



The Legal 500 Country Comparative Guides

Austria: Insurance & Reinsurance

This country-specific Q&A provides an overview to insurance & reinsurance laws and regulations that may occur in Austria.

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1. How is the writing of insurance contracts regulated in your jurisdiction?

Insurance contract law is largely legally determined in Austria. In general, “insurance contract law” refers to those provisions that regulate the insurance sector under private law. Furthermore, there are special regulations in the field of social insurance. However, the latter will not be discussed in detail here. The legal framework conditions for the conclusion of an insurance contract are first of all determined by the general civil law provisions of the General Civil Code (ABGB). Based on this and partly amending it, the Insurance Contract Act (VersVG) contains special regulations that go into the particularities of the insurance contract in more detail. The VersVG provides for general provisions which are relevant to all insurance contracts; however, the rear sections of the Act then contain special provisions which specify different provisions for each class of insurance. A special characteristic of Austrian insurance contract law can be found in the field of motor vehicle insurance. For certain vehicles there is a mandatory legal obligation to take out liability insurance. This circumstance is accompanied by the fact that the framework of the mandatory liability insurance contract to be concluded is tightly defined and there is almost no scope for deviating agreements. The legal basis for motor vehicle liability insurance contracts can be found in the Motor Vehicle Liability Insurance Act (KHVG).

2. Are types of insurers regulated differently (i.e. life companies, reinsurers?)

The regulatory provisions are primarily contained in the Insurance Supervision Act 2016 (VAG 2016), which in its current version implements the Solvency II Directive of the European Union. The supervisory provisions set forth therein, which are monitored by the Austrian Financial Market Authority (FMA), are primarily aimed at protecting policyholders and insured persons. In CC comments -16 January 2020 this respect, the supervisory provisions apply equally to all insurance undertakings; even reinsurance undertakings are subject to the regime of VAG 2016. Nevertheless, the different insurance lines are also subject to different regulatory requirements, which becomes particularly apparent when comparing a property insurance with a life insurance. When taking out a property insurance policy, the policyholder usually pays only a risk premium; life insurance policies, on the other hand, often not only protect against the risk of death, but also aim to achieve a savings goal. Accordingly, there are partly different regulatory requirements.

3. Are insurance brokers and other types of market intermediary subject to regulation?

Depending on the type of insurance mediation, different legal provisions apply. The Austrian legal system essentially distinguishes three different forms of insurance mediation. These include the insurance broker, the insurance agent and such intermediaries who are directly employed by the insurance company for which they mediate contracts. All these distribution channels have in common that they have to comply with the applicable regulations regarding insurance distribution; these are, above all, the provisions of the Trade Regulation Act (GewO) and the Insurance Supervision Act 2016 (VAG 2016). Depending on the form of distribution, however, different regulations are then applicable in addition. Insurance brokers are subject to the Brokers Act (MaklerG), insurance agents to the Commercial Agents Act (HVertrG), and employed sales staff are subject to the general regime of the Salaried

Employees Act (AngG). In some cases, the provisions of the Austrian Banking Act (BWG) may also apply.

4. Is authorisation or a licence required and if so how long does it take on average to obtain such permission? What are the key criteria for authorisation?

The operation of an insurance company is primarily characterised by the regulatory requirements of the Insurance Supervision Act 2016 (VAG 2016). Chapter 3 of the 1st main section of this act stipulates the necessity of a licence for the operation of an insurance company. This license is granted by the Austrian Financial Market Authority (FMA) if the relevant requirements are fulfilled.

In particular, in order to obtain a licence, the domestic insurance undertaking must be operated in the legal form of a joint-stock company, a Societas Europaea or a mutual insurance association. In addition, there are further requirements, such as a head office located in Austria, sufficient own funds and at least two members of the management board who are able to comply with governance regulations.

5. Are there restrictions or controls over who owns or controls insurers (including restrictions on foreign ownership)?

Chapter 6 of the 1st main section of the Insurance Supervision Act 2016 (VAG 2016) regulates the so-called shareholder control. Pursuant to Section 24 (1) VAG 2016, persons who wish to acquire a qualified interest in an insurance undertaking or who already hold such an interest and wish to increase it to a certain extent exceeding the size of their shareholding must notify this intention to the Austrian Financial Market Authority (FMA). The FMA must then evaluate the planned acquisition and, in particular, take into account the aspects listed in Section 26 VAG 2016. Especially, it must consider the reliability of the prospective acquirer and its financial solidity, ensure that the insurance undertaking will be in a position to conduct business in accordance with the legal provisions, and lastly also verify that there are no concerns in terms of criminal law. If the FMA examines these aspects and comes to the conclusion that there is a risk that persons intending to acquire a qualified interest in an insurance undertaking could exert influence that would be detrimental to the sound and prudent management of the insurance undertaking, the FMA must take appropriate measures.

