Chambers
Global Practice
Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

# Real Estate 2022

Austria: Trends & Developments
Michael Lagler, Arabella Eichinger, Constantin Benes,
Laurenz Schwitzer and Marco Thorbauer
Schoenherr

practiceguides.chambers.com

# AUSTRIA

## Trends and Developments


***Contributed by:***
*Michael Lagler, Arabella Eichinger, Constantin Benes, Laurenz Schwitzer and Marco Thorbauer*
***Schoenherr*** ***see p.8***

### Real Estate Investments

After a challenging year in 2020, the Austrian institutional real estate investment market showed its robustness in 2021. COVID-19 still had, of course, an impact on investment decisions, but the investment pressure increased and this had an impact on all asset classes.

This article will examine the development of the various asset classes over the past year and give an outlook on what might be expected from the market in 2021.

### Investment Overview

Compared with the previous year, Austrian investment volume increased by 25% to approximately EUR4.3 billion in 2021. Residential was the most popular asset class in 2021 with a share of 32% of the investment volume, followed by retail with 29%, office with 17%, logistics with 11% and hotel with 4%. Around half of the volume – approximately 49% – was accounted for by Austrian investors, German investors were responsible for around 21% of the transactions and international investors for around 30%.

#### *Hotels*

Unsurprisingly, the hotel sector was hit disproportionately hard by COVID-19, suffering from government-ordered lockdowns and from the massive impact on travelling. The number of transactions and the investment volume declined significantly in the past year and the market has almost come to a halt.

In 2021 the hotel segment accounted for approximately 4% of the total investment volume in real estate. Although the ongoing pandemic and other crises continue to affect the hotel investment market, in 2021 more than twice as much capital was invested in hotel properties as in 2020 and prime yields have registered stable development. In the first half of 2021, almost EUR110 million was invested in the hotel sector and this was almost doubled by the end of the year. Further improvement in the performance of the hotel sector is strongly dependent upon the flattening of the development of COVID-19 infections, the progress of the vaccination roll-out and the easing of travel restrictions.

#### *Residential*

In 2021, with an investment volume of EUR1.4 billion, there were more investments in residential than in any other asset class. Due to COVID-related issues, there were a great deal of construction delays in 2021; as such, Vienna is expected to exceed the previous year's figures for completions by around 30% (approximately 4,500 residential units). The rent level largely stabilised in 2021, but there was an increase in residential prices of 7% in Vienna, 21% in Graz and Linz respectively. An increase in purchase prices is to be expected in 2022. High costs of land in urban areas, competition with other types of use and the need to reduce land sealing is encouraging developers to focus on re-densification and conversion.

More than ever, residential real estate is considered to be a very secure and stable investment, as institutional (as well as private) investors need to place their funds and financing is available at low cost. While the completion of new projects is expected to decrease because of the war in Ukraine, which has a direct and indirect impact, the broad investor base and the high overall demand will likely lead to a further increase in purchase prices.

### *Institutional*

In the first three quarters of 2021, around EUR450 million was invested in Austrian office properties. The office segment accounted for 17% of the total investment volume in real estate in 2021. The interest in investment remains strong in office properties with long-term rentals at top locations; German and Austrian investors are the main demand drives here.

In terms of leasing performances, the Viennese office market recorded its lowest level in 2021 (169,000 sq m) since records began but it is predicted this will not continue in 2022. The prime rent in Vienna rose to EUR26 sq m/month last year. The limited availability of space, paired with a low completion rate alongside a low vacancy rate, led to the weakest year on record in Vienna in 2021, with a take-up rate of approximately 169,000 sq m. In Vienna alone, 66,700 sq m were completed in 2021. A total of around 130,000 sq m is expected to be completed in 2022, of which around 77% will be refurbished space in inner-city locations.

