



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Austria: Insurance & Reinsurance (3rd edition)

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

This Q&A is part of the global guide to Insurance & Reinsurance (3rd edition). For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/insurance-and-reinsurance-3rd-edition>



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

The writing of insurance contracts is regulated by the Insurance Contract Act (Versicherungsvertragsgesetz; VersVG), which governs the rights and duties of both the insurer and the insured. The general sections of the VersVG are set out in Articles 1 to 49 and cover all types of insurance contracts. In addition, the VersVG sets out specific rules for different insurance branches such as indemnity insurance, fire insurance, personal liability insurance, legal protection insurance, life insurance, private health insurance and casualty insurance.

Maritime insurance and reinsurance contracts are explicitly excluded by the scope of application of the VersVG.

However, the VersVG does not regulate every single aspect of insurance contracts. Rather, it is supplemented by the provisions of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch; ABGB). Matters such as conclusion, transferability, conversion and termination of contracts are (partly) regulated by the ABGB. When insuring consumers, certain provisions of the Consumer Protection Act (Konsumentenschutzgesetz; KSchG) and other consumer-specific statutory provisions have to be borne in mind as well. Moreover, special laws for certain types of insurance contracts exist, as is the case with motor third party liability insurance (Kraftfahrzeug-Haftpflichtversicherungsgesetz; KHVG).

In addition, certain provisions of the Insurance Supervision Act (Versicherungsaufsichtsgesetz; VAG) may be of relevance when writing insurance contracts, e.g. the insurer's information obligations towards the insured.

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

The VAG sets out the regulatory regime for insurance companies. On 1 January 2016, an updated version of the VAG came into force, implementing the Solvency II Directive (2009/138/EC). The VAG regulates both insurance and reinsurance companies, but contains specific provisions and requirements depending on the type of insurances provided by the insurance undertaking.

As mentioned under Question 1, the VersVG does not apply to reinsurance contracts.

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

Insurance broking is a regulated trade pursuant to the Trade Regulation Act (Gewerbeordnung; GewO). Insurance mediation can either be carried out by insurance agents or insurance brokers, depending on their relationship to the insurer. Both insurance brokers and insurance agents have to be authorised under the GewO (cf. Question 4).

The brokerage of insurance services itself is governed by the Broker Act (Maklergesetz, MaklerG).

4. Is authorisation or a licence required and if so how long does it take on average to obtain such permission?

Both insurance brokers and agents need to be qualified in accordance with the GewO, such qualifications being publicly available via the Austrian Insurance Intermediary Register. In particular, brokers and agents need to pass a qualification examination to be permitted to market and promote insurance contracts. The timeframe for obtaining a licence depends on the individual's prior knowledge. In total, three examinations have to be undertaken, which deal with legal and entrepreneurial issues as well as the specifics of particular insurance sectors. The subjects of the exams to be taken by aspiring insurance brokers differ from the corresponding versions for future insurance agents.

Similarly, insurance companies must make use of qualified employees or draw on the services of brokers and agents when brokering insurance products to clients.

With regards to the licensing requirements for insurance and reinsurance undertakings, only insurers that have been authorised by the Financial Market Authority (Finanzmarktaufsicht; FMA) are permitted to undertake insurance business (cf. Question 6).

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

Entities must notify the FMA, if they intend to acquire, directly or indirectly, an equity holding in an Austrian insurance or reinsurance undertaking or to further increase, directly or indirectly, such an equity holding, as a result of which the proportion of the voting rights or of the capital held would reach 20, 30 or 50 percent (Article 24(2) VAG).

In assessing the intended acquisition or increase in shares, the FMA will scrutinise the reputation of the acquirer and its proposed key personnel, its financial soundness and whether it will be able to comply with regulatory requirements. In addition, the FMA will ascertain that there is no reason to suspect any connection to money laundering or the financing of terrorism (cf. Article 26 VAG).

