless, the principle of subsidiary has to be considered.[620]

Austria was a founding member of the European Free Trade Association (EFTA) in 1960. The EEC treaty was signed by Austria in 1992 and entered into force on 1.1.1994. Austria eventually joined the EU together with Sweden and Finland in 1995. Aside from the fundamental freedoms, EU policies and legislation has had a significant impact on housing policies in Austria since then, especially in areas of EU policy against poverty and social exclusion, energy saving rules and anti-discrimination.

- ***fundamental freedoms***
- ***e.g. the Austrian restrictions on the purchase of secondary homes and its compatibility with the fundamental freedoms;***
- ***cases in which a licence to buy house is needed – is this compatible with the fundamental freedoms?***

Today, the provision of housing is taking place within a single market to which the EU-internal market principles apply. Art 26 par. 2 TFEU provides that "*the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*."

The fundamental freedoms and the corresponding EU-directives, which are essential for the functioning of the internal market, have affected Austrian housing policy therefore in many perspectives.

(i) <u>Free movement of people and freedom of establishment</u>

Art 21 TFEU provides every citizen of the EU the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Art 49 TFEU furthermore

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[620] Karas, 'Die Auswirkungen der Dienstleistungsrichtlinie auf die Österreichische Wohnungspolitik' in *Die Österreichische Wohnungsgemeinnützigkeit als Europäisches Erfolgsmodell*, ed. Lugger & Holoubek (Wien: Manz, 2008), 21.

prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State.

Directive 2004/38/EC[621] provides in Art 4 - Art 7 for citizens of the EU and their family members the right of free movement to and residence within the territory of another Member State for at least three months. This Directive 2004/38/EC has been transposed together with other Directives into the new "Niederlassungs- und Aufenthaltsgesetz 2005"[622], which regulates administrative matters of residence, and the "Fremdenpolizeigesetz 2005"[623], which regulates matters of immigration policy against illegal residence.[624]

Art. 45 TFEU guarantees furthermore every EU citizen the right to move freely, to stay, and to work in other member states. Regulation (EEC) 1612/68[625] provides in its Art. 9 the same rights and benefits for EU-workers granted to national workers in matters of housing, including ownership of the housing he needs and equal treatment in access to housing. Recommendation 65/379/EEC[626] advises member states to intensify their efforts of construction and provisions of dwellings, especially state subsidized dwellings, for EU-workers and their families. After the EU enlargements in 2004, 2007, and 2013, several limits for the right to work in Austria have been enacted for new citizens of new member states. Today, the right to work is still limited for Croatian citizens.

With reference to Austrian housing policy, the changes with regard to the right to move, reside, and work freely gave EU citizens and their families access to municipal housing and limited-profit housing.

(ii) Free movement of capital

Art. 63 par. 1 TFEU prohibits all restrictions on the movement of capital between Member States and between Member States and third countries.

Free movement of capital is intended to permit movement of investments such as purchases of immovable property, and it has therefore deeply influenced Austrian policy on transfer of land.[627] Requirements of authorization by public authorities for transfer of land are compatible with community law only if they are justified under Art 65 par. 2 TFEU or by compelling reasons of public interest. The concrete measures have to be proportional with respect to the aim, and in cases of doubt the less restrictive measure has to be chosen.[628] The ECJ has ruled, for example in the Konle-case,[629] that the

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[621] Directive of 29-04-2004 (OJEU L 158/77).

[622] BGBl I Nr. 100/2005 (last amendment BGBl. I Nr. 144/2013).

[623] BGBl. I Nr. 100/2005 (last amendment BGBl. I Nr. 144/2013).

[624] See Ramin, ‚Die Rechtsstellung der Unionsbürger nach dem Fremdenrechtspaket', (2005).

[625] Regulation of 15-10-1968 (OJEC L 257/2).

[626] Recommendation of 07-07-1965 (OJEC L 137/27).

[627] See Chapter 6.3 for details.

[628] Herzig, 'Grundbuch und EU-Ausländer', *wbl* (2007), 160.

requirement of authorization by public authorities is disproportionate, as a model of declaration would be a less restrictive interference with the right to free movement of capital.

The statutes on transfer of land ("Grundverkehrsgesetze") in all nine Austrian Länder had to be amended several times within the last 20 years to eliminate discrimination against EU-citizens or organisations with regard to transfer of land.

(iii) Free movement of services

Art 56 TFEU states that "*restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended*". Directive 2006/123/EC on services in the internal market – although not covering social services of the member states in the area of housing (Art 2 par. 2 lit. j leg. cit.) – is another pillar in removing legal and administrative barriers to trade in the services sector.

Construction companies and workers nowadays can offer their services freely community-wide and have to be considered in the public procurement procedures, for example of municipalities for the award of public contracts. Also, uniform standards for construction materials and product specifications or safety rules (e.g. for air-conditioners, lifts and boilers) have influenced national housing legislation.

- ***EU social policy against poverty and social exclusion***

In addition to the principle of free movement and residence for people and workers, EU social policy against poverty and social exclusion has also enlarged the group of people that have access to limited-profit and municipal rental housing in Austria, through implementation of Directives 2003/109/EC, 2003/86/EC and 2009/50/EC.

Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents rules that long-term residents shall enjoy equal treatment with nationals regarding access to goods and services, the supply of goods and services made available to the public, and to procedures for obtaining housing (Art 11 par. 1 lit. f leg. cit.).

According to Directive 2003/86/EC on the right to family reunification, Member States have an option to require for reunification that adequate accommodation exists, which is regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned (Art. 7 par. 1 lit. a leg. cit.).

Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for purposes of highly qualified employment provides that so called "EU Blue Card holders" shall enjoy equal treatment with nationals of the Member State issuing the Blue Card as regards access to goods and services and the supply of goods and services

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[629] EuGH C-302/97.

made available to the public, including procedures for obtaining housing (Art 14 par. 1 lit. g leg. cit.).

All three above cited directives have been transposed into the "Niederlassungs- und Aufenthaltsgesetz 2005"[630] and "Fremdenpolizeigesetz 2005"[631].

"Fighting poverty and social exclusion" is one of 5 targets of the European Commission for the EU for 2020. Therefore, further initiatives to reduce the risk of poverty and social exclusion for at least 20 million EU citizens can be expected, which will have influence on national housing policy as well.

- ***Competition and state aid law***

Austrian housing policy is dominated by the promotion of limited profit housing associations, which receive object-based state subsidies for the construction and modernization of buildings and tax reliefs to provide affordable housing for the majority of the Austrian citizens. A crucial question for Austrian national housing policy is whether the Austrian system of limited profit housing and subsidization is compatible with European rules on unfair competition, on state aid, on taxation, and on the internal market for services of general economic interest, in particular rules on social services of general interest. Until now, this question has not been answered by the European Commission.