### *Retail*

The retail asset class was able to generate the second-highest investment turnover, with a share of 29% of the investment volume in 2021. This is mainly due to the share acquisition of SCS from Credit Agricole for more than EUR400 million and the sale of Grabenhof to the Vienna Medical Association for more than EUR300 million. Due to existing demand, there are still opportunities to re-let in a timely manner, as a result of which the vacancy and rent rate has not changed much from the previous year. In the prime area, rents have started to rise again and will continue to do so in 2022. Due to several lockdowns, the importance of online retail for generating sales has increased for many retailers. For example, the linking of web shops and physical shops (omni-channelling) has proven promising.

### *Logistics*

The 2021 total investment in the logistics real estate market amounted to about EUR440 million and around 390,000 sq m of logistics space was completed. Overall, the take-up in 2021 amounted to around 150,000 sq m and once again reached a record high level (+23% year on year). The largest share of this space was acquired by logistics service providers in the eastern surroundings of Vienna. At present, the largest capacities are available in this area due to the separate construction phases of the Industrial Campus Vienna East in Enzersdorf an der Fischa and the SkyLogPark in Fischamend. The prime rent for logistics properties rose to approximately EUR5.80 sq m/month in 2021. The vacancy rate in modern logistics space reached a new record low at the end of 2021, amounting to just 0.9% in properties of building class A + B in Vienna and the Vienna region. The pipeline for 2022 is better positioned, with around 138,000 sq m.

## Outlook

For 2022, a transaction volume is forecast at EUR4.5 billion, as investors look set to explore new asset classes. From the different asset classes, shopping centres are expected to have the highest prime yields, followed by logistics, office and then residential. From a legal perspective, COVID-19 will still have an impact, but other topics such as digitalisation, ESG and climate change legislation will come more and more into focus.

## Real Estate Finance

Origination of real estate financing continued to vary significantly between asset classes in 2021. While residential real estate and other core (retail) assets performed strongly, new financings of other asset classes, in particular city hotels, were still struggling to arrange for new debt.

With an ever-increasing appetite for private real estate investments, regulators are putting more focus on restricting mortgage lending in a bid to mitigate system risk from residential estate funding.

### *Existing debt*

For existing projects, especially hotel and retail assets, 2021 was marked on the one hand by COVID-19-related standstill agreements, covenant resets and state financial support in the form of guarantees, grants and repayable advances; and, on the other hand, new debt origination and refinancing for core assets.

From a legal point of view, the extraordinary termination rights in respect of loan agreements (Article 987 of the Austrian Civil Code) if maintaining the credit relationship becomes unbearable for important cause (*aus wichtigen Gründen unzumutbar*) for a party came into focus for the first time. This relatively new law was introduced as a consequence of the last financial crisis and has been relatively untested to date.

Moreover, not only "LMA style" debt documentation but also Austrian "in-house" loan agreements and the general terms and conditions (GTCs) of Austrian banks typically contain material adverse condition (MAC) provisions that entitle a lender to terminate an agreement and cancel commitments. The GTCs also often foresee the right to unilaterally adjust margins or to request the granting of additional collateral in the material deterioration of the financial condition of a borrower or its assets or a significant decrease of the value of the collateral granted (eg substantial deterioration of stocks held by a borrower).

However, the lender's rights under such MAC provisions and GTCs are limited by law and such provisions could be invalid if not objectively justified. In particular, careful legal assessment is recommended if a MAC event would be based on the occurrence of a crisis event only and thus would not have the immediate (threatening) effect on the financial condition or the business of a borrower, its assets or the granted collateral itself.

It remains to be seen whether lenders would base a termination of a loan solely on this provision, but given that mandatory closures of assets due to COVID-19 are no longer expected to be the norm, it is believed that discussions around this issue will cease.

On the other hand, no specific statutory "force majeure" provisions exist under Austrian law that would entitle a borrower to prevent a MAC termination by a lender in the case of a crisis.