If the FMA is of the opinion that the influence exercised by the acquirer or holder of such qualified equity holding is likely to operate against the sound and prudent management of the undertaking, it is authorised to take the measures appropriate to put an end to such situation, including appointing a government commissioner or even ordering the discontinuation of business operations (cf. Articles 27 and 284 VAG).

Foreign ownership is not restricted. However, if a foreign investor wishes to acquire an Austrian insurance undertaking, the VAG grants the FMA additional rights in the course of the authorization process, e.g. an extension of the FMA's

timeframe for requesting information from the acquirer (cf. Article 25(3) VAG).

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

Insurers are required to obtain a licence with the FMA, which acts as supervisory institution pursuant to the VAG. The requirements for obtaining a licence are set out in Article 8 VAG. Insurance and reinsurance undertakings must operate under the legal form of either a stock company, a *Societas Europaea* (SE) or a mutual insurance company. Moreover, the administrative headquarters have to be located in Austria.

A licence will not be granted if the insurance undertaking's business plan does not fulfil certain requirements (cf. Article 10 VAG). In particular, it must be safeguarded that the undertaking's obligations towards its customers will be complied with in the long run. Similarly, authorisation will be denied if the insurer does not fulfil the requested minimum capital requirements (see Question 10), is unable to prove it will satisfy solvency capital requirements (see Question 9) or comply with the governance rules set out in the VAG.

An insurer's or reinsurer's license to conduct insurance business in one of the member states of the European Union (EU) or the European Economic Area (EEA) is, in principle, valid for conducting insurance business within the EU/EEA. However, where such undertakings want to write business in Austria, they have to notify the FMA of the intended establishment of a branch or of the intended commencement of cross-border services (cf. Article 21 and Article 23 VAG, respectively).

Branches of foreign insurance undertakings, i.e. those not licensed in the EU/EEA, must provide additional information when applying for a licence in Austria (cf. Articles 16 to 19 VAG).

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

The FMA can penalise entities that conduct insurance business in Austria without the appropriate permission with a fine of up to EUR 100,000 (cf. Article 329 VAG). Furthermore, the FMA will prohibit those operating without a valid license from issuing further insurance contracts and force them to terminate existing contracts.

8. How rigorous is the supervisory and enforcement environment?

With the implementation of the Solvency II Directive (2009/138/EC), the supervisory environment for insurance undertakings has become more stringent. In particular, the new regulatory regime introduced stricter rules as to solvency and capital requirements as well as reporting duties.

The FMA is vested with a wide range of powers to supervise insurance undertakings and enforce compliance with the supervisory rules. For example, the FMA monitors insurers closely, requires extensive stress tests and can conduct supervisory activities on-site. It can impose fines of up to EUR 100,000 for violations of supervisory rules.

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

The FMA supervises the solvency of insurance and reinsurance undertakings in accordance with the VAG.



The supervisory regime introduced with the implementation of the Solvency II Directive and the supplementary Commission Delegated Regulation (2015/35) obliges insurance and reinsurance undertakings to calculate their solvency capital requirements on the basis of a balance sheet that recognises assets and liabilities at market value. The assessment does not follow national rules but is carried out on the basis of international accounting standards. Taking market values as basis allows for a better risk assessment and depiction of the actual economic situation of the insurance undertaking.

Undertakings are required to hold sufficient own funds to cover the solvency capital requirements as set out by the VAG and have to calculate the solvency capital requirements at least once a year and report the result to the FMA.

The standard formula for calculating the solvency capital requirements is laid out in Articles 177 to 181 VAG. It follows a modular approach, dividing the overall risk exposure into different sub-modules, for which a capital requirement is then determined individually.

Alternatively, undertakings can also use full and partial internal models to calculate the requirements after obtaining approval from the FMA (cf. Articles 182 to 192 VAG).

