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## **Austria introduces vacancy tax**

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### **Introduction**

In an effort to combat the housing shortage and soaring rents, the Austrian provinces of Salzburg and Styria have passed laws that grant local municipalities the right to tax vacant apartments. In Tyrol, local municipalities must collect the vacancy tax. Commercial buildings are not covered.

While the financial burden resulting from the tax is modest, the administrative hurdles, especially for larger real estate companies operating in various regions, can be significant.

The new tax will have to be considered when drafting lease agreements and sale agreements.

### **Vacant apartments**

The vacancy tax applies to apartments that are not used at all, as well as apartments that are used as a secondary residence (holiday homes) only.

Apartments are considered vacant in Salzburg and Styria if no one has registered their primary or secondary residence at the apartment with the central population register (CPR) for 26 calendar weeks or more in one calendar year. Although the law is unclear, it appears that these do not have to be consecutive weeks. Thus, if the apartment is not used for 15 weeks and then, later that year, for another 12 weeks, the apartment is considered to be vacant.

By contrast, an apartment is considered to be vacant in Tyrol, if it is not used for six consecutive months. While the registration in the CPR may indicate whether or not an apartment is used, this is not an absolute proof in Tyrol.

Not all vacant apartments are subject to the tax. The list of exceptions differs in each of the Acts concerning the matter. As a general guideline, the following apartments are exempt:

- apartments that cannot be used or are being refurbished;
- apartments that cannot be rented out at market rent;
- buildings with two or three apartments, where the owner lives in one of the apartments;
- company flats; and
- apartments that are temporarily unused due to health reasons of the owner.

Additional exemptions apply in each of the Acts. In Salzburg and Styria, the list is non-exhaustive, and the municipalities may exempt additional categories of apartments. In Tyrol, the list is fixed.

### **Tax rate**

It is up to the local municipalities to set the tax rate; the Acts provide general guidelines only. In all of the Acts, the municipalities should set the tax on the basis of the market value of the apartments.

The Styrian Act states that the tax for an apartment of 100 square metres may not exceed €1,000 per calendar year, and it leaves it up to the municipalities to define the tax more closely. In Salzburg, the Act defines upper limits of the tax depending on the apartment's size. Generally, the tax is up to €20 per square metre and year for apartments not older than five years and €10 per square metre and year for other apartments. Tyrol sets both a minimum and maximum tax rate, depending on the size of the apartment. For example, the annual tax for an apartment between 90 and 150 square metres must be at least €45 per square metre and no more than €100 per square metre. In certain municipalities, which have been identified with critical housing problems, the limits are doubled. If the apartment is not vacant but used as a secondary residence, the tax is lower.

### **Entry into force**

While the Act has entered into force in Styria as of 1 October 2022 and will enter into force in Tyrol and Salzburg on 1 January 2023, the vacancy tax will only be collected after the municipalities have enacted the respective regulations.

### **Constitutional aspects**

#### *Lack of competence*

The Constitutional Court has already ruled twice on vacancy tax. In 1985, the Court annulled a law that required owners of vacant apartments in Vienna to offer these to the City of Vienna for rent or else pay a penalty of approximately three times the market rent.<sup>(1)</sup> The Court held that the Viennese government was out of its constitutional boundaries when enacting a vacancy tax.

At the heart of the criticism is that the regulation of (small and midsize) apartments falls within the competence of the federal government and not the provinces. Therefore, a law (also in the form of a tax) that aims to affect the use of such apartments cannot be enacted on a province level.

The provinces may, however, regulate the use of other apartments (eg, large or luxury apartments), and they can levy taxes that are considered too low to have a steering effect on the use of small and midsize apartments.

### *Principle of equality*

The envisaged vacancy tax raises concerns with regard to the principle of equality. The buildings of certain housing associations, non-profit housing organisations and buildings that are owned by the municipality are exempt from the vacancy tax. There seems to be no objective justification of this different treatment.

### **Consequences for agreements**

#### *Lease agreements*

Persons taking up residence in Austria must register their address with the CPR. In practice, however, it is quite common that tenants do not register with the CPR. Although this is an administrative offence, authorities do not actively enforce registration. The registration must be completed by the persons taking up residence themselves. The landlord cannot file the registration on behalf of the tenant.

Therefore, in Styria and Salzburg, where the vacancy tax is levied purely on the fact of whether a residence is registered in the CPR, landlords must henceforth include an obligation for the tenant to register with the CPR in the lease agreement. In Tyrol, this is advisable but not mandatory.

#### *Transactions*

In case the apartment is sold, the purchase and sale agreement needs to address the vacancy, either by including representations and warranties that the apartment was used as primary residence or by providing compensation for the vacancy.

### **Administrative hurdles**

The tax may not represent a large financial burden; it is, however, a huge administrative burden for real estate companies that operate in various provinces.

Persons who are subject to the vacancy tax must submit the respective tax form to the municipality within tight deadlines:

- In Salzburg, they must always be filed by 15 January.
- In Styria, the deadline is 31 March.
- In Tyrol, the deadline is 30 April.

As stated above, the rules as to when the vacancy tax applies are different for each province. For example, in Tyrol, the apartment must be vacant for six consecutive (full) months. In Salzburg and Styria, it must be vacant for more than 26 full, but not necessarily consecutive, weeks. In Salzburg and Tyrol, the apartment is exempt if the owner can demonstrate that it could not be rented out at market price (without regulating how the market price is determined); while in Styria, no such exemption applies. In Salzburg, the tax depends on whether the apartment (not the building) is older than five years; while in Tyrol and Styria, no such distinction applies.

Therefore, in actuality, these administrative hurdles may have more steering effect than the tax itself.

## Comment

These Acts will have little, if any, influence on vacancy rates. There are two main reasons for this.

Firstly, vacant apartments are already a financial burden to their owners, who have to pay for service charges, cost of repairs, property tax and insurance, without being able to recover these costs from tenants or without actually using the apartment. It is unlikely that a few additional euros will change that. The real reason why owners are hesitant to rent out their apartment is the Austrian Rent Act (MRG). This act not only prescribes a minimum term of three years and makes it almost impossible to terminate the lease; in the case of older apartments, this act also contains:

- rent caps;
- far-reaching repair obligations (including the obligation to upgrade existing installations to present standards); and
- easy court access for tenants that allows risk free court proceedings.

Until this is changed, owners will remain hesitant to put their apartment on the market.

Secondly, in the case of Styria and Salzburg, the tax is purely based on the registration with the CPR. In practice, it is quite easy to circumvent this – for example, by registering a family member in the vacant apartment. While this is an administrative offence, penalties are scarce.

In a nutshell, even if the Constitutional Court considers the three vacancy tax laws to be in line with the constitution, there are ways to easily circumvent the vacancy tax due to a poor monitoring mechanism. The vacancy tax is simply too low to be relevant to an owner's decisions and will therefore fail to achieve its intended effect.

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## Endnotes

(1) Austrian Constitutional Court, G 2/85, 12 March 1985.