6. Is it possible to insure or reinsure risks in your jurisdiction without a licence or authorisation? (i.e. on a non-admitted basis)?

The operation of an insurance undertaking generally requires a licence to be granted by the Austrian Financial Market Authority (FMA), otherwise an insurance undertaking may not be operated (Section 6 (12) VAG 2016). However, insurers headquartered in another member state of the European Economic Area do not require a further licence to operate in Austria. All that is required is a notification to the respective competent authority in the home

country. On the other hand, an Austrian license issued by the FMA is also valid throughout the entire European Economic Area. Once a notification procedure has been completed with the FMA, Austrian insurance undertakings may therefore also operate in other contracting states without requiring a further license.

7. What penalty is available for those who operate in your jurisdiction without appropriate permission?

Pursuant to Section 329 (1) fig. 1 VAG 2016, a person who conducts insurance business without the required authorisation commits an administrative offence and shall be punished by the FMA with a fine of up to EUR 100,000.00.

8. How rigorous is the supervisory and enforcement environment? What are the key areas of its focus?

In 2009, the Solvency II Directive (2009/138/EC) was published throughout Europe. Since its implementation or entry into force in January 2016, there have been noticeable changes in European and Austrian supervisory law. In particular, the Austrian Financial Market Authority (FMA) has acquired far-reaching additional powers to ensure the most effective supervision of the insurance undertakings subject to its supervision. The Solvency II Directive thus had as its primary aim the intensification of insurance supervision. This is accompanied, for example, by a strengthening of risk-oriented supervision, increased transparency and accountability, more efficient supervision of insurance groups, and the binding of the new supervisory regime to international standards.

9. How is the solvency of insurers (and reinsurers where relevant) supervised?

The Solvency II Directive (2009/138/EC), which was transposed or came into force in January 2016, has brought about far-reaching innovations, particularly in the area of solvency. These innovations are supplemented by the delegated regulation 2015/35 of the European Commission of 10 October 2014, which was last amended by the delegated regulation (EC) 2019/981. Compliance with the requirements of solvency is monitored by the Austrian Financial Market Authority (FMA).

10. What are the minimum capital requirements?

Chapter 6 of the 8th main section of the Insurance Supervision Act 2016 (VAG 2016) regulates the minimum capital requirements. According to Section 193 VAG 2016, insurance companies must hold eligible basic own funds to cover the minimum capital requirements. Absolute lower capital limits are standardized in paragraph 2. Thus, non-life insurance undertakings may in principle not remain below EUR 2.5 million, life insurance undertakings EUR 3.7 million and reinsurance undertakings EUR 3.6 million.

11. Is there a policyholder protection scheme in your jurisdiction?

There is no separate law that has set itself the primary goal of ensuring special protection for the policyholder, as is the case, for example, in general civil law with the Consumer Protection Act (KSchG). Nevertheless, a policyholder in Austria benefits from a very high standard of protection. Thus, the Insurance Contract Act (VersVG) contains numerous provisions which are intended to protect the policyholder and which may only be deviated from in favour of the policyholder. Also, the regulatory requirements, which are mainly regulated in the Insurance Supervision Act 2016 (VAG 2016), focus to a large extent on the protection of the policyholder.

In addition, the still relatively new Insurance Distribution Directive (IDD) should be mentioned, which standardises requirements that must be met in the course of insurance sales.

And finally, the highest court rulings are also quite favourable to policyholders. For example, the Supreme Court emphasises in its consistent jurisdiction that the contractual relationship between the policyholder and the insurer is especially characterised by good faith, so that the jurisdiction of the courts often imposes additional requirements on the insurer which are not expressly stipulated by law.

12. How are groups supervised if at all?

Sections 195 et seqq. of the Insurance Supervision Act 2016 (VAG 2016) stipulate corresponding requirements that must be observed by insurance companies that are part of a group. Many governance provisions are to be applied analogously at group level, with special provisions being added to these. Detailed requirements concerning the calculation of group solvency are also laid down by law.

The purpose of group supervision is to provide the supervisory authority with an assessment of the solvency of the insurance undertaking integrated into a group that is as transparent and clear as possible. Accordingly, the Austrian Financial Market Authority (FMA) is granted extensive rights, such as the right to conduct a review procedure or to make an assessment of the members of the management board. There is also an obligation to notify the FMA in the event of significant risk concentration at the group level or in the case of material intra-group transactions.