In recent academic discussions in Austria, various aspects of the Austrian model of limited-profit housing and subsidization were determined incompatible with EU law.[632]

The European Commission has so far confronted the Austrian government with only a request of minor relevance about the subsidies for construction and modernization of dwellings. The Commission wanted to know if workers of other EU member states in Austria, who have their main residence in another EU member state, have access to subsidies for construction and modernization of dwellings themselves or for their dwellings that are located across the border.[633]

- ***energy saving rules***

EU legislation and policy on energy saving has also had significant impact with regard to Austrian housing policy, although Directive 2012/27/EU on energy efficiency has only recently been implemented into the Austrian legal order and therefore no effects could be noticed so far.

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[630] BGBl I Nr. 100/2005 (last amendment BGBl. I Nr. 144/2013).

[631] BGBl. I Nr. 100/2005 (last amendment BGBl. I Nr. 144/2013).

[632] Storr, 'Wohnungsgemeinnützigkeit im Binnenmarkt', *JRP* (2012), 397; Kahl, 'Die Kommissionspraxis im Bereich des sozialen Wohnbaus unter Berücksichtigung der Situation in Österreich', *Jahrbuch Beihilferecht* (2011), 329; Koppensteiner, 'Die Wohnbauförderung im Visier des Unionsrechts – Viel Lärm um nichts?', *wbl* (2013), 379; Pöschmann, 'Rechtliche Absicherung von Dienstleistungen im allgemeinen wirtschaftlichen Interesse in der österreichischen Rechtsordnung', *JRP* (2007), 136.

[633] Koppensteiner, 'Die Wohnbauförderung im Visier des Unionsrechts – Viel Lärm um nichts?', *wbl* (2013), 379.

Directive 2010/31/EU[634] on the energy performance of buildings, which replaced the former Directive from 2003, has been transposed in Austria following the separation of competences into a federal "Energieausweisvorlagegesetz 2012"[635] (EAVG 2012) and into the construction laws ("Wohnbaugesetze") of the nine Austrian Länder.[636]

"*Climate change and energy sustainability*" is also one of the 5 targets of the European Commission for the EU for 2020. The aim is to reduce the greenhouse gas emissions by 20 % or even 30 % lower than 1990, gain 20 % of the supply of energy from renewables, and increase energy efficiency by 20 %. Further impact from EU legislation on national housing policy can therefore be expected.

7.2 EU policies and legislation affecting national tenancy laws

- ***consumer law and policy***

Austria transposed most of the Directives on consumer law issues by making amendments and additions to the existing Consumer Protection Act "Konsumentenschutzgesetz 1979" (KSchG), for example Directive 93/13/EEC on unfair terms in consumer contracts, Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises and Directive 98/27/EC on injunctions for the protection of consumers' interests.

Directive 93/13/EEC on unfair terms in consumer contracts provided a lower level of consumer protection in many aspects compared to the Austrian standard of that time, so only few substantial changes had to be made.[637]

Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees was transposed into §§ 922 to 933b ABGB and §§ 8 to 9b KSchG and led to a general reform of warranty rights.

The implementation of the first EU time sharing Directive 94/47/EC of 1994[638] into the Austrian legal order lead to a reform of the protection of the right to use immovable properties on a timesharing basis, which has been regulated in the former "Teilzeitnutzungsgesetz 1997"[639]. The second EU timesharing Directive 2008/122/EC of 2008,[640] forced legislative actions once again, and so the new "Teilzeitnutzungsgesetz 2011" (TNG) was announced, a statute which is still in force today.

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[634] OJEU L 153/13.

[635] BGBl. I Nr. 27/2012.

[636] See Chapter 6.1 for details.

[637] Kiendl, 'Die Richtlinie des Rates über missbräuchliche Klauseln in Verbraucherverträgen und ihre Auswirkungen auf das österreichische Recht', *JBl* (1995), 87 et seq.

[638] Directive 94/47/EC of 26.10.1994.

[639] BGBl. I Nr. 32/1997.

[640] Directive 2008/122/EC of 14.01.2008.

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The new Directive 2011/83/EU[641] on consumer rights has only receintly been transposed by Austria. The transposition was enforced by amendments of the ABGB and KSchG and by enactment of a new Statute called "Fern- und Auswärtsgeschäftegesetz".

- ***Competition law***

Austrian tenancy law has also been influenced by EU competition law regarding situations in which the landlord is an entrepreneur or a real estate agent. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising were implemented into the "Bundesgesetz gegen den unlauteren Wettbewerb"[642] (UWG, Unfair competition Act). The scope of Directive 2005/29/EC also includes immovable property, as Art 2 lit. c of Directive 2005/29/EC defines "product" as any goods or services including immovable property, rights and obligations.

- ***anti-discrimination legislation***

Before Austria joined the EU, the former "Gleichbehandlungsgesetz 1979"[643] (Anti-Discrimination Statute) was changed in various parts to fulfil the common EC law standards of that time.[644] The EU Anti-Discrimination Directives of 2000[645] and 2002[646] then led to the new "Gleichbehandlungsgesetz 2004"[647] (GlBG) which was fundamentally amended in 2011 with respect to housing matters. § 31 par. 1 GlBG regulates that for access to and the supply of goods and services which are available to the public, including housing, discrimination based on sex or ethnic background is forbidden. In § 36 GlBG an order of anti-discriminatory advertisement of dwellings is implemented, whereby a violation of this order can lead to a claim for damages (§ 38 par 1 GlBG) and a fine of up to EUR 360 by regional state authorities (§ 37 par. 1 GlBG).[648]

- ***Energy saving rules***

As mentioned above, EU Directive 2010/31/EU on the energy performance of buildings,[649] which replaced the former Directive from 2003, has been implemented in Austria following the separation of competences in federal civil law and construction law of the nine Austrian Länder.

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[641] OJEU L 204/64.

[642] BGBl. I Nr. 448/1994, last amendment BGBl. I Nr. 79/2007.

[643] BGBl Nr. 108/1979.

[644] Especially due to the second (BGBl Nr. 419/1990) and third (BGBl Nr. 833/1992) amendment of the GlBG 1979; Hopf, Mayr & Eichinger, 'Historische Entwicklung - Gleichbehandlung in Österreich und in der EU' in *GlBG* (2009), 59 et seq, note 5.

[645] 2000/43/EC, 2000/78/EC.

[646] 2002/73/EC

[647] BGBl I Nr. 66/2004 (last amendment BGBl. I Nr. 120/2012).

[648] See Hopf, Mayr & Eichinger, '§ 36' in *GlBG* (2009), note 1 et seq. for details.

[649] OJEU L 153/13.

The civil law part of the Directive 2010/31/EU on energy performance certificates (Art. 11 and Art. 12), a part which is especially important for rental agreements, has been integrated into a federal "Energieausweisvorlagegesetz 2012" [650] (EAVG 2012).[651]

Before the implementation of the former Directive of 2003, the landlord had no obligation to provide objective expert reports on the energetic standard of a rented dwelling to the tenant.

