

# Commercial Real Estate in Austria: Overview

by Philipp Frenzl, Völkl Rechtsanwälte GmbH

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A Q&A guide to commercial real estate law in Austria.

The Q&A gives a high-level overview of real estate investment structures; restrictions on foreign ownership; title; tenure; sale of real estate; real estate tax; real estate finance; leases; and planning law.

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## Real Estate Investment

### Investment Structures

1. What entity types and acquisition structures do investors typically use for real estate investment in your jurisdiction?

### Common Entity Types

**Partnerships.** The advantage of a partnership is risk-sharing between several partners. Disadvantages include a heavy tax burden and the partners' personal liability.

**Property companies (limited company).** Advantages include tax savings, risk limitation, and flexibility. Disadvantages include that payments of any profits generated by the business to shareholders require a shareholders' resolution.

**Foundations.** These have tax-saving and preservation of property advantages but there is no flexibility and the purpose of the foundation must be ensured.

**Joint ventures.** In a joint venture, several partners share the investment and business risks and competitive advantages can arise from the co-operation. Disadvantages include the partners' limited economic independence, requirements to co-ordinate efforts, and possible conflicts of interest.

**Real estate funds.** These are more suitable for long-term investments, as their value largely arises from appreciation. Real estate funds allow investors can participate in the real estate market without having to buy properties, but there is also a risk of partial or total loss.

### Real Estate Investment Trusts (REITs)

REITs are listed investment vehicles that bundle funds from investors to buy real estate shares and properties such as hotels and shopping malls.

As REITs pass on about 90% of their income to investors in the form of dividends, they can provide an attractive investment return. REIT investors are treated like shareholders for tax purposes.

Internationally, REITs have been a common structure for some time. In Austria, this form of investment vehicle has not yet found its way into the legal system. For the purpose of indirect real estate investments, the main vehicles available are real estate companies and open-ended and closed-ended real estate investment funds.

## Common Acquisition Methods

Common acquisition methods include asset purchases and share purchases of companies holding real estate.

In an asset deal, the real estate itself is directly transferred from the seller to the buyer. Real estate transfer tax (3.5%) and the Land Registry registration fee must be paid. One advantage is that the buyer has more control over the specific property and directly acquires ownership of it.

One advantage of a share deal is the lower tax burden. Generally, the real estate transfer tax rate is reduced to 0.5%. It is possible to avoid payment of real estate transfer tax if certain conditions are met. However, significant expenses may be incurred to conduct due diligence, transfer the shares to a new shareholder, and record the share deal with the Commercial Registry.

## Restrictions on Foreign Ownership and Occupation

2. Are there restrictions on foreign ownership or occupation of real estate (including foreign ownership of shares in companies holding real estate)? Are there restrictions on foreign lending, security, and guarantees to buy or occupy real estate in your jurisdiction?

## Foreign Ownership of Real Estate

Austria is divided into nine federal states. Each state has its own real estate law.

EU citizens can acquire real estate under the same conditions as Austrian citizens. This means that any purchase restrictions that may exist in the individual federal states apply to all parties. Special rules apply to non-EU citizens under state laws. Detailed information is provided by the state governments. The Land Transfer Act (*Grundverkehrs-gesetz*) is regulated independently by the states.

In most federal states, there are restrictions on the purchase of pure holiday homes. Non-EU citizens must obtain the consent of the competent authority in the federal state before concluding a sales contract. This permit must be submitted to the Land Registry before the final transfer of title takes place.

Additionally, in most federal states, legal persons (such as companies) are regarded as foreign citizens either if they have their statutory seat in a non-EU country or are controlled by non-EU citizens. Consequently, there are also restrictions on indirect foreign ownership.

In Austria, it is mandatory to disclose the beneficial owners of companies, partly due to anti-money laundering regulations.

## Foreign Lending, Security, and Guarantees

Foreign investors must comply with strict money laundering provisions. Generally, the competent authority identifies beneficial owners and the origin of the money (sections 5 *et seq.*, Financial Markets Anti-Money Laundering Act (*Finanzmarkt-Geldwäschegesetz*)).

However, there are no restrictions on the registration of property with a loan from a foreign lender. Registration is possible if the loan is in the currency of an EU or EEA state.