10. **What are the minimum capital requirements?**

Article 193(2) VAG sets out the following minimum capital requirements for insurers and reinsurers:

- EUR 2.5 million for non-life insurance companies, excluding those providing indemnity insurance, credit insurance and fidelity insurance;
- EUR 3.7 million for non-life insurance companies, including those providing indemnity insurance, credit insurance and fidelity insurance;

- EUR 5.2 million for composite insurance companies;
- EUR 3.7 million for life insurance companies;
- EUR 3.6 million for reinsurance companies;
- EUR 1.2 million for captive reinsurance companies; and
- in case of composite insurance companies, at least the sum of the minimum capital requirements for non-life and life insurance companies.

In addition, insurance companies are required to prove fulfilling the solvency capital requirements which have to be calculated in accordance with Article 174 et seq. VAG.

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

Although there is no insurance guarantee scheme in place, Austria has a mechanism of protecting policyholders of life as well as certain health and accident insurance policies by way of mandatory requirements as to the earmarking of assets.

Policyholder protection is also paramount to the new regulatory regime introduced in the course of the implementation of the Solvency II Directive. It aims at striking a balance between offering a high level of protection for policyholders and at the same time refraining from overburdening insurers with economically detrimental regulatory accounting requirements.

Solvency (cf. Question 9) and minimum capital requirements (cf. Question 10) strengthen the viability of insurance undertakings. As soon as an insurance undertaking's equity capital falls below the threshold set out in the VAG, the FMA is required to take action. Although not a zero-failure regime, the risk of insurers experiencing serious financial trouble is now reduced considerably.

12. **How are groups supervised if at all?**

The supervision of insurance groups is set out in Chapter 9 of the VAG (Articles 195 to 240). In particular, these rules relate to the supervision of a group's solvency, its cluster risk and intragroup transactions as well as its governance system. Groups have already been supervised under previous versions of the VAG, but group supervision has received further attention under the revised Act, especially as regards group solvency requirements.

An individual group's solvency requirements are calculated in accordance with Articles 202 to 214 VAG. In general, the calculation has to be consolidation-based. A calculation based on the deduction and aggregation method requires prior approval by the group supervisor respectively the FMA. Solvency calculations have to be carried out at least once a year.

Minimum capital requirements, on the other hand, are dealt with individually and not at group level.

Pursuant to Article 220 VAG, a significant risk concentration at group level has to be notified to the FMA. The FMA also, on a case-by-case basis, specifies the respective thresholds as to which risk concentrations are considered significant and require notification.

With regards to a group's governance system, Article 222 VAG stipulates that the implementation of risk management, internal control and reporting systems shall be carried out consistently throughout all of a group's companies, so as to ensure effective supervision at the group level.

13. **Do senior managers have to meet fit and proper requirements**

and/or be approved?

Yes, pursuant to Article 120 VAG, managing directors and key personnel are required to meet fit and proper requirements. In particular, insurance and reinsurance undertakings need to ensure that all persons who effectively run the undertaking have adequate professional qualifications, knowledge and experience to enable sound and prudent management (fit) and are of good repute and integrity (proper).

At least two managing directors are required to have sufficient theoretical and practical knowledge in the insurance sector as well as general management experience. As a general rule, these criteria will be met if a person has a minimum of three years of management experience in an insurance undertaking of a comparable size and business sector. In addition, at least one member of the board of directors must be fluent in German.

Insurance and reinsurance undertakings shall notify the FMA of any intention to appoint or change key personnel together with all information needed to assess whether such persons comply with the fit and proper requirements. With regards to members of the board of directors, the FMA has to be notified at least one month before the scheduled appointment and, with respect to other key personnel, immediately after appointment. The FMA is authorised to impede appointments.

14. Are there restrictions on outsourcing parts of the business?

The implementation of the Solvency II Directive introduced stricter requirements in relation to the outsourcing of parts of an insurer's business (cf. Article 109 VAG).

Most importantly, insurance undertakings that are outsourcing parts of their

business need to ensure that the FMA has effective access to all relevant data held by the outsourcing service provider as well as the provider's offices.