13. Do senior managers have to meet fit and proper requirements and/or be approved?

Adequate professional qualifications and personal reliability of the Management Board is of particular importance in the insurance industry. Accordingly, corresponding minimum requirements have been included in Chapter 5 of the 5th main section of the Insurance Supervision Act 2016 (VAG 2016). For example, according to Section 120 VAG 2016, insurance and reinsurance companies must ensure that all persons who actually manage the

company or hold governance or other key functions have at all times sufficient professional qualifications, knowledge and experience to ensure sound and prudent management (professional qualification) and are reliable and of integrity (personal reliability). In order to ensure efficient supervision by the Austrian Financial Market Authority, Section 122 of the Austrian Insurance Supervision Act (VAG 2016) includes an obligation to notify the intended appointment of members of the management and the appointment of persons who actually manage the company or are responsible for governance or other key functions.

14. To what extent might senior managers be held personally liable for regulatory breaches in your jurisdiction?

Violations of regulatory requirements may be punished by the imposition of an administrative penalty. According to Section 9 of the Administrative Penal Code (VStG), the person who is appointed to represent the company externally is in principle criminally responsible for compliance with the administrative regulations by legal entities. In the case of insurance companies, this is regularly the management board.

In practice, however, the option provided in Section 9 (2) VStG is regularly used to appoint one or more persons as responsible representatives, who are responsible for compliance with the administrative regulations for the entire company or for certain spatially or objectively delimited areas of the company. These appointed persons are then liable within the scope of the administrative criminal liability.

15. Are there restrictions on outsourcing services relating to the business?

The outsourcing of functions or business activities to service providers is regulated in Section 109 of the Insurance Supervision Act 2016 (VAG 2016). According to this Act, insurance and reinsurance undertakings must ensure that service providers to whom functions or business activities are outsourced cooperate with the Financial Market Authority (FMA), that effective access to the data and business premises of the service provider is ensured, and that the service provider fulfills certain basic requirements.

Contracts under which critical or important operational functions or activities are outsourced must be notified to the FMA in due time before outsourcing and, if the service provider is not an insurance or reinsurance undertaking, require prior approval by the FMA.

Certain important operational functions or activities may not be outsourced, however. This is essentially the case if outsourcing significantly impairs the quality of the governance system, if the operational risk is excessively increased by the outsourcing, if the monitoring of compliance with the regulations applicable to the operation of the insurance is impaired or if the permanent and flawless provision of services to policyholders and beneficiaries is jeopardised.

16. Are there restrictions on the types of assets which insurers or reinsurers can invest in or capital requirements which may influence the type of investments held?

According to Section 124 of the Insurance Supervision Act 2016 (VAG 2016), insurance and reinsurance companies must invest all their assets according to certain specified principles. For example, investments may only be made in assets and instruments whose risks can be adequately identified, measured, monitored, managed and controlled, which can be reported on accordingly and whose risks are adequately taken into account when assessing the overall solvency requirements. All assets shall furthermore be invested in such a way as to ensure the security, quality, liquidity and profitability of the entire portfolio. Under certain conditions, the use of derivative financial instruments is also permitted. More detailed investment requirements are laid down by the Austrian Financial Market Authority (FMA) in a specially issued Investment Regulation, which came into force on 1 January 2016.

17. How are sales of insurance supervised or controlled?

The Insurance Distribution Directive (RL 2016/97/EU; short: "IDD"), which came into force in February 2016, had to be transferred into national law (after a corresponding postponement) by 1 October 2018 at the latest. It regulates the admission and exercise of the entire insurance distribution and thus in particular the access to the profession and insurance mediation in the actual sense. The provisions of the IDD apply not only to agents and brokers, but also to employees of an insurance company, i.e. to direct sales. Thus, in the sense of fair competition, uniform provisions have been created for all distribution channels, and insurance customers now have the same standards regardless of the type of intermediary they consult.

The monitoring of compliance with the provisions is the responsibility of the competent trade authority in the case of intermediaries and the FMA in the case of insurers.

18. Are there specific or additional rules pertaining to distance selling or online sales of insurance?

Especially in recent years, there has been an increase in the sale of insurance policies via websites or mobile applications. This is typically a type of direct sales. In response to the significant increase in this kind of distribution, the same legal framework conditions apply to such online shops as in the case of face-to-face sales.