In principle, there are no restrictions on foreign European securities. However, for property development projects, the guarantor must be a domestic credit institution (section 8, Property Development Contract Act (*Bauträgervertragsgesetz*)).

## Title to Real Estate

### Title Registration

3. How is title to real estate evidenced? What is the system for public registration/recordation of title? Is electronic access and electronic conveyancing available?

### How Title is Evidenced

Ownership rights to real estate are registered in the land register. The Land Registry maintains all the details of the property and records financial charges and other matters that affect the title. To acquire a property title, registration in the Land Registry is mandatory.

### Public Registration/Recordation System

See above, *How Title is Evidenced*.

### Electronic Access and Conveyancing

Queries relating to the land database can be filed online via clearing houses and the portal of the *Federal Office of Metrology and Surveying*. An excerpt of the land register can be obtained subject to a charge. A query can also be raised through a lawyer. It is possible to obtain a public deed on the state land register for submission to an authority from the (arbitrary) district court (land registry department) or a notary public.

Electronic conveyancing is not available in Austria. The sale contract must be certified by a notary public and filed at the competent district court for entry into the land register.

4. What are the main information and documents registered/recorded in the public registration/recordation system? Can confidential information or documents be protected from disclosure?

## Main Information and Documents

The land register provides reliable information on all legal matters affecting a property. The main purpose of the land register is to create and maintain security for legal relationships relating to land.

Accordingly, all information that is important to determine the content and scope of a right is recorded in the land register. In particular, the property and right holders must be clearly defined and the rights that relate to the property must be clear and unambiguous, including third party rights (for example, mortgages).

According to the material publicity principle, the content of the land register is fundamentally correct (public belief). Content and rights listed in the land register are presumed to exist and unregistered rights are presumed not to exist.

Only the most necessary documents/information must be submitted to the Land Registry for registration, including:

- The certified purchase contract with the name and date of birth of the new owners.
- Description of the real estate.
- Matters affecting the title, including third party rights.
- Purchase price.

## Confidential Information

Confidential information cannot be protected from disclosure in the public land register, because its purpose is to create and maintain security for legal relationships relating to land. However, only absolutely necessary information should be sent to the public Land Registry.

5. Is there a state guarantee of title? Are authorities that manage public title registration/recordation systems liable for title registration errors? Is title insurance available and is it commonly used?

## State Guarantee of Title and Compensation

There is no state guarantee of title, but liability for errors can arise under the Public Liability Act (*Amtshaftungsgesetz*).

Under certain circumstances, an action for cancellation of the register entry is permitted. A cancellation action is only admissible if there is an incorrect entry that contradicts the substantive legal position. Only a claim under a contract can prevent entitlement to file a claim for cancellation.

In addition, a notary may also be liable for mistake.

## Title Insurance

Title insurance is not available in Austria.

## Types of Tenure

6. How can real estate be held (that is, what types of tenure and other main ownership rights exist over land)?

### Freehold Title/Absolute Ownership

Real estate can be held through sole ownership, co-ownership, or condominium ownership. In all cases, ownership is registered by the Land Registry (section 4, Land Register Act (*Allgemeines Grundbuchsgesetz 1955*) (GBG)). Two natural persons can also own a condominium together.

### Leasehold Title

Real estate can be held through leasehold title, in which case the lessee is usually not registered in the land register. Depending on the type of leasehold, the lease is either governed by the generally civil law rules (sections 1091 *et seq.*, Civil Code (*Allgemeines bürgerliches Gesetzbuch*)) or the specific rules of the Tenancy Act (*Mietrechtsgesetz*) (sections 1 *et seq.*, Tenancy Act).

### Condominium Ownership/Equivalent

Condominium ownership (or equivalent) is available. The Condominium Act (*Wohnungseigentumsgesetz*) contains special provisions governing this type of tenure.

### Other Rights

Other rights over land include:

- Easements (section 473, Civil Code).
- Usufruct (section 509, Civil Code).
- Building rights (Building Law Act (*Baurechtsgesetz*)).
- Superficies (section 435, Civil Code).

## Sale of Real Estate

### Preliminary Agreements

7. What types of preliminary agreements are typically used in the sale of real estate and are they legally binding?

When a purchase offer is made, the buyer makes a binding declaration that it intends to purchase the property. The declaration includes all the essential conditions of the sale, including the purchase price, burdens, and delivery date.