- ***Constitutional law affecting the EU and European Convention of Human Rights***

In Austria, the ECHR has a constitutional amending status so that traditionally the decisions of the "European Court of Human Rights" (ECtHR) have a high influence on Austrian human rights law development. With reference to tenancy law, the influence of the ECtHR is limited in Austria so far, as a subjective right to housing is not derivable from the ECHR yet.

The ECHR does not determine the core of private tenancy now, but rather the regulatory context in which private contracts or land law rules and principles are embedded. More than 70 judgements of the ECtHR affecting landlord and tenant relations have been delivered so far including case law on communication rights, non-discrimination rights, the protection of the private sphere and family life, due process rights, and the landlord's property rights.[652] With reference to Austria, two decisions of the ECtHR had direct reference to tenancy law: *Mellacher and others v. Austria*[653] (landlord´s property rights) and *Karner v. Austria*[654] (non-discrimination). For details see Chapter 5 above.

Concluding remarks

Finally, it can be stated that the influence of EU-law has also steadily increased with regard to Austrian tenancy law, although the core pillars still have not been affected so far. It will be a highly interesting task to follow further steps of the European Commission and the European Parliament, which recently adopted a resolution on social housing, with the following opening remarks:[655]

> *"[The European] Parliament recalls that access to housing is a fundamental right in the European Union but that this right is under threat due to a shortage of affordable social housing, as well as because of the continuing economic and social crisis. In fact, on its own, the market is increasingly incapable of meeting the*

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[650] BGBl. I Nr. 27/2012.

[651] See for details Stabentheiner, 'Der wohnrechtspolitische Sologeher dieses Berichtszeitraums: das Energieausweis-Vorlage-Gesetz 2012', *Jahrbuch Wohnrecht* (2012), 7; Marzi, 'Das Energieausweis-Vorlage-Gesetz 2012', *wobl* (2012), 182; Hüttler & Marzi, 'Kap 20' in *Handbuch des Miet- und Wohnrechts*, ed. Rainer (Wien: Manz, 2012).

[652] Schmid & Dinse, 'Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court on Human Rights on Tenancy Law', *ZERP Working Paper* 1 (2013), 6.

[653] Application no. 10522/83, 11011/84, 11070/84, Mellacher and others v. Austria of 19/12/89.

[654] Application no. 40016/98, Karner v. Austria of 24/7/03.

[655] 2012/2293(INI) - 11/06/2013.

> *need for affordable homes, in particular in densely populated urban areas. Furthermore, rising housing and energy costs are aggravating the risks of disease, poverty and social exclusion. Parliament therefore calls for measures to address these issues. It expresses particular concern about the direct and indirect impact of some austerity measures in the context of the current social and economic crisis – such as cuts in housing benefit and social services, the taxation of social housing providers, the cancellation of new housing projects and the selling-off of parts of national social housing stocks."*

Austrian housing policy has experience in setting out a "*social housing action framework*", (…) "*to ensure consistency between the various policy instruments*" (…) "*use[d] to address this issue (state aid, structural funding, energy policy, action to combat poverty and social exclusion, health policy)*", as called for by the European Parliament.

The Austrian "third way" between private market and pure public administration in housing matters by promoting renting with a public task (limited-profit rental housing and municipal housing) as an affordable alternative to homeownership and the private rental market might be a possible solution to improve the future conditions of living of all citizens in the EU.

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7.3 Table of transposition of EU legislation

DIRECTIVES	TRANSPOSITION AUSTRIA	RELATED SUBJECT	PART QUES-TION-NAIRE
CONSTRUCTION			
Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply and public service contracts (OJEC L 134/114).	"Bundesvergabegesetz 2006" (BGBl. I Nr. 17/2006, last amendment BGBl. I Nr. 128/2013)	A special allocation procedure is envisioned for contractors when the target is the design or construction of social housing (Article 34).	
Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJEEC L 40/12); **repealed by the Regulation (EU) 305/2011** of the European Parliament and of the Council of 9 March 2011 laying down harmonized conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJEU L 88/5).	1. Bund: "Bauproduktegesetz 1997" (BGBl. I Nr. 55/1997, last amendment BGBl. I Nr. 136/2001); 2. Länder: Building Products Acts, e.g. for Styria: "Steiermärkisches Bauprodukte und Marktüberwachungs-gesetz 2013" (LGBl. Nr. 83/2013)	About construction products: free movement and the certificates required.	
TECHNICAL STANDARDS			
Energy efficiency			
Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency,	Transposition period: June 2014 Transposition planned	Energy savings targets	6.1. 'Regula-tion on

amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJEU L 315/1).	by implementation of new statutes, e.g. "Bundesenergieeffizienz gesetz" and amendment of various existing statutes, e.g. "Wärme- und Kälteleitungsgesetz"[656]	imposed to the state. It also deals with public bodies' buildings and others that require greater energy savings.	energy saving'.
Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJEU L 153/13).	<u>1. Bund:</u> Civil law provisions (Art 11 and Art 12): Energieausweis-Vorlage-Gesetz 2012 (BGBl. I Nr. 27/2012). <u>2. Länder:</u> Public law provosions (technical standards) in Construction Acts e.g. for Vienna: Bauordnung für Wien 1930 (LGBl. 1930/11, last amendment LGBl Nr. 46/2013) and Wiener Bautechnikverordnung (LGBl 2008/31, last amendment Nr. 73/2012); with reference to standards "OIB-RL 2011" of the Austrian Instituite of Construction Engeneering (OIB)	Improvement of the energy performance of new and existing buildings.	6.1. 'Regula-tion on energy saving'.
Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and basic information for users of household	

[656] See for details <http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00442/> (18 February 2014).

and other resources by energy-related products (OJEU L 153/1).		electric appliances.	
Commission Delegated Regulation (EU) 874/2012 of 12 July 2012 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of electrical lamps and luminaries (OJEU L 258/1).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)		
Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJEU L 140/16).	"Ökostromgesetz 2012" (BGBl. I Nr. 75/2011, last amendment BGBl. I Nr. 11/2012), bylaws and amendment of various statutes Transposition actually pending before the ECJ[657]	Promotion of the use of renewable energy in buildings.	
Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJEU L 211/55).	"Elektritätswirtschafts- und – organisationsgesetz 2010" (BGBl. I Nr. 110/2010, last amendment BGBl. I Nr. 174/2013); "Energie-Control Gesetz" (BGBl. I Nr. 110/2010, last amendment BGBl. I 174/2013); "Energielenkungsgesetz 2012" (BGBl. I Nr. 41/2013)	Basic standards for electricity sector.	
Heating, hot water and refrigeration			
Commission Delegated Regulation (EU) 626/2011 of 4 May 2011 supplementing **Directive 2010/30/EU** of the European Parliament and of	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about air conditioners.	