19. Are consumer policies subject to restrictions? If so briefly describe the range of protections offered to consumer policyholders

Since there is no insurance-specific consumer protection act, the generally applicable consumer protection provisions (in particular the Consumer Protection Act [KSchG]) as well as the insurance-specific standards of the Insurance Contract Act (VersVG) must be consulted. In particular, policyholders who are consumers enjoy far-reaching rights when concluding and terminating a contract. For example, according to Section 3 KSchG, a policyholder, if he is a consumer, can withdraw from the contract under certain conditions within 14 days if he has not submitted his contractual declaration at the insurer's business premises. Withdrawal is also possible if, at the time of conclusion of the contract, circumstances relevant to the policyholder, which the entrepreneur has presented as

probable in the course of the contract negotiations, do not occur or only occur to a considerably lesser extent. Until 31 December 2018, Section 5c VersVG also provided for a right of withdrawal for consumers, which could be exercised within 14 days without stating reasons. Now the right of withdrawal standardised in Section 5c VersVG is no longer bound to the status of consumer. Pursuant to Section 8 (3) VersVG, a consumer may terminate an insurance contract concluded for a period of more than three years at the end of the third year or each subsequent year. In addition to these rights of withdrawal and the possibility of termination under Section 8 (3) VersVG, contracts concluded with consumers are subject to the strict regime of Section 6 KSchG, which lists a catalogue of invalid contractual provisions.

20. Are the courts adept at handling complex commercial claims?

Practice shows that the Austrian courts have a routine handling of insurance law matters and legal protection is thus generally guaranteed.

The capital city of Vienna has a special status in so far as it has its own commercial courts, which have their own jurisdiction for actions brought against companies registered in the commercial register. Since domestic insurance companies must always be registered in the commercial register, lawsuits brought against insurance companies domiciled in the capital city must generally be brought before the commercial courts, which are thus even more practised and experienced in dealing with the special matter of insurance law.

21. Is alternative dispute resolution well established in your jurisdictions?

Alternative dispute resolution is generally well established in Austrian jurisdiction. There are a numerous arbitration boards and statutory regulations governing alternative dispute resolution. Indeed in insurance disputes alternative dispute resolution is of secondary importance.

22. Is there a statutory transfer mechanism available for sales or transfers of books of (re)insurance? If so briefly describe the process.

The legal framework for transfers of portfolios is governed by the provisions of Sections 28 et seq. of the Insurance Supervision Act 2016 (VAG 2016). Under certain conditions, the portfolio of insurance and reinsurance contracts may be transferred in whole or in part without the consent of the policyholders. However, as a rule, transfers of portfolios require the approval of the Austrian Financial Market Authority (FMA). In certain cases, cooperation of the FMA with foreign supervisory authorities is also stipulated.

If a portfolio transfer is executed, the rights and obligations arising from the insurance contracts belonging to the transferred portfolio are transferred to the acquiring undertaking upon registration in the Commercial Register or, if no such registration is required, upon approval of the portfolio transfer.

23. What are the primary challenges to new market entrants?

In the past few months and years in particular, the insurance industry has been undergoing a

turnaround, particularly at the legal level. Many areas have been newly regulated and are now much more extensively determined than before. There is a threat of much more severe penalties in the event of a breach of legal requirements, and an overview of all regulatory requirements is becoming an increasing challenge. In addition, there are also non-insurance-specific regulations, such as the General Data Protection Regulation (GDPR), which came into force on 25 May 2018.

24. To what extent is the market being challenged by digital innovation?

In addition to the legal hurdles, insurers are currently faced with the challenge of satisfying the increasingly fast-moving market. In particular, the growing digitalisation is a key aspect of this.

It is a balancing act between the fulfilment of all legal requirements on the one hand, and the customer's need for quick and uncomplicated conclusion of an insurance contract, which is increasingly being done digitally, on the other.

25. To what extent is insurers' use of customer data subject to rules or regulation?

The regulations concerning the use of customer data by insurers are very extensive and are mainly found in the General Data Protection Regulation (GDPR), the Austrian Data Protection Act (DSG) under the §§ 11a ff Insurance Contract Act (VersVG). Violations of the legal requirements may result in serious penalties of up to 4% of global group sales.

26. Over the next five years what type of business do you see taking a market lead?

In Austria there are a number of established insurance companies covering all lines of business. Despite specialisation in individual areas, it is not expected that the market leadership of these companies will change in the next 5 years.

In the consumer sector, however, current developments show a clear trend towards digitisation. Consumer increasingly demand simplified and uncomplicated products that are easy to understand for everyone. Accordingly, the conclusion of an insurance contract is often requested without lengthy consultation and preferably online with just a mouse click. This market trend is opposed by the legal requirements to ascertain the wishes and needs of the customer and to insure with the most suitable product. In this respect, it will be a major challenge for insurers - as it already is - to reconcile the needs of customers with the legal framework.