Commercial negotiations that take place before the purchase offer, which are necessary to negotiate purchase conditions, are not legally binding.

When a binding offer is submitted, the property is not yet formally purchased. The buyer is only legally obliged to purchase the property when the offer is accepted by the seller. If the buyer withdraws after signing a binding offer (for example, because it cannot secure financing), the seller is entitled to compensation under civil law rules.

Other preliminary agreements that are typically used in the sale of real estate include the following:

- Preliminary contract/punctuation.
- Letter of intent.
- Declaration of commitment.

Generally, these documents are not legally binding.

### Exchange and Completion/Closing

8. When does the sale become legally binding? What are the main documents and formalities for exchange and completion/closing of the sale? When does title transfer? Is notarisation required?

### When Legally Binding

The parties are legally bound to proceed with the sale after the offer made by one party is accepted by the other party. However, to transfer title to the buyer, a written contract must be certified by a notary public and filed with the competent district court for entry in the land register.

In Austria, it is common to engage a trustee, usually a lawyer, who will ensure that title is only transferred to the buyer when they have paid the purchase price to the trustee. The trustee then files the purchase contract for entry into the land register and forwards the purchase price to the seller.

A deposit is not customary in Austria but can be agreed.

## Completion/Closing Documents

The main documents and arrangements required for completion of the sale are:

- A real estate purchase contract.
- Certification (notarisation) of the contract.
- Declaration of cancellation of liens.
- Proof of payment of real estate transfer tax and the court fee.
- The land registry entry.

Obtaining security, such as mortgages or priority notices for disposals, can be done in the period between exchange of contracts and completion.

## When Title Transfers

Title transfers once it is registered in the land register.

## Notarisation

The real estate purchase contract and the declaration of cancellation of liens must be notarised.

## Environmental Issues

9. Briefly outline the environmental legislation and potential liability in a purchase of real estate. Is it common to carry out environmental due diligence and obtain environmental insurance? How is environmental liability typically dealt with in the sale contract?

## Environmental Legislation and Liability



The conservation of nature and landscape falls within the competence of the federal states in Austria. Each federal state has its own Nature Conservation Act. There are also regulations on the protection of nature and certain species and special regulations, such as for the authorisation of certain projects.

The Industrial Code (*Gewerbeordnung*) governs the construction, operation, ongoing review, and discontinuation of operating facilities and is therefore one of the most important environmental laws in Austria.

Other laws (such as environmental and water law) must also be considered. For some new projects, an environmental impact assessment must be carried out.

Depending on the legal basis for the claim, either the polluter/holder of the polluting source or the landowner may be held liable for environmental damage. Whether the buyer is liable for environmental damage that occurred before the sale is usually determined by the purchase contract.

## **Environmental Due Diligence and Insurance**

It is not common to carry out environmental surveys and searches and to secure environmental insurance, but it may be necessary and useful.

## **Environmental Issues in the Sale Contract**

Environmental liability can be regulated by an indemnification clause in the sale contract. The parties can also include a condition precedent under which the contract will only come into force if all environmental audits have been successfully completed.

## **Real Estate Tax**

### **Stamp Duty/Transfer Tax**

10. Is stamp duty/transfer tax (or equivalent) payable on a purchase of real estate? Who pays and are there any exemptions? Does it apply to the transfer of shares in a company holding real estate?

### **Stamp Duty/Transfer Tax**

Real estate transfer tax and a court fee are payable on the purchase of real estate.

### **Who Pays**

The buyer must pay real estate transfer tax of 3.5% of the purchase price and a court fee of 1.1% of the purchase price. The parties can agree in the contract that the seller will pay transfer tax and the court fee. However, both parties are usually liable to the state.

## Exemptions

Not applicable.

## Transfer of Shares

Purchasing a company that owns real estate can result in liability to real estate transfer tax at a rate of 0.5%. Tax liability is triggered on either:

- A transfer of at least 95% of the shares in a real estate owning company or partnership.
- A transfer in connection with a corporate restructuring.

## Tax on Seller's Profits/Gain

11. Is tax imposed on a seller's profit or gain on a sale of real estate? Are there any exemptions? Does it apply to a transfer of shares in a company holding real estate?

## Tax on Seller's Profits/Gain

The seller may be liable to real estate income tax. The rate of real estate income tax is 30% of the sales profit.