[657] <http://europa.eu/rapid/press-release_IP-13-1113_en.htm>

the Council with regard to energy labelling for air conditioners (OJEU L 178/1).			
Commission Delegated Regulation (EU) 1060/2010 of 28 September 2010 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of household refrigerating appliances (OJEU L 314).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about household refrigerating appliances.	
Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJEU L 211/94).	"Gaswirtschaftsgesetz 2011" (BGBl. I Nr. 107/2011, last amendment BGBl. I Nr. 174/2013); "Energie-Control Gesetz" (BGBl. I Nr. 110/2010, last amendment BGBl. I 174/2013); "Energielenkungsgesetz 2012" (BGBl. I Nr. 41/2013)	Basic legislation about natural gas in buildings and dwellings.	
Council Directive 82/885/EEC of 10 December 1982 amending Directive 78/170/EEC on the performance of heat generators for space heating and the production of hot water in new or existing non-industrial buildings and on the insulation of heat and domestic hot-water distribution in new non-industrial buildings (OJEEC L 378/19); **repealed by Directive 2005/32/EC** of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products **(OJEC**	"Ökodesign-Verordnung 2007" (BGBl. II Nr. 126/2007, last amendment BGBl. II Nr. 197/2011)	Legislation about heating and hot water in dwellings and buildings.	

L 191/29).			
Household Appliances			
Commission Delegated Regulation (EU) 392/2012 of 1 March 2012 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of household tumble driers (OJEU L 123/1).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about tumble driers.	
Commission Delegated Regulation (EU) 1059/2010 of 28 September 2010 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of household dishwashers (OJEU L 314/1).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about dishwashers.	
Commission Delegated Regulation (EU) 1061/2010 of 28 September 2010 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of household washing machines (OJEU L 314/47).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about washing machines.	
Commission Delegated Regulation (EU) 1062/2010 of 28 September 2010 supplementing **Directive 2010/30/EU** of the European Parliament and of the Council with regard to energy labelling of televisions (OJEU L 314/67).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about televisions.	
Commission Directive 2003/66/EC of 3 July 2003 amending Directive 94/2/EC implementing Council Directive 92/75/EEC with regard to energy labelling of household electric refrigerators, freezers and their combinations (OJEU L 170/10).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about household electric refrigerators and freezers.	

Commission Directive 2002/40/EC of 8 May 2002 implementing Council Directive 92/75/EEC with regard to energy labelling of household electric ovens (OJEC L 128/45).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about household electric ovens.	
Commission Directive 96/60/EC of 19 September 1996 implementing Council Directive 92/75/EEC with regard to energy labelling of household combined washer-driers (OJEC L 266/1).	"Produkte-Verbrauchsangaben-verordnung 2011" (BGBl. II Nr. 232/2011)	Labelling and information to provide about household combined washer-driers.	
Lifts			
European Parliament and Council Directive 95/16/EC of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (OJEC L 213).	1. <u>Bund:</u> "Aufzüge-Sicherheitsverordnung 2008" (BGBl. II Nr. 274/2008, last amendment BGBl. II Nr. 512/2013) 2. <u>Länder:</u> Special Statutory provisions in Construction Law e.g. "Tiroler Aufzugs- und Hebeanlagengesetz 2012" (LGBl. 153/2012)	Legislation about lifts.	
Boilers			
Council Directive 92/42/EEC of 21 May 1992 on efficiency requirements for new hot water boilers fired with liquid or gaseous fuels, amended by Council Directive 93/68/EEC of 22 July 1993 (OJEEC L 73).	Regulation on the Transposition of the Hot Water Boilers Directive of 28 April 1998 (BGBl. I 796).	Legislation about boilers.	
Hazardous substances			

Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJEU L 174/88).	"Elektroaltgeräteverordnung" (BGBl. II Nr. 121/2005, last amendment BGBl. Nr. II 397/2012)	Legislation about restricted substances: organ pipes of tin and lead alloys.	
CONSUMERS			
Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 99/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJEU L 304/64). (*Verbraucherrechte-Richtlinie*)	No transposition so far Transposition period: June 2014 Transposition planned by amendment of the ABGB and KSchG and a new statute "Fern- und Auswärtsgeschäftegesetz"[658]	Information and consumer rights; Legislation referred to procurement of services, car park; Immovables are excluded: lease of housing, but not of premises.	6.2. 'Ancillary duties of both parties in the phase of contract preparation and negotiation'.
Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJEU L	"Telekommunikationsgesetz 2003" (BGBl. I Nr. 70/2003, last amendment BGBl. I Nr. 102/2011	Consumer protection in the procurement of communications services.	

[658] <http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00004/index.shtml>

337/11).			
Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJEU L 110/30).	"Konsumentenschutzgesetz 1979" (BGBl. Nr. 140/1979, last amendment BGBl. I Nr. 100/2011)	Action for an injunction of Directives (Annex I) aimed at the protection of the collective interests of consumers.	
Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of time-share, long-term holiday product, resale and exchange products (OJEU L 33/10).	"Teilzeitnutzungsgesetz 2011" (BGBl. I Nr. 8/2011)	Contracts relating to the purchase of the right to use immovable properties on a timeshare basis.	4.2. 'Regulatory types of tenure without a public task'+ 6.2. 'Ancillary duties of both parties in the phase of contract preparation and negotiation'.
Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJEU L 376/21).	"Bundesgesetz gegen den unlauteren Wettbewerb" (BGBl. I Nr. 448/1994, last amendment BGBl. I Nr. 79/2007)	Misleading advertising and unfair business-to-consumer practices; Immovables are products in terms of Directive 2005/29/EC (Article 2 (c)).	7.2. 'Competition Law'.
Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament, and of	"Bundesgesetz gegen den unlauteren Wettbewerb" (BGBl. I Nr. 448/1994, last amendment BGBl. I Nr. 79/2007)		7.2. 'Competition Law'.

the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council (OJEU L 149/22).			
Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJEU L 178/1).	"E-Commerce-Gesetz" (BGBl. Nr. 152/2001)	Contracting by electronic means; Rental contracts are included (Article 9 (2a)).	6.2. 'Ancillary duties of both parties in the phase of contract prepara-tion and negotia-tion'.
Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJEC L 144/19) **repealed by Directive 2011/83/EU** of the European Parliament and of the Council of 25 October 2011 on consumer rights **(OJEU L 304/64)** with effect from 13 June 2014.	No transposition so far Transposition period: June 2014 Transposition planned by amendment of the ABGB and KSchG and a new statute "Fern- und Auswärtsgeschäfte-gesetz"[659]	Contracts relating to immovables are excluded, except from lease (Article 3 (1)).	
Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJEEC L 95/29).	"Konsumentenschutz-gesetz 1979" (BGBl. Nr. 140/1979, last amendment BGBl. I Nr. 100/2011)	Unfair terms.	6.3. 'Control of contractual terms'.
Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJEEC L 371/31) **repealed by Directive 2011/83/EU** of the European Parliament and	No transposition so far Transposition period: June 2014 Transposition planned by amendment of the ABGB and KSchG and a new statute "Fern- und	Information and consumer rights. Legislation referred to procurement of services.	6.2. 'Ancillary duties of both parties in the phase of contract prepara-

