

## Real Estate - Austria

### New act affects withdrawal rights on real estate agreements

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#### Introduction

Parliament recently passed a bill to implement the EU Consumer Rights Directive (2011/83/EC). Among others things, the new Distance Contracts and Off-Premises Contracts Act deals with consumers' right to withdraw from certain contracts concluded outside the trader's ordinary place of business and those concluded using distance communication. Unfortunately, the new act does not create a uniform system applicable to all types of agreement, but rather creates two new regimes that complement the regimes already in place. The new act applies to agreements concluded after June 13 2014. This update focuses on the effect of the act on real estate-related agreements.

#### Consumer contracts

The new rules apply to agreements concluded between traders and consumers. The Austrian definition of a 'consumer contract' is broader than the European definition in two instances:

- Persons intending to start a business are considered consumers.
- Certain legal entities – such as the community of owners of a condominium property – are considered consumers.

#### Right to withdraw from a contract

The Consumer Protection Act contains a general consumer right to withdraw from off-premises contracts. In an attempt to harmonise these rules with the rules contained in the new Distance Contracts and Off-Premises Contracts Act, the act modifies the pre-existing rules. Pursuant to these rules, consumers can withdraw from any contract that has been concluded outside the trader's ordinary place of business or outside the trader's booth at a trade fair or marketplace.

The consumer can exercise this right within 14 days. Where there is a contract on the delivery of goods, this 14-day period commences on receipt of the goods. In all other cases, the 14-day period commences on execution of the agreement, provided that the consumer receives certain information on the trader, contract and the right to withdraw from the agreement. If the consumer is not provided with this information, the right to withdraw from the agreement ends 12 months and 14 days after execution of the agreement (or delivery of the goods).

The right to withdraw from the agreement does not apply in the following cases:

- if the consumer has initiated contact with the trader;
- if no consultations between the consumer and the trader have been made before the execution of the agreement, or if the trader was not personally present when the consumer concluded the

- agreement, except in cases where the trader exerted pressure on the consumer; and
- certain agreements of little value.

Most importantly, the right to withdraw a contract no longer applies to agreements falling under the scope of the Distance Contracts and Off-Premises Contracts Act.

### **Real estate-related rights to withdraw from a contract**

The Consumer Protection Act entitles consumers to withdraw from a rental or purchase and sale agreement, provided that:

- the consumer has executed the agreement on the same day that he or she first visited the premises; and
- the consumer intends to assume his or her primary residence at the premises.

This right remains unchanged by the new act.

### **New rules on distance contracts and off-premises contracts**

The act applies to distance contracts and off-premises contracts concluded between a trader and a consumer.

#### ***Off-premises contracts***

In line with the directive, 'off-premises contracts' are defined as any contract between the trader and the consumer:

- concluded in the simultaneous physical presence of the trader and the consumer in a place that is not the trader's business premises;
- for which an offer was made by the consumer and that is concluded in the simultaneous physical presence of the trader and the consumer in a place that is not the trader's business premises;
- concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place that is not the trader's business premises and in the simultaneous physical presence of the trader and consumer; or
- concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer.

Broker agreements and certain rental agreements are typically concluded in an off-premises situation as described in the first three points above and thus typically fall within the scope of the act.

#### ***Distance contracts***

'Distance contracts' are defined as contracts concluded between the trader and consumer under an organised distance sales or service provision scheme, without the simultaneous physical presence of the trader and consumer and with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.

Many estate agents offer their services through online platforms. Contracts concluded by those agents are considered distance contracts.

#### ***Exceptions***

The act contains a list of contracts to which it does not apply. This list is based on the exceptions listed in Article 3 of the directive. In particular, the act does not apply to contracts:

- for social services, including social housing;
- for the creation, acquisition or transfer of immovable property or of rights in immovable property;
- for the construction of new buildings, the substantial conversion of existing buildings and for rental of residential accommodation;
- that fall within the scope of EU Directive 2008/122/EC on the protection of consumers regarding certain aspects of timeshares, long-term holiday products, resale and exchange contracts; and
- that are established by a public office holder who has a statutory obligation to be independent and impartial and who must ensure – by providing comprehensive legal information – that the consumer concludes the contract only on the basis of careful legal consideration and with knowledge of its legal

scope.

This list excludes many real estate-related contracts from the requirements of the new act. Others (ie, broker agreements concluded by estate agents) fall within the scope of the act. Surprisingly, rental agreements for purposes other than residence are also covered by the act; although, from an Austrian law perspective, they would qualify as agreement for neither the delivery of goods nor the provision of services.

### **Pre-contractual information**

The act contains detailed information requirements that must be met by the trader. The requirements for off-premises contracts differ from those for distance contracts. The information provided by the trader automatically becomes part of the agreement, which is subsequently concluded between the trader and the consumer. The consumer must expressly agree to any deviations from this information.

### **Right to withdraw**

The new act grants the consumer a 14-day period to withdraw from a distance or off-premises contract without giving any reason.

For service agreements, this 14-day period commences on the day that the contract concludes. For sales agreements, the 14-day period commences when the consumer acquires physical possession of the goods (subject to special rules for certain contracts).

The act provides for a 12-month extension of the right of withdrawal period if the trader has not provided all the information required, specifically information about the conditions, time limit and procedures for exercising the right of withdrawal or the model withdrawal form set out in the annex to the act.

Where a consumer exercises the right of withdrawal, he or she is under no obligation to pay for the services provided by the trader, unless the consumer has expressly asked for the provision of the services before the end of the withdrawal period and has thereby acknowledged that he or she will lose the right of withdrawal once the trader fully performed the contract.

Where a consumer exercises the right of withdrawal after having made such a request, he or she must pay the trader an amount that is proportional to what has been provided until the time that the consumer has informed the trader that he or she is exercising the right of withdrawal, in comparison with the full coverage of the contract.

### **Comment**

It seems paradoxical that an act which intends to increase the information available to consumers before concluding a contract at the same time creates a complex set of rules that are difficult to understand even for learned scholars and lawyers. For example, contracts concerning the substantial conversion of existing buildings are excluded from the new act and thus fall within the scope of the pre-existing legislation. Contracts concerning refurbishment works that are not considered substantial fall under the new regime. The act gives no indication as to what is considered 'substantial' and what does not meet this test.

Moreover, the act leaves many questions unanswered with regard to broker agreements. As the real estate market is a fast-paced market, it is highly likely that estate agents will ask their customers to sign a release form instructing them to perform the contract immediately. With some effort, the estate agents will be able to provide the consumer with the information as set out in the new act. If, however, the consumer exercises his or her withdrawal right within the 14-day period, it is unclear whether and how the estate agent will be compensated. As estate agents typically work on commission, in the absence of success, the agent will receive no compensation. Even if the estate agent facilitates the conclusion of a contract, it is uncertain whether this entitles the estate agent to claim his or her commission in cases where he or she has named an interested party before the consumer has exercised the right to withdraw and where the agreement with the interested party is concluded after the consumer has exercised the right to withdraw. In such cases, the estate agent has already provided all the services that he or she owes under Austrian law (ie, naming an interested third party), but the commission is not yet due because the agreement with the interested third party is not yet concluded. It remains to be seen how the courts will handle this.

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