The FMA needs to be notified of any intention to outsource critical or important operational functions of an insurance undertaking in a timely manner. If the outsourcing service provider itself is neither an insurance nor a reinsurance undertaking, prior approval by the FMA is required.

In any event, outsourcing of critical or important operational functions is prohibited, if the intended outsourcing leads to either,

(1) materially impairing the quality of the undertaking's system of governance;

(2) unduly increasing the operational risk;

(3) impairing the ability of the supervisory authorities to monitor the undertaking's compliance with its regulatory obligations; or

(4) undermining continuous and satisfactory service to policyholders.

Where appropriate, approval may be granted conditionally, to prevent the occurrence of one of the aforementioned scenarios or the endangerment of the insureds' interests.

15. **How are sales of insurance supervised or controlled?**

Insurance intermediaries have to be authorised in accordance with the GewO (cf. Question 3). The implementation of the Insurance Distribution Directive (Directive 2016/97/EU; IDD) has brought about profound changes, inter alia as to the day-to-day practice of all insurance agents and insurance brokers as well as changes as regards the supervision of insurance intermediaries by the FMA.

The IDD itself is broad in scope and not limited to the regulation of insurance mediation by insurance brokers and agents. In fact, it also covers the distribution of insurance investment products by insurers. The Directive's main regulatory objective is to improve the protection of policyholders. For this purpose, the IDD seeks to avoid any conflicts of interest as regards the intermediary's remuneration and imposes extensive disclosure and advisory obligations on the intermediary. The IDD also affects the rules on product regulation and was originally supposed to be implemented by February 2018. However, this deadline was subsequently postponed until July 2018 (and finally to October 2018).

Independent of the IDD's transposition into national law, the VAG already provides the FMA with a range of powers to supervise and control intermediaries, e.g. to sanction the unauthorised sale of insurance products (cf. Article 329 VAG).

In addition, the Professional Association of Insurance Brokers (Fachverband der Versicherungsmakler), a sub-organization of the Austrian Federal Economic Chamber, sets out professional standards mandatory to all Austrian insurance brokers. Since January 2017, a disciplinary commission supervises the compliance with said standards.

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

The VersVG sets out extended rights for consumers, particularly in relation to the termination of insurance policies. Consumers have the right to withdraw from an insurance contract within two weeks after conclusion without giving reasons (Article 5c VersVG). With regards to life insurance policies, consumers can withdraw from the contract within 30 days after conclusion (Article

165a(2a) VersVG).

Consumer policies are also subject to the KSchG, which provides a broad range of protections to consumer policyholders. For instance, Article 3 KSchG provides consumers with the right to withdraw within one month from conclusion of the insurance contract, if it was not concluded on the business premises of the trader or at a trade fair. Furthermore, consumers may also withdraw from insurance contracts, if circumstances, which were essential for the consumer's consent, are less likely to occur than depicted by the trader (Article 3a KSchG). Consumers can withdraw from such contracts within a week after such fact is noticeable to the consumer. With regards to insurance contracts for a duration exceeding one year, the right of withdrawal expires one month after the date of conclusion.

In general, a contractual provision not individually negotiated is deemed to be unfair and thus invalid, if, contrary to the requirement of good faith, it significantly alters the balance of the parties' contractual rights and obligations to the detriment of the consumer. For instance, with regards to insurance contracts, the consumer's burden of cost must be as transparent as possible. Similarly, a contract stipulating a burden of proof for the consumer stricter than the general statutory rule is invalid. Article 6 KSchG provides a non-exhaustive catalogue of contractual provisions considered unfair .

17. **Are the courts adept at handling complex commercial claims?**

Austria has a very well-functioning and reliable judiciary and the courts are adept at dealing with complex factual and legal matters. The average length of court proceedings is reasonable and the quality of decisions is usually high.