[659] <http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00004/index.shtml>

of the Council of 25 October 2011 on consumer rights **(OJEU L 304/64)** with effect from 13 June 2014. (*Haustürgeschäfte-Richtlinie*)	Auswärtsgeschäfte-gesetz"[660]	Tenancy contracts are excluded from its scope (Article 3 (2 a)).	tion and negotia-tion'.
HOUSING LEASE			
Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations - **Rome I** (OJEU L 177/6 corr. L 309/87).	Article 4 (1 c) determines that contracts relating to a tenancy of immovable property are governed by the law of the country where the property is situated (lex rei sitae). Although the regulation (EC) 593/2008 is directly applicable, several norms of the Austrian "Gesetz über das Internationale Privatrecht 1978 (IPRG)" (BGBl. I Nr. 304/1978, last amendment BGBl. I Nr. 158/2013) and of other Statutes have been changed or removed in 2009 (BGBl I. Nr. 109/2009) for reasons of clarification.	Law applicable (Article 4 (1c, d), Article 11 (5)).	7.2. 'Private Interna-tional Law'.
Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (OJEC L 12/1) - **Brussels I / EuGVVO**	The jurisdiction lies with the court of the Member State where the property is situated. § 27a par. 2 "Jurisdiktionsnorm 1895 (JN)", (BGBl. Nr 111/1895, last amendment BGBl. I Nr. 158/2013) provided already a direct	Law applicable International jurisdiction in proceedings which have tenancies of immovable property as their object (Article 22	7.2. 'Interna-tional Procedural Law'.

[660] <http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00004/index.shtml>

	applicability for international treaties with respect to the question of international jurisdiction for the Lugano treaty (BGBl. I Nr. 114/1997)	(no. 1)).	
Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings (OJEC L 160/1) – **EUInsVO**	Lex rei sitae is the applicable law for the effects of cross-border insolvency proceedings on contracts conferring the right to make use of immovable property. § 27a par. 2 "Jurisdiktionsnorm 1895" (JN, RGBl. Nr 111/1895, last amendment BGBl. I Nr. 158/2013) in conjunction provided already a direct applicability for international treaties with respect to the question of international jurisdiction for the Lugano treaty (BGBl. I Nr. 114/1997); For insolvency § 63 "Insolvenzordnung 1914" (IO, RGBl. I Nr. 337/1914, last amendment BGBl. Nr. I 109/2013) has to be interpreted in conjunction with § 27a par. 2 IO.	Law applicable in Insolvency Proceedings (Article 8).	7.2. 'Private Interna-tional Law'.
Commission Regulation (EC) 1920/2001 of 28 September 2001 laying down detailed rules for the implementation of Council Regulation (EC) 2494/95 as regards minimum standards for the treatment of	Directly applicable, details in "Bundesstatistikgesetz 2000" (BGBl. I Nr. 163/1999, last amendment BGBl. I Nr. 111/2010) and bylaw	CPI harmoniza-tion: Estate agents' services for lease transactions	

service charges proportional to transactions values in the harmonized index of consumer prices and amending Regulation (EC) 2214/96 (OJEC L 214/1).	"Verordnung des Bundesministers für Wirtschaft und Arbeit zur Erstellung von Verbraucherpreis-indizes" (BGBl. II Nr. 351/2003, last amendment BGBl. II Nr. 468/2010)	(Article 5).	
Commission Regulation (EC) 1749/99 of 23 July 1999 amending Regulation (EC) 2214/96 concerning the sub-indices of the harmonized indices of consumer prices (OJEC L 214/1).	Directly applicable, details in "Bundesstatistikgesetz 2000" (BGBl. I Nr. 163/1999, last amendment BGBl. I Nr. 111/2010) and bylaw "Verordnung des Bundesministers für Wirtschaft und Arbeit zur Erstellung von Verbraucherpreis-indizes" (BGBl. II Nr. 351/2003, last amendment BGBl. II Nr. 468/2010)	CPI harmoniza-tion: Lease, housing preservation and repair, water and other services (subscript 4).	6.4. 'Index-oriented increase clauses'.
Council Regulation (EC) 1687/98 of 20 July 1998 amending Commission Regulation 1749/96 concerning the coverage of goods and services of the harmonized indices of consumer prices (HICP) (OJEC L 214/12).	Directly applicable, details in "Bundesstatistikgesetz 2000" (BGBl. I Nr. 163/1999, last amendment BGBl. I Nr. 111/2010) and bylaw "Verordnung des Bundesministers für Wirtschaft und Arbeit zur Erstellung von Verbraucherpreis-indizes" (BGBl. II Nr. 351/2003, last amendment BGBl. II Nr. 468/2010)		6.4. 'Index-oriented increase clauses'.
Commission Regulation (EC) 2214/96 of 20 November 1996 concerning harmonized indices	Directly applicable, details in		

of consumer prices: transmission and dissemination of sub-indices of the HICP (OJEC L 137/27).	"Bundesstatistikgesetz 2000" (BGBl. I Nr. 163/1999, last amendment BGBl. I Nr. 111/2010) and bylaw "Verordnung des Bundesministers für Wirtschaft und Arbeit zur Erstellung von Verbraucherpreis-indizes" (BGBl. II Nr. 351/2003, last amendment BGBl. II Nr. 468/2010)		
Recommendation 65/379/EEC: Commission Recommendation of 7 July 1965 to the Member States on the housing of workers and their families moving within the Community (OJEC L 137/27).		Discrimination on grounds of nationality; Equality in granting housing, aids, subsidies, premiums or tax advantages to workers who have moved within the EU.	7.1. 'Fundamental Freedoms'.
DISCRIMINATION			
Council Directive 2004/113/EC of 13 December 2004 on the principle of equal treatment between men and women in the access to and supply of goods and services (OJEC L 373/37).	"Gleichbehandlungs-gesetz 2004" (GlBG, BGBl I Nr. 66/2004, last amendment BGBl. I Nr. 120/2012)	Discrimination on grounds of sex.	6.3. 'Restrictions on choice of tenant – antidiscrimination issues'.
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJEC L 180/22).		Discrimination on grounds of racial or ethnic origin.	6.3. 'Restrictions on choice of tenant – antidis-

			crimination issues'.
IMMIGRANTS OR COMMUNITY NATIONALS			
Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJEU L 95/1); repealing the former Directive 89/552/EEC and its amending Directive 2007/65/EC (Article 34). Cf. also Commission Communication on the Application of the General Principles of Free Movement of Goods and Services - Concerning the Use of Satellite Dishes (COM 2001, 351 final).	"ORF-Gesetz 1984" (BGBl. I Nr. 479/1984, last amendment BGBl. I Nr. 169/2013); "Audiovisuelle Mediendienste-Gesetz 2001" (BGBl. I Nr. 74/2001, last amendment BGBl. I Nr. 84/2013); "Fernseh-Exklusivrechte-Gesetz 2001" (BGBl. I Nr. 85/2001, last amendment BGBl. I Nr. 84/2013); "Verbraucherbehörden-Kooperationsgesetz 2006" (BGBl. I Nr. 148/2006, last amendment BGBl. I Nr. 2/2013).	Member States shall ensure freedom of reception and shall not restrict retrains-missions on their territory of audiovisual media services from other Member States (Article 3 (1)).	5. 'Human Rights'; 7.1. 'Funda-mental Freedoms'.
Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJEU L 155/17).	"Niederlassung und Aufenthaltsgesetz 2005 (BGBl I Nr. 100/2005, last amendment BGBl. I Nr. 144/2013); "Ausländerbeschäfti-gungsgesetz 1975" (BGBl. I Nr. 218/1975, last amendment BGBl. I Nr. 72/2013).	Equality of treatment with housing (Article 14 (1g); However, Member States may impose restrictions (Article 14 (2)).	7.1. 'EU social policy against poverty and social exclusion'.
Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the	"Niederlassung und Aufenthaltsgesetz 2005 (BGBl I Nr. 100/2005, last amendment BGBl. I Nr. 144/2013); Fremdenpolizeigesetz 2005 (BGBl. I Nr.	Discrimina-tion on grounds of nationality; Free movement (Article 4,5)	7.1. 'Funda-mental Freedoms'.