## Exemptions

Several exemptions are available (for example, if the property was the seller's main residence for five years within the last ten years or for two years before the sale).

## Transfer of Shares

Income from the sale of shares is considered income from capital and is subject to income tax at a rate of 27.5%.

## Value Added Tax (VAT) or Equivalent

12. Is VAT (or equivalent) payable on a sale of real estate? Who pays? Are there any exemptions?

### **VAT/Equivalent**

The sale of real estate is exempt from VAT, but the seller can voluntarily subject the sale to VAT (20%). This only makes sense if the buyer is entitled to input tax deduction.

### **Who Pays**

As a rule, the seller invoices VAT and the buyer must pay for it. In some cases, the buyer is entitled to input tax deduction.

### **Exemptions**

Not applicable.

### **Municipal/Local Taxes**

13. Are municipal/local taxes paid on the occupation or ownership of business premises or business ownership?  
Are there any exemptions?

Municipal tax is paid on wages paid to employees working in inland business premises (section 1, Communal Tax Act (*Kommunalsteuergesetz 1993*)).

Additionally, owners of residential and commercial buildings are liable to property tax (*Grundsteuer*). This is a municipal tax levied either once a year or quarterly. The taxable basis is the assessed value of the real property.

There are specific exemptions from property tax in each of the nine federal states.

## **Real Estate Finance**

### **Secured Lending Involving Real Estate**

14. Briefly outline the typical security package required by lenders in relation to commercial real estate lending. How are the most common forms of security interest relating to real estate created and perfected? Is there a mortgage tax/registration fee?

## Typical Security Package

There are two types of security, *in personam* and *in rem*. *In personam* security means that a certain person can be made liable for a debt, while *in rem* security describes a right to enforce a claim against specific assets. Anything that is of value (such as cars, real estate, insurance, bank accounts, or salary) can be used as *in rem* security.

In the case of *in personam security*, repayment is borne by the borrower itself, a co-debtor, or a guarantor, depending on the assets and solvency of the participants.

Typically, lenders require *in rem* security in the form of a mortgage. Lenders may also require a co-debtor or guarantor.

## Common Forms of Security: Creation and Perfection

A mortgage is a special form of pledge (*in rem* security) under which real estate is pledged by the borrower, a co-debtor, or a guarantor, to secure the loan amount. Several consecutive creditors are successively entered in the land register in ranking order.

For a mortgage to be valid and enforceable, the notarised mortgage contract must be filed with the competent district court for entry in the land register.

## Mortgage Tax/Registration Fees

To register a mortgage in the land register, a court fee of 1.2% of the loan amount must be paid, as well as costs of certification. There are no methods commonly used to reduce the amount of mortgage tax.

## Lenders' Remedies

15. Briefly outline the main remedies for lenders in relation to secured real estate if the borrower defaults on the loan. What is the effect of the borrower's insolvency on the lender's remedies?

## Lenders' Remedies

If the borrower must pay their debt in instalments, the lender usually reserves the right, in the event of non-payment of instalments or ancillary claims, to demand immediate payment of the whole outstanding debt (acceleration of maturity date), after having given a reasonable additional period of time to the borrower to comply with their obligations.

In insolvency proceedings, lenders can realise the real estate outside of court proceedings if all creditors agree to withdraw the real estate from the insolvency proceeding. In this case, a sale by public auction is not necessary, but the owner can sell by private auction.

In regular execution proceedings, lenders can only realise in a formal court-directed process; out-of-court realisation is not available for immovable property (section 466, Civil Code).

### **Effect of the Borrower's Insolvency**

In the case of a lien, the lender has a right of segregation in the event of the borrower's insolvency (section 48, Insolvency Code (*Insolvenzordnung*)). The claim underlying a right of segregation must therefore be paid to the full extent or to the extent of the segregation right. If a claim is not fully covered by an existing right of segregation, the unsecured residual claim can be filed in insolvency proceedings.

A lender who benefits from a mortgage (*in rem* security) can realise the real estate to cover their claim against an insolvent borrower.

## **Real Estate Leases**

### **Negotiation of Leases**

16. Are commercial lease provisions regulated or freely negotiable? Which legislation applies?

Contractual lease provisions are freely negotiable but must not violate standards of public decency (section 879, Civil Code). In addition, the lease must comply with the Tenancy Act and the Civil Code.