In first instance, claims will either be handled by the district courts or the regional courts, depending on the amount in dispute. Whereas claims for less

than EUR 15,000 are, as a general rule, dealt with by the district courts, claims above that threshold are dealt with by regional courts. Appeals are made either to higher regional courts, when appealing a judgment issued by the regional courts, or to the regional courts, when appealing a judgment issued by the district courts. The third and final instance is the Austrian Supreme Court.

In addition, Austria has specialised commercial courts. These commercial courts are particularly fit to handle complex commercial claims and inter alia competent to hear (re-)insurance disputes.

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

Austria has a long-standing tradition as an arbitration hub for Central and Eastern Europe. Already in 1895, Austria first enacted legislation on arbitral proceedings. In 2006, the new Austrian Arbitration Law, which is based on the UNCITRAL Model Law, entered into force. There are also specific rules in place for mediation proceedings in civil matters.

The establishment of the Vienna International Arbitral Centre (VIAC) in 1975 furthered Austria's position as the preferred place for the settlement of east-west disputes. VIAC has administered over 1,600 proceedings since its inception and its caseload increases continuously. It administers both mediation and arbitration proceedings but is particularly renowned for its arbitration rules, the Vienna Rules. VIAC only deals with international cases involving at least one party with its place of business or normal residence outside of Austria or cases concerning disputes with an international character.

In 2016, the Austrian Branch of ARIAS (AIDA Reinsurance and Insurance Arbitration Society) was founded. However, with regards to insurance or reinsurance disputes, arbitration still lacks behind court proceedings as the

preferred method for resolving disputes.

19. **What are the primary challenges to new market entrants?**

The comparably moderate economic growth and the historically low interest rate environment pose a challenge for many insurance undertakings. More stringent regulatory requirements imposed in the aftermath of the financial crisis put further pressure on market participants. In particular, the implementation of Solvency II will require insurance undertakings to adopt their equity capital resources and reporting systems. These issues will similarly pose challenges to new market entrants.

However, Austria still remains a country with low insurance density. Whereas, in 2015, the EU average rate of insurance penetration, i.e. gross written premiums in comparison to GDP, was at 7.41 percent, Austria's rate of insurance density was 5.1 percent, falling 0.1 percent from the previous year. Hence, the Austrian insurance market still provides room for new market entrants.

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

As with almost every industry, digitalisation has also reached the insurance sector. It is, however, still lagging behind other service industries in terms of implementing digital innovation. This is partly due to the dense regulatory environment, which makes it more difficult for insurance undertakings to adopt new technologies while complying with regulatory requirements.

Established market players are thus challenged by innovative start-ups that are willing to disrupt the sector. Startups such as Amodo, which has received funding by Austrian-based venture capital fund Speedinvest, analyse data



gathered from digital devices to allow better assessment of a customers' risk exposure and product requirements. While this approach allows further individualization of insurance products, concerns as to the use of sensitive data will have to be addressed.

Recently, key players in the Austrian insurance market have declared digital innovation as their main development target. In 2016, one of the leading insurance companies in Austria and the CEE region announced an investment program in the amount of EUR 500 million aimed at adapting procedures and products to the change in customers' expectations and needs owed to digital innovation.

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

Individual private pension insurance will gain attractiveness among the Austrian workforce. Demographic change will further reduce the ratio between the working population and pension receivers, thus putting additional pressure on the state pension system. As a consequence, the gap between final salaries and pension earnings is widening. Taking into account that the proportion of private pension insurance is still comparatively small in Austria, we estimate that demand for private pension schemes will increase significantly over the next five years.

As regards liability insurance we expect the D&O insurance market to grow on consolidated premiums. At the same time W&I insurances and other types of transactional risk insurance will gain in importance. In light of a strong rise of cyberattacks and dependence on technology, a similar trend can be predicted for cyber insurance policies and related products.

In addition, we expect further growth in the property insurance sector due to



the rise in property prices in Austria.