### *New debt/debt origination*

Article 991 of the Austrian Civil Code entitles a lender to refuse payouts if, after the conclusion of a loan agreement, circumstances arise that result in a deterioration of the financial condition of a borrower or respective collateral, provided that such event endangers the repayment of the loan or the payment of interest (also taking potential enforcement proceeds from collateral into consideration). Article 991 was also passed in the context of the last financial crisis and has been relatively untested thus far. It is recommendable to contractually address, specify or exclude the application of Article 991 (which is not mandatory law) when entering into a new financing or amending existing financing as a consequence of a crisis.

*Contributed by:* *Michael Lagler, Arabella Eichinger, Constantin Benes, Laurenz Schwitzer and Marco Thorbauer,* ***Schoenherr***

In 2022, there is expected to be large restructuring processes for asset classes that have been heavily affected by COVID-19. Standstill agreements and state support measures will run out and financing will need to be adjusted to new profitability and business plans. On the originator side, there is willingness and ability to invest. Interest rates are expected to remain low, with the trend moving towards fixed interest rates.

However, loan documentation is becoming more lender-friendly, with covenants becoming tighter, especially with respect to the senior debt capability (eg, LTV-based financing) and transferability in respect for lenders loosening up. It is likely that this will also cause mezzanine financing to emerge for several asset classes in Austria to fill in the new gap from senior debt. From a legal point of view, this will likely increase the complexity of real estate finance deals, as mezzanine structures and intercreditor relationships with senior lenders are still a relatively new product so no general market standard exists, unlike in many other neighbouring countries (Germany in particular). Moreover, significant ad valorem registration costs for mortgages (1.2% of the amount to be secured) require careful deal structuring when handling several creditor classes for a real estate financing.

### *Green finance*

Apart from COVID-19, green finance for assets is on the rise and is definitely here to stay. The Taxonomy Regulation (EU 2020/852) came into force in July 2020 and tasked the European Commission with establishing an actual list of environmentally sustainable activities by defining technical screening criteria for each environmental objective through delegated acts, which is set to be implemented by 2022.

Green finance is already strong on the debt capital markets and bonded loan (*Schuldschein*) side, but is not yet widespread for real estate project finance. Currently, “green” real estate loans are predominantly linked to the mere green certification of the asset (following completion), without real covenant or pricing effect for the financing, and thus are treated rather as a marketing tool. This will change soon though, as the European Green Deal is putting pressure on the industry to reduce $CO_2$ emissions and to channel funds into sustainable investments.

## Real Estate Construction – Uncertain Times

COVID-19 and the consequent economic crisis did not seem to affect the construction industry in Austria significantly in a negative way. However, the new crisis that developed in February 2022, the war in Ukraine, already does have a significant effect on the construction industry, not only in Austria but in the whole of Europe.

Although the contractors’ order books still seem as full as they were in previous years and construction projects keep coming, more and more uncertainty regarding construction costs has arisen. Significant Austrian construction companies are therefore no longer willing or able to offer fixed prices for construction projects, given the current fluctuations of the prices of raw materials and energy.

As fixing prices with construction companies are very important for investors and developers to limit their risks and to be able to provide stable prices for their products, it is expected that this risk will be passed on to the buyers, leading to even higher retail prices. Furthermore, this rise in construction prices will also impact projects already under construction. Depending on the kind of construction agreement concluded between the developer and the construction companies, it is possible that the increase of construction costs is passed on to the developer, potentially making additional financing necessary.

***Contributed by:*** *Michael Lagler, Arabella Eichinger, Constantin Benes, Laurenz Schwitzer and Marco Thorbauer,* ***Schoenherr***

Irrespective of these new challenges, more major projects have recently been, or are about to be, completed, such as TrIIIple (approximately 500 residential units and 670 apartments for students and young professionals with a net floor area of around 70,000 sq m) and Wohngarten (682 apartments with a total usable area of 35,000 sq m) in Vienna.

The completion of many projects has also been recorded by the Austrian statistics office (*STATISTIK AUSTRIA Bundesanstalt Statistik Österreich*), according to which more than 68,100 apartments were completed in 2020 (official figures for 2021 have not yet been published).