Member States, amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJEU L 158/77). (*Freizügigkeitsrichtlinie*)	100/2005, last amendment BGBl. I Nr. 144/2013)	and residence (Article 6,7) for European citizens and their families.	
Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJEU L 16/44).	"Niederlassung und Aufenthaltsgesetz 2005 (BGBl I Nr. 100/2005, last amendment BGBl. I Nr. 144/2013); "Ausländer-beschäftigungsgesetz 1975" (BGBl. I Nr. 218/1975, last amendment BGBl. I Nr. 72/2013).	Equality of treatment with housing (Article 11 (1f)).	7.1. 'EU social policy against poverty and social exclusion'.
Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJEU L 251/12).		The reunification applicant shall prove to have a habitable and large enough dwelling (Article 7 (1a)).	7.1. 'EU social policy against poverty and social exclusion'.
Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJEEC L 257/2).		Equal treatment in housing and access to the housing applicants' lists (Article 9, 10 (3)).	6.3. 'Restric-tions on choice of tenant - antidiscrim ination issues'.
INVESTMENT FUNDS			
Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and Regulations (EC) 1060/2009 and (EU) 1095/2010 (OJEU L 174/1).	"Alternative Investmentfonds Manager-Gesetz 2013" (BGBl. I Nr. 135/2013)	Real estate investment funds.	2.3. 'Relevance of tenancy contracts to professional and institutional investors'

MORTGAGES			
Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property of 31 March 2011 (COM 2011/0142 final).		Credit agreements secured by a mortgage or by another security, loans to purchase a property and certain credit agreements aimed at financing the renovation of a property.	

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8. Typical national cases (with short solutions)

to be proposed by each team in the following structure:

- name of typical case (e.g. “extra costs”, “ liability for damages”) ,
- brief sketch of typical case
- solution

8.1 Full-, partial- or non applicability of the MRG[661]

In December 2012, Ruth concluded a contract unlimited in time as main tenant concerning a dwelling located in the attic of a building. Her son Julian moved in at the same time and is still living in the dwelling together with his mother. The building was originally constructed in 1927 without public funding as semi-detached house and the dwelling located in the attic was built in 1976 by expansion of the attic. At the same time, the legal status of the dwelling was changed to (separate) ownership of a dwelling in condominiums. Ruth wants to move out of the dwelling but wants to transfer her tenancy rights to her son. Can Ruth transfer her tenancy rights in March 2013 to Julian without consent of the landlord?

According to § 12 MRG the transfer of tenancy rights to persons of descending lines (e.g. children) is lawful if the benefitted person has moved in together with the leaving tenant. However, § 12 MRG is only relevant for contracts to which the MRG fully applies. Since an amendment of the MRG in 2001[662], the application of the MRG excludes tenancy agreements concerning leased property in edifices, which do not consist of more than two individual flats or business premises, whereby premises that were or are newly created by expansion of the attic are not included in the calculation (§ 1 par. 2 fig. 5 MRG).

The MRG is not applicable, and Ruth cannot transfer her tenancy rights to Julian without consent of the landlord.

8.2 Time limitation clause in tenancy contracts

In October 2009, Daniel and Evi concluded an oral tenancy contract regarding a dwelling in a building which has been constructed without public funding in 1966. Both parties agreed to limit the contract to a period of three years, starting on 1 October 2009 and ending on 31 October 2012. In August 2012, Daniel phones Evi and reminds her to return the rented apartment by 31 October 2012. Evi has in the meantime changed her plans and does not want to move to another dwelling. Daniel still insists on Evi to handover the dwelling and claims an order to handover the rented dwelling by judicial decree. Will Daniel be successful with his claim?

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[661] Situation inspired by Case 9 in Call, *Mietrechtsgesetz – 100 Fälle mit Lösungsvorschlägen* (1986), 37 et seq.

[662] BGBl I Nr. 61/2001.

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The MRG is partially applicable to tenancy contracts concerning a dwelling in a building which has been constructed without public funding in 1966 (§ 1 par. 4 fig. 1 MRG). According to § 29 par. 1 fig. 3 MRG, a tenancy agreement is terminated by effluxion of time, but only in case of an explicit written clause within the tenancy agreement (§ 29 par. 1 fig. 3 lit. a) MRG).

As the time limitation clause has not been concluded in written form, § 29 par. 1 fig. 3 MRG does not apply and the contract is treated as unlimited in time according to § 29 par. 3 fig. 3 lit. a) MRG. Daniel will therefore not be successful with his claim.

8.3 Freedom of contract vs. rent regulation in tenancy contracts

Stefan is owner of a fancy building in the city centre of Vienna which was constructed in 1936. The building permit dates from 1.3.1935. Within this building, a dwelling with inside bathroom, toilet, heating and hot water supply, and living space of 50 m² is located on the fifth floor and is equipped with the usual common facilities (lift, central heating, etc.). Stefan wants to rent out his dwelling without furniture for EUR 1,800 per month including operating costs, public charges and VAT. Michi, a student in his third year of Law School who has already attended a seminar on Austrian tenancy law, concludes the written tenancy agreement unlimited in time with Stefan because he thinks that the rent is excessively high and will definitely be reduced by the arbitrational board for housing of Vienna. The next day after moving into the apartment, Michi contacts the arbitrational board for housing of Vienna and claims a reduction of his rent. Will his claim be successful?

For dwellings in edifices which have been constructed in 1935, the MRG is fully applicable. The lawful amount of rent is therefore limited by one of the systems of rent regulations of the MRG: adequate rent (§ 16 par. 1 MRG), category rent (§ 15a MRG) or benchmark rent (§ 16 par. 2 MRG). The rented dwelling is a category A dwelling for housing purposes with 70 m² living space in a building with a construction permit dated before 8 May 1945, and Michi claimed the reduction of rent immediately after handover. Therefore, the provisions for adequate rent (§ 16 par. 1 fig. 1 to fig. 5 MRG) and category rent are not applicable for this tenancy agreement, but the provisions for benchmark rent (§ 16 par. 2 MRG) are applicable. For a standard premises, a certain basic rent per m² and month is fixed for each Austrian state separately in bylaws ("Richtwertgesetz 1994"). In Vienna, for example, this basic rent is currently[663] EUR 5.16 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.