As a rule, the Tenancy Act applies to buildings with several apartments that were built before 30 June 1953 without public funding and to rental properties owned by landlords if the building was built before 8 May 1945. There are numerous exceptions where the Tenancy Act does not apply. The Civil Code applies on a subsidiary basis and in cases where the Tenancy Act does not provide for any regulations.

When buying an apartment from a co-operative or a former co-operative, the rent amount must comply with the Limited Profit Housing Act (*Wohnungsgemeinnützigkeitsgesetz*).

### **Rent Payments**

17. At what intervals is rent usually paid in a business lease? How are rent levels usually determined and reviewed?

## Rent Payment Intervals

Rent is usually payable in advance on the fifth of every month, although the parties can agree otherwise.

Rent can be set freely, but the Tenancy Act and the Limited Profit Housing Act sets maximum limits that must not be exceeded. The rent consists of the main rental charge plus operating costs and any special expenses (for example, lift operating costs and reasonable remuneration for rented furnishings).

## Rent Review

The Tenancy Act and the Limited Profit Housing Act sets maximum limits that must not be exceeded. In other cases, a change requires the agreement of the tenant and landlord. Rent cannot be increased unilaterally either under the Tenancy Act or the Civil Code. Only a small adjustment for inflation is allowed.

18. Is stamp duty and VAT (or equivalent) payable on rent?

Rent payable under residential leases concluded since 11 November 2017 is not subject to any charges (not applicable to leases of business premises). Apartment rental agreements concluded before this date were subject to a fee. Rent is otherwise subject to 10% VAT, which must be paid by the tenant.

Rent of commercial premises is not subject to VAT, but the landlord can opt for VAT in certain circumstances. In this case, VAT must be paid by the tenant at a 20% rate.

19. Is a rent security deposit or other security usually required by the landlord?

A rent security deposit equivalent to three months' rent is common and must be set out in a specific contract. The law does not limit the amount of a rent security deposit. The courts usually allow deposits of up to six months' rent. However, a higher deposit may be allowed in certain cases.

The landlord must invest the deposit profitably.

In principle, the landlord can also request other forms of security, such as a bank guarantee, but this is not common in Austria for residential lease contracts.

## Length of Term and Security of Occupation

20. Is there a typical length of lease term or restrictions on the duration of a lease? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term?

### Length of Lease Term

There is no typical length of lease term. A lease can be temporary or indefinite.

A temporary lease must last for at least three years (section 29, Tenancy Act). A shorter term is not legally effective and the contract will be presumed to be concluded for an indefinite term. There is no maximum length of term and many contracts are concluded for three, five, or ten years. There is no minimum term under the Civil Code.

The term of leases for private detached and semi-detached houses can be freely agreed.

### Security of Occupation

If the lease is temporary, the tenant typically has no right to renew it. Tenants' occupation rights are set out in sections 29 to 36 of the Tenancy Act.

A fixed-term contract governed by the Tenancy Act can be extended. The new term must be at least three years and be recorded in writing.

A temporary lease ends when the term expires. During this period, early termination under either the Tenancy Act or the Civil Code is only possible by extraordinary termination. If the lease is indefinite, extraordinary termination is required under the Tenancy Act. Under the Civil Code, ordinary termination can be used. Ordinary termination is subject to a notice period, while extraordinary termination can be requested with immediate effect in cases of serious breaches.

### Disposal

21. What restrictions typically apply to the disposal of the lease by the tenant?

## Assignment and Subletting of the Lease

A tenant can assign or sublet the lease with the landlord's consent. Assignment and subleases can be regulated by the contract. However, provisions prohibiting subletting are only permitted in residential leases subject to the Tenancy Act (section 11, Tenancy Act). There may be restrictions for subsidised residential premises.

For residential leases subject to the Tenancy Act, the principle is that the sale of the property does not terminate lease contracts. The new owner is bound by all the terms of the lease and cannot unilaterally terminate the lease.

## Group (Affiliate) Sharing

In principle, only the tenant can use the premises. Sharing of premises with companies in the same group usually requires a specific agreement between the landlord and the tenant.

