



## ISSUES RELATING TO FINANCE

### AUSTRIA

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1. **What instruments are used to create a lien on real estate to secure an indebtedness (e.g., a mortgage or deed of trust)?**

A mortgage is the method of creating a lien on real estate. The creation of a mortgage (on real estate) requires a written contract (the signatures of the parties have to be certified by a notary public or by court) and the registration of the mortgage into the land register to become effective.

2. **Describe [national] [state] [territorial] [provincial] or local mortgage recording or other similar taxes payable on making a loan secured by real estate or perfecting a lien on real property.**

For registration in the land register, lien documents have to be concluded in writing and the signatures of the parties have to be authorized by a notary public or by court. According to the Stamp Duty Act, loan agreements are subject to a stamp duty assessed as a percentage of the loan amount. Depending on the type of the loan agreement a stamp duty in the range between 0.8 per cent and 1.5 per cent is triggered. Mortgage agreements are subject to a 1 per cent stamp duty assessed on the basis of the loan value. Austrian stamp duty can be avoided under certain conditions. Furthermore, the required registration of a mortgage in the land register triggers a registration fee of 1.2 per cent of the secured amount. Under very restrictive conditions mortgages can be assigned without payment of additional stamp duty. However, the registration fee of 1.2 per cent for the registration of the new mortgagee basically cannot be avoided.

**3. Describe manner in which a lien secured by real property is foreclosed.**

In order to foreclose immovable collaterals the mortgagee has to file an action and obtain a judgment against the mortgagor. Afterwards the mortgagee can commence foreclosure proceedings against the mortgagor regarding the mortgage.

**4. Describe any significant costs of or impediments to foreclosing a lien on real property.**

According to the Distraint Act, the creditor has to advance the costs of the foreclosure proceedings.

**5. What is the customary time period for foreclosing a lien on real property?**

The time frame for foreclosure proceedings, starting from the time the lender has obtained an enforceable judgment, usually is between one and two years. Foreclosure proceedings are only provided for monetary claims.

**6. Are there [national] [state] [territorial] [provincial] or other local governmental permissions, approvals or licenses required for foreign banks or other foreign lenders to make real estate loans secured by real property? If so, please describe.**

A commercial lender from another jurisdiction can only make loans secured by collateral in Austria if the lender has obtained a license from the financial market authority (FMA) according to the Banking Act. If the lender is admitted for banking businesses in another member state of the EEA, no further license is required in Austria. However, in this case, as a precondition to be entitled to provide financial services in Austria, a notification procedure between the responsible authority of the home member state and the Austrian FMA has to be performed (the authorization for the provision of financial services cross-border within the EEA is known as the "European Passport").

**7. What legal limits are imposed on the amount of interest which may be charged on a loan secured by real property?**

Interest rates will be considered as usurious if they are outstandingly high and not justified. Austrian courts decided that an interest rate of 10.33 per cent p.a. cannot be qualified as usurious. The consequence of usurious interest rates is the voidness of the loan agreement. According to the Usury Act the borrower can repay the loan in instalments as provided for the loan in the void loan agreement. In this case the borrower has to pay statutory interest of twice the base lending rate issued by the National Bank (OENB) as applicable at the time the loan agreement was concluded (as of July, 2008, the base lending rate amounts to 3.70 per cent). If the borrower is a consumer and the lender an entrepreneur, the Consumer Act provides for the voidness of interest clauses according to which in case of a default the consumer would have to pay an interest rate exceeding the interest rate provided for due payment for more than 5 per cent p.a.

**8. Describe any laws that restrict the ability to make a borrower or guarantor personally liable for indebtedness secured by real property.**

If the guarantor is a consumer and the lender a commercial lender, the Consumer Act provides for an obligation of the lender to inform the guarantor of the economic situation of



the debtor, if the lender knows or should have known that the debtor presumably will not be able to repay the debt. Otherwise the guarantor can only be held personally liable if the guarantor had issued the guarantee despite such information. Furthermore, the Consumer Act provides a judicial mitigation right concerning the personal liability of the guarantor, if the lender knows or should have known that the guarantee is in an inequitable disproportion to the guarantor's financial ability. Furthermore, the Distraint Act provides that the minimum living wage is unseizable.