Even taken into account the surcharges for size, kind, location and maintenance condition, the rent of EUR 1,800, or EUR 25.71 per m²/month is far beyond the benchmark rent and Michi's claim will be successful.

[663] Since 1 April 2012, BGBl II 2012/82.

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8.4. Rent increase

Martin is owner of a 130 m² dwelling in a condominium, which was constructed in 2004, and rents this dwelling out to Nicole for EUR 1,200 per month in January 2013. In the tenancy contract unlimited in time, both parties have agreed on an annual increase of the rent of 6 %, effective from 1 January of every year. In December 2013, Martin informs Nicole about the rent increase and asks her to pay EUR 1,272 per month from 1 January 2014 on. Although aware of the clause of rent increase in the tenancy contract, Nicole still thinks that the rent increase is far too high, especially because the "Verbraucherpreisindex" (VPI, Consumer Price Index) of the Statistic Austria has only increased by 2 % in the same time period. Therefore, she contacts the department for tenancy issues of the Chamber of Labour and asks them for help. What advice will Pauli, who is an expert in tenancy law of the Chamber of Labour, give Nicole?

§ 1 par. 4 MRG partially excludes from the application of the MRG leased property that is commonly held if the leased property is within an edifice that has been newly constructed based on a building permit dated after 08 May 1945 (§ 1 par. 4 fig. 3 MRG). Martin's dwelling fulfills this criterion; the MRG is only partially applicable to the tenancy contract, and the strict rent regulation rules of the MRG do not apply. The parties were free to conclude any increase of rent. Also, general civil law restrictions of laesio enormis (§ 934 ABGB) and the regulations of the ABGB concerning exorbitant rents (usury § 879 par. 2 fig. 4 leg. cit.) do not apply.

The clause on rent increase is valid, so Pauli will advise Nicole to pay the higher rent of EUR 1,272.

8.5 Use of the dwelling

In 2012, Peter and Doris concluded a written contract unlimited in time to which the MRG fully applies. In the tenancy agreement, a clause was included that the dwelling must be used by Doris as main residence for housing purposes only. In 2013, Doris decides to use two rooms of the dwelling as nail studio and advertises her services by internet. Peter finds out about Doris commercial activities in the rented object, gives notice, and requests an order of termination by judicial decree. Doris receives the court order and wants to challenge it. Will Doris's challenge be successful?

A landlord can only terminate a contract unlimited in time to which the MRG fully applies by extraordinary notice for important reasons (§ 29 par. 1, § 30 MRG). An extraordinary notice is lawful i.a. in case an additional important reason for termination has been included into the tenancy agreement in written form. In general, the tenant has the right to use the dwelling ad libitum, but this general rule does not apply if a specific use of the dwelling has been prohibited in the tenancy agreement.

The illegal use of the dwelling for Doris' business activities is a valid, important reason for Peter to give extraordinary notice. Therefore, Doris's challenge against the court order will not be successful.

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8.6 Commission fee for real estate agent

Dr. Andrieu, a very busy chief executive officer in a local bank, does not have time to rent out his dwelling and therefore in March 2013 hires Ferdinand, an ambitious real estate agent. Nicole, a young employee in a grocery store, is very interested in renting the dwelling after Ferdinand showed her around. She immediately concludes a tenancy contract limited in time for a period of three years. The monthly amount of rent is EUR 700 including operation costs, plus 10 % VAT. After four weeks, Ferdinand sends her an invoice for his commission fee of EUR 2,800. Nicole has recently read an article about changes of law with regard to brokerage fees in an Austrian newspaper and thinks that the invoice is too high. Is she right, and how much does she really have to pay?

For non-commercial premises, the commission fee for tenancy contracts is limited for tenants, according to § 20 IMV, to only one so-called "Bruttomietzins" (BMM) if a tenancy contract limited in time is concluded for a period of less than three years. According to § 24 par. 1 IMV, the BMM consists of the monthly amount of rent plus operation costs, service charges and (possible) monthly amount of rent for furniture, but not of the VAT for the rent. The commission fee has obviously been calculated wrong, and Nicole has to pay only the amount of EUR 840,-- (= one monthly rent of EUR 700 plus 20 % VAT).

8.7. Neighbour Relations[664]

Hans and Thorsten are tenants of neighbouring apartments in the same building, which was constructed without public funding in 1967. Thorsten is a passionate trumpet player and usually practises every day at least 5 hours from 7 p.m. until midnight. His neighbour Hans is frustrated because Thorsten plays excessively loud and for far too long. One evening Fritz, a good friend of Hans and practicing lawyer in Austria, is invited for dinner, and Hans asks him if he could file an injunction suit against his neighbour. What advice will Fritz give to his friend Hans?

Whether a tenant is impaired by noise unreasonably or not has to be judged by technical standards dealing with soundproofing and acoustics for rooms. However, the local conditions may not be exceeded, and the local common usage may not be impaired fundamentally (§ 364 par. 2 ABGB per analogiam). It is also likely that the rules of the house ("Hausordnung") prohibit any excessive noise, especially between 10 p.m. and 6 a.m. The rules of the house are valid only if the contract refers to them or if the tenant submits them. A tenant as possessor of rights can proceed against third parties with an action against disturbance of possession (§ 364 par. 2 ABGB) or can engage his landlord to act against Hans due to his contractual obligations (§ 1096 ABGB).

Fritz gives Hans as possessor of rights the advice that he can either claim himself or engage his landlord to act against Hans.

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[664] Situation inspired by Question 28, Lurger, Haberl & Waß, 'EUI Tenancy Law Project - Austrian report' (2004), <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawAustria.pdf>, 52.

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8.8. Changes of dwelling by tenant

In 2012, landlord Isabella and tenant Frank concluded a contract unlimited in time regarding a dwelling in a building that was constructed with public funding in 1962. In January 2014 Frank wants to install new windows that have a far better insulation for heat as he recognised that the costs for heating are quite high. The windows have not been changed for 20 years and are generally in poor condition. Frank asks Isabella if he is allowed to change the windows, but she denies his request. Nevertheless, Frank wants to change the windows and also pay for them. Is he allowed to do this without consent of his landlord Isabella?

The MRG fully applies to this contract unlimited in time as the application is not excluded according to § 1 par. 2 to par. 5 MRG. The tenant in principle needs to request for the consent of the landlord to do improvements himself (§ 9 par. 1 MRG). The permission cannot be denied by the landlord if the improvement decreases the consumption of energy according to § 9 par. 2 fig. 2 MRG and the tenant additionally complies the criteria of § 9 par. 1 fig. 1, 2, 4, 5, 6 and 7 MRG.

Frank's new windows decrease the consumption of energy significantly, and he therefore does not need the consent of his landlord Isabella to perform this improvement.