The most significant projects in Austria currently still under way or planned are as follows.

- Vienna Twentytwo: currently one of the largest residential projects in Vienna. By 2024-25, a mixed-use tower 155 m high and a residential high-rise of 110 m will be built on an area of around 15,000 sq m in the 22nd district in Vienna. The total net floor area will be approximately 80,000 sq m, containing around 600 new apartments and also a hotel and commercial space. The project is being carried out by a joint venture consisting of SIGNA and ARE - Austrian Real Estate.
- Althan Quartier: a broad mix of offices, co-working spaces, restaurants/bars, shops and apartments is being created, with a total net area of 130,000 sq m, on the site of the former Franz-Josef railway station. The newly created offices are expected to create around 2,500 jobs in the district. The developer is the Austrian company 6B47. Completion of the entire project is scheduled for 2023.
- Wildgarten: 1,100 residential units on approximately 11 hectares at Rosenhügel in Vienna's 12th district are currently under construction. The entire project has a total floor space of around 82,000 sq m and will be completed by 2023. Interestingly, this project does not contain any high-rises but will consist of three buildings, each having up to eight floors. A total of 46,000 sq m of the project site will be a green recreational area.
- Brennerbasistunnel: one of Europe's main infrastructure projects is finally under construction after years of planning. The tunnel will be approximately 55 km long and will establish a new and direct connection between Innsbruck and Franzenfeste through the core of the Alps. When completed, it will be one of the world's longest train tunnels. Completion is currently scheduled for 2028.

### Summary

The Austrian and European construction industry has proved to be crisis-resistant. However, given the new scarcity of construction materials and the rise of construction costs, it is expected that the prices for real property - in particular for residential objects in Austria - will keep on rising, leading to some projects being re-evaluated.

### Real Estate Tax

Within the Austrian tax world, no major game-changers have been impacting real estate transactions over the last year. However, there are two aspects that will definitely have an impact on future real estate transactions from an Austrian tax perspective. On the one hand, a new anti-tax avoidance EU Directive will impact the interposition of property companies being mere shell companies without substance. On the other hand, the Austrian legislator is pushing to introduce tax benefits for green investments. Both aspects will need to be taken into account for current and future real estate transaction structurings.

***Contributed by:** Michael Lagler, Arabella Eichinger, Constantin Benes, Laurenz Schwitzer and Marco Thorbauer,* ***Schoenherr***

### *ATAD III – mandatory reporting of shell companies*

The European Commission published a new draft Directive on 22 December 2021, known as the anti-tax avoidance Directive III ("ATAD III"), which will further prevent tax evasion and avoidance within the European Union caused by the use of shell companies. As a result, such shell companies shall be obliged to report certain facts to the tax authorities; not benefit from double tax treaty benefits (ie, reduction of withholding tax); and not benefit from the Parent Subsidiary Directive.

ATAD III is expected to significantly impact the structuring of cross-border real estate transaction in the future. According to the draft of ATAD III, certain "gateway-criteria" and a so-called "minimum substance test" in combination with reporting requirements will be applied to identify shell companies. If qualified as shell company in the meaning of ATAD III, this qualification could have serious consequences for investment structures that do not perform "actual economic activity" but are used as mere property entities.

Therefore, any real estate transaction structures that include the interposition of shell companies should be analysed from a tax perspective already keeping in mind ATAD III. ATAD III will be implemented into local law until 30 June 2023 and become effective by 1 January 2024. However, the substance requirements must already be met within the year 2022.

### *Green investments*

As climate change is changing taxation regimes all over the world, certain tax benefits in Austria lead the way to sustainable real estate projects. Within the last years, the Austrian government has enacted preferential treatment for the production of renewable energy and carbon-free living, which has been reinforced by the ecological tax reform in 2021. One example of this is the bonus for ecological investments. For assets that can be qualified as "green", the bonus will be available in the amount of 15%. The investments that fall within the scope of ecological investments are still to be defined in more detail in the form of a regulation issued by the Austrian tax authorities. However, such tax benefits that will increase in the future will get more and more attention in real estate transactions and should therefore already now be taken into account in the structuring phase.

