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Adapting rights in rem



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European Judicial Network
(in civil and commercial
matters)

1 Which are the rights in rem that could arise from a succession under the law of this Member State?

Under Austrian law, after death the estate as a legal person continues the legal status of the deceased (Section 546 of the Austrian Civil Code – *Allgemeines Bürgerliches Gesetzbuch* - ABGB). When the estate is devolved (*Einantwortung*), the heir takes over the legal status of the estate. The same applies to decisions ordering the estate to be appropriated by the Federal Government (Section 547 of the Austrian Civil Code). Nobody may take over ownership of an estate without proper authority. An estate is generally acquired following probate proceedings through devolution, i.e. the transfer of legal ownership to the heirs (Section 797 of the Austrian Civil Code).

2 Are these rights in rem recorded in a register of rights in immovable or movable property and, if so, is such recording compulsory? In which register(s) are they recorded and what are the registration requirements and procedure?

Under Austrian law, the acquisition, transfer, limitation and revocation of rights in rem (ownership, easement, land charge, lien, construction rights) of properties, repurchasing rights, pre-emptive and lease rights must be recorded in the land register managed by the district courts (*Bezirksgerichte*) to take effect.

Nevertheless, an heir already acquires rights in rem to a property when devolution comes into effect and not only when his/her ownership rights are recorded in the land register. Registration in the land register is thus more declaratory in nature. However, the provisions in Section 21 and 94 of the Land Register Act (*Grundbuchsgesetz*) prevent actual ownership rights from being taken into account in dealings relating to the land register if they are not reflected in the land register. An entry against the (not yet registered) heirs is therefore, with few exceptions, inadmissible, even if they are already property owners under substantive law. With regard to entries in the land register, the fact that devolution has taken place should consequently not be taken into consideration until the heirs' ownership rights are recorded in the land register.

In Austria, heirs' rights are registered under the land register amendment process governed by Section 136 of the Land Register Act. This involves the land register being corrected so that it reflects the actual legal situation. This occurs when legal changes have subsequently been made but not yet implemented in the land register. Registration is therefore merely declaratory in nature. Under the process covered by Section 136 of the Land Register Act, 'proof of inaccuracy' is enough to warrant registration; this replaces the documents that would otherwise be required. This proof is provided if the inaccuracy is manifest or demonstrated by means of authentic instruments (such as a certificate of devolution issued by the court or a European Certificate of Succession). An inaccuracy is considered manifest, for example, if the repeated transfer of rights not recorded in the land register referred to by the applicant and the ensuing universal succession to the property by the legal predecessor result directly from the law.

Entries are made in the land register on request of the parties. Entries can only be made by the authorities in exceptional cases which are not applicable here.

3 Which effects are linked to the registration of the rights in rem?

Under Austrian law universal succession by the heir takes place without registration in the land register when devolution comes into effect. Registration in the land register in such cases is therefore merely declaratory.

4 Are there specific rules and procedures in place for the adaptation of a right in rem to which a person is entitled under the law applicable to the successions in case the law of the Member State in which the right is invoked does not know such right in rem?

Under Austrian residential property law, the minimum share inextricably linked to the residential property may not be shared as long as the residential property exists unless there is an 'owner partnership' (*Eigentümerpartnerschaft*). This is a legal community of two natural persons who are co-owners of the residential property.

If a number of people have acquired ownership of the minimum share through succession without forming an owner partnership, for example if the estate has been settled abroad and legal succession involves several persons, their property cannot be recorded in the land register. If an application for registration of property rights is made, the Land Register Court must reject the application, inform the applicants that the desired rights cannot be recorded in the land register and give them a reasonable period to arrange acquisition of the minimum share by a single person or an owner partnership instead. If this period expires and no such arrangements have been made, the Land Register Court must arrange for a public sale (Section 12(3) of the 2002 Residential Property Act - *Wohnungeigentumsgesetz*).

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