8.9. Deposits

Kimberly is owner of a luxurious dwelling in a condominium, which was constructed in 2006. Jakob wants to rent the dwelling, and both parties agree on a rent of EUR 2,000 per month. Additionally, Kimberly asks for a deposit of EUR 12,000, but Jakob doubts that this amount of money is acceptable. As both start to quarrel about the conclusion of the contract, Jakob calls his friend Mark, who works in a medium-sized law office, for help. What advice will Mark give to Jakob?

The MRG, according to § 1 par. 4 fig. 3 MRG, only partially applies to this contract. The contractual partners are free to agree on any clause for deposits. Amount, management, and allowed uses of the deposit are subject to the individual tenancy contract. Legal limits for extraordinarily high deposits exist only with reference to general provisions of private law (§ 879 par. 1 and par. 3 ABGB), which are not relevant in this case.

Mark will advise Jakob to either pay the EUR 12,000 or search for another dwelling.

8.10 Increase of rent after transfer of tenancy rights ex lege and ex contractu[665]

Landlord Christoph and tenant Josef concluded an oral contract unlimited in time in January 1955 concerning a dwelling in a building which was constructed with public funding with a building permit dated 1 January 1953. In 1963, both parties agreed in a written amendment to the contract that in case of his death, Josef has a contractual right to transfer his tenancy rights to his legal successors. In 1995, Josef declared again explicitly towards the new landlord Lena, who bought the rented unit from Christoph, that

[665] Situation inspired by OGH 3 Ob 53/12h.

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he would transfer his tenancy rights to his son Sebastian. In 2005, Josef dies and his son Sebastian, who in the meantime has turned 38 years old, enters into the tenancy contract. Can Lena raise the rent after the death of Josef?

According to § 46 par. 1 MRG, a landlord has no right to increase the rent if a spouse, a registered partner, a life companion or minor children enter ex lege (§ 14 MRG) into the rent contract. § 46 par. 2 MRG provides that an increase of the rent is lawful in case full-adult children enter into the contract ex lege.

Although Sebastian is aged 38 and therefore does not fulfill the criteria of § 46 par. 1 MRG, an increase of rent is unlawful because the transfer of tenancy rights did not occur ex lege, but ex contractu.

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9. Tables

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9.3 Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch
AGB	Allgemeine Geschäftsbedingungen
AK	Arbeiterkammer Österreichs
AKV	Alpenländischer Kreditorenverband für Kreditschutz und Betriebswirtschaft
AnwBl	Österreichisches Anwaltsblatt
Art	Article
AußStrG	Außerstreitgesetz
AVG	Allgemeines Verwaltungsverfahrengesetz
BGB	ger Bundesgesetzbuch
BGBl	Bundesgesetzblatt
BM	Bundesministerium
BMJ	Bundesministerium für Justiz
BMM	Bruttomietzins
B-VG	Bundes-Verfassungsgesetz
Cf	confer
CFREU	Charter of Fundamental Rights of the European Union
CPI	Consumer Price Index
DSG	Datenschutzgesetz
EAVG	Energieausweisvorlagegesetz
EC	European Community
ECHR	European Court of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice

Ed	editor
EEC	European Economic Community
EFTA	European Free Trade Association
EheG	Ehegesetz
eng	english
EO	Exekutionsordnung
ESC	European Social Charta
EStG	Einkommensteuergesetz
et seq	et sequentes
etc	et cetera
EU	European Union
EUR	Euro
EvBl	Evidenzblatt der Rechtsmittelentscheidungen (in der ÖJZ seit 1946)
EvBl	Evidenzblatt der Rechtsmittelentscheidungen der ÖJZ
excl	excludes
fig	figura
GBG	Grundbuchgesetz
GDP	Grand Domestic Product
ger	german
GewO	Gewerbeordnung
GmbH	Gesellschaft mit beschränkter Haftung
HbG	Hausbesorgergesetz
HeizKG	Heizkostenabrechnungsgesetz
HIPC	Harmonized Index of Consumer Prices
i a	inter alia
i e	id est
ICESCR	International Covenant on Economic, Social and Cultural Rights
ie	id est
ImmMV	Immobilienmaklerverordnung
Immolex	Neues Miet- und Wohnrecht
ImmZ	Österreichische Immobilienzeitung
IMV	Immobilienmaklerverordnung
incl	includes
IO	Insolvenzordnung

JBl	Juristische Blätter
JN	Jurisdiktionsnorm
KlGG	Kleingartengesetz
KSchG	Konsumentenschutzgesetz
KSV 1870	Kreditschutzverband von 1870
Leg cit	legis citatae
LGBl	Landesgesetzblatt
LPHA	limited profit housing association / „gemeinnützige Bauvereinigung“
lit	litera
m	meter
MaklerG	Maklergesetz
MG	Mietengesetz
MietSlg	Mietrechtliche Entscheidungen
MRG	Mietrechtsgesetz
MSchV	Mieterschutzverordnung
Nr	Nummer
OGH	Oberster Gerichtshof
ÖGZ	Österreichische Gemeindezeitung
OJEC	Official Journal of the European Communities
OJEEC	Official Journal of European Economic Community
OJEU	Official Journal of the European Union
ÖJZ	Österreichische Juristenzeitung
ÖJZ	Österreichische Juristenzeitung
ÖROK	Österreichische Raumordnungskonferenz
ÖVP	Österreischische Volkspartei
par	paragraphe
RAO	Rechtsanwaltsordnung
RATG	Rechtsanwaltstarifgesetz
RDB	Rechtsdatenbank
RdW	Österreichisches Recht der Wirtschaft
RFG	Recht und Finanzen für Gemeinden
RGBl	Reichsgesetzblatt
RichtWG	Richtwertgesetz
RIS	Rechtsinformationssystem

RS	Rechtssatz
Slg	Sammlung
SPÖ	Sozialdemokratische Partei Österreichs
tab	tabula
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TNG	Teilzeitnutzungsgesetz
UStG	Umsatzsteuergesetz
VfGH	Verfassungsgerichtshof
VfSlg	Sammlungen der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes, Neue Folge
VO	Verordnung
VPI	Verbraucherpreisindex
VwGH	Verwaltungsgerichtshof
VwSlg	Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, Neue Folge
WÄG	Wohnrechtsänderungsgesetz
WBF	Wohnbauförderung
wbl	Wirtschafsrechtliche Blätter
WEG	Wohnungseigentumsgesetz
WFG	Wohnbauförderungsgesetz
WGG	Wohnungsgemeinnützigkeitsgesetz
WKÖ	Wirtschaftskammer Österreichs
wobl	Wohnrechtliche Blätter
WWFSG	Wiener Wohnbauförderungs- und Wohnhaussanierungsgesetz
WWG	Wohnhaus-Wiederaufbaugesetz
ZBl	Zentralblatt für die juristische Praxis
ZERP	Zentrum für Europäisches Privatrecht
ZPO	Zivilprozessordnung
ZStG	Zinsstoppgesetz