## Legal Reorganisation or Transfer/Sale of the Tenant

For leases that are not subject to the Tenancy Act, a legal reorganisation or transfer/sale of the tenant entitles the landlord to terminate the lease. The landlord must compensate damages suffered by the tenant as a result of the termination. However, a contract entered in the land register remains valid.

22. Does a landlord or tenant retain any liability under the lease after the lease is assigned?

The parties' retained liability after the lease is assigned depends on whether there has been any breach of the lease or whether the parties have any other legal claims.

## Landlord's Remedies and Tenant's Insolvency

23. What remedies are available to a landlord for a breach of the lease by the tenant? On what grounds can the landlord usually terminate the lease? What is the effect of the tenant's insolvency?

## Landlord's Remedies and Grounds for Termination

The landlord can only terminate the lease early for good reasons, including mainly:

- Non-payment of the rent despite reminders.



- Crucially disadvantageous use of the property.
- Denial of services by the tenant.
- Rental of the property to third parties.

(Section 30, Tenancy Act.)

Under the Tenancy Act, rental agreements can only be terminated by the landlord by court order (section 33, Tenancy Act). Under the Civil Code, there are no mandatory rules regarding termination. Therefore, the contractual provisions apply or, if the lease is silent, the default provisions of the Civil Code apply.

Other landlord's remedies for breach of the lease include a claim for damages (if the tenant culpably causes damage to the landlord).

### **Effect of the Tenant's Insolvency**

The tenant's insolvency does not allow the landlord to terminate the lease.

A tenant's insolvency imposes a stay on enforcement proceedings against the tenant for unpaid rent and other amounts (section 7, Insolvency Code). Claims for unpaid rent that was due before the insolvency date is treated as an insolvency claim, while claims for unpaid rent that becomes due after the insolvency date is treated as a mass claim and will be satisfied first (section 46, Insolvency Code). Insolvency proceedings are governed by the Insolvency Code.

### **Planning and Development Controls**

24. In what circumstances can local or state authorities purchase property compulsorily (expropriation/ eminent domain)? Is the purchase price or compensation based on market value?

### **Compulsory Purchase/Expropriation**

Local and state authorities can only purchase business premises compulsorily when the public interest outweighs private interests. Different laws apply depending on the reason for the expropriation, for example, section 365 Civil Code applies as a general rule.

### **Compensation**

In the event of expropriation, the purchase price is based on market value. Sales for the purpose of expropriation are tax exempt.

25. What authorities regulate planning control and which legislation applies?

There are various regulations on planning control, both at the state and federal level. Responsibilities (whether federal or state) are regulated by the Federal Constitutional Act (Articles 10 to 15, Federal Constitutional Act).

Historic buildings are protected by the Monument Protection Act (*Denkmalschutzgesetz*) (a federal law).

26. What are the main authorisation and consultation procedures in relation to planning consents?

## Initial Consents

Since the process varies from state to state, it is recommended to contact the appropriate people in the relevant state.

Generally, a written application for construction must be submitted to the competent authority to obtain a permit for the execution of the project.

The building authority of first instance (in Austria, the mayor) clarifies relevant facts involving experts from different departments. These include building experts from many departments including the district construction office, as well as experts in landscape, traffic, conservation, regional planning, building law, agriculture, and health issues.

An administrative decision must be made within six months (section 73, General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz 1991*)).

The building permit expires after a set deadline if the project is not started. The building must also be completed within a certain period. Depending on the state, the deadlines can be extended by application.

## Third Party Rights and Appeals

Depending on the construction project, the neighbours will be notified of it. In certain circumstances, a construction negotiation must be held (in certain states). During the construction negotiations, all persons and authorities involved are given the opportunity to assert their rights and interests.

An administrative decision can be challenged by the parties through an appeal. The first instance appeal body is either the competent state administrative court or the Federal Administrative Court. In the last instance, appeals are heard by the Supreme Administrative Court or the Constitutional Court.

**Contributor Profile**

**Philipp Frenzl, Partner**

**Vökl Rechtsanwälte GmbH**

**T** +43 1 934 60 68

**E** [p.frenzl@voelkl.partners](mailto:p.frenzl@voelkl.partners)

**W** [www.voelkl-partners.at/en](http://www.voelkl-partners.at/en)

**Professional qualifications.** Lawyer, Austria

**Areas of practice.** Real estate; corporate; sports law; banking; capital markets defence/institutional investors; commercial criminal law.

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