***Contributed by:*** *Michael Lagler, Arabella Eichinger, Constantin Benes, Laurenz Schwitzer and Marco Thorbauer,* ***Schoenherr***

**Schoenherr** is a leading full-service law firm in Central Europe. Operating in a rapidly evolving environment, Schoenherr is a dynamic and innovative firm with an effective blend of experienced lawyers and young talents. As one of the first international law firms to move into CEE/SEE, Schoenherr has grown to be one of the largest firms in the region. With 14 offices and several country desks, its comprehensive coverage of the region means Schoenherr offers solutions that perfectly fit the given industry, jurisdiction and company. Schoenherr's real estate team advises clients active in real estate investment and development and management on the full range of real estate services and sectors: commercial, office, industrial, hotel and leisure, health, mixed-use projects, agriculture and forestry.

## AUTHORS

**Michael Lagler** is partner for real estate and managing partner. He mainly focuses on corporate real estate and M&A-driven property transactions in Austria and CEE. Together with Schoenherr's international offices, Michael handles commercial real estate deals, including the acquisition and development of office, leisure, hotel, retail property and nursing homes. Additionally, Michael has had, since the financial crises, a strong focus on distressed transactions, including fire sales of commercial properties, where he regularly teams up with Schoenherr's banking and finance, tax and restructuring teams.

**Arabella Eichinger** is a partner and joined the real estate team of Schoenherr in September 2013. She has an excellent track record in real estate and construction law. As a widely renowned real estate lawyer, she advises on national and international real estate projects and transactions, focusing on residential and hotels in Austria. Arabella studied law at the University of Vienna and was admitted to the Bar in 2003. Prior to Schoenherr, she worked as head of legal at UBM Realitätenentwicklung AG and thereafter she joined Asamer, an international producer of construction materials, where she managed real estate development projects in CEE.

**Constantin Benes** is a partner in Schoenherr's Vienna office and specialises in real estate and construction law. Constantin has represented real estate developers, project financiers, real estate investment funds and institutional real estate promoters. Constantin authors numerous publications focusing on all areas of real estate and commercial civil law. Before joining Schoenherr, Constantin worked as an intern in New York, USA and Salzburg, Austria, dealing with national and international clients. Constantin studied in Graz, Austria (University of Graz; Magister iuris, JD equivalent), and New York, USA (Columbia Law School; LLM, Harlan Fiske Stone Scholar, 2017).

**Laurenz Schwitzer** is a partner in Schoenherr's Vienna office and is part of its banking and finance practice group. Laurenz joined the firm in 2013 and has since amassed vast experience in complex asset financing and financial restructuring processes, with a specialised focus on real estate financing, mezzanine financing, direct lending and green finance. Prior to his engagement at Schoenherr, Laurenz was part of one of the Big Four's corporate finance practices in Vienna.

**Marco Thorbauer** is a counsel at Schoenherr Vienna and has been with the firm since 2016. He has been significantly involved in the development and expansion of the tax practice group in recent years. His main area of practice is national and international tax law. He advises internationally operating companies on tax structuring and tax planning and transactions, as well as tax proceedings. Before joining Schoenherr, Marco worked as an associate in an international law firm in Vienna and Frankfurt (2014-2016). Marco publishes articles and contributes to books in the area of tax law.

## Schoenherr

Schottenring 19
Vienna
A-1010
Austria

Tel: +43 1 534 37 0
Fax: +43 1 534 37 66100
Email: office.austria@schoenherr.eu
Web: www.schoenherr.eu

schönherr
ATTORNEYS AT LAW

# Chambers Guides to the Legal Profession

Chambers Directories are research-based, assessing law firms and individuals through thousands of interviews with clients and lawyers. The guides are objective and independent.

practiceguides.chambers.com