

Real Estate in Germany



Why Real Estate in Germany?

There are several reasons to buy or build real estate in Germany.

- **Owner occupation:** People may want to have a holiday home in Germany. Some others leave their country completely and are looking for a permanent residence.
- **Investment:** Foreign real estate is an important and necessary asset in an internationally diversified portfolio.
- **Business use:** A company sets up a subsidiary or a branch in Germany. Instead of renting premises it buys them.

Being international is becoming more and more important for companies and for individuals for both business and private reasons. Consequently foreign real property is becoming ever more normal for many people. Increasing permeability of borders (e.g. in the EU) is fostering this trend.

This brochure describes the essential legal and tax issues that have to be considered when thinking about buying or building real estate in Germany. It does not replace careful consultation.

Legal Issues

I. Statutory forms of property

- The ownership of real estate is laid down by the German Civil Code (“Bürgerliches Gesetzbuch”). The owner has the uninhibited use and enjoyment of the real estate to the extent that there are no rights of other persons against it.
- German law distinguishes between the easement appurtenant and the easement in gross. The first gives the owner of the dominant tenement certain rights over a neighbouring property, such as a right of way. By contrast the easement in gross does not run with the land but is owned by a person, not necessarily the owner of a dominant tenement.
- Other possible forms of property are
 - Statutory heritable building right (“Erbbaurecht”)
 - Condominium (“Wohnungseigentum”)
 - Time-sharing

II. Acquisition of property

- Practically all agreements and transactions in which recordable estates in real property are transferred require to be signed, executed, and closed before a notary. The notary is a qualified lawyer who impartially advises both parties of their rights and sees to it that the desired transaction is properly recorded.
- The cost for the notarial deed and subsequent recording is approximately 1% of the considerations for larger properties and greater than 1% for smaller properties. The parties usually agree that the buyer bears the costs for the notary and the recording.
- Purchase agreements generally provide that the risk of loss passes on the date of closing. In the absence of such a contractual clause, the risk of loss passes to the purchaser of property at the earlier of the date of the recording of the title or the passing of possession of the property pursuant to § 446 Civil Code.

III. Protection of property

- Normally the ownership of real estate is protected by the Civil Code.
- A distinction is made between public acts that amount to an expropriation requiring reasonable compensation and mere land-use controls that are reasonable restrictions and serve overriding public interests (condemnation). The notion of Art. 14 of the German Constitution (“Grundgesetz”) is that title confers on the holder not only rights but also social responsibilities.

IV. Proof of property rights through land register

- Recording in the German Land Register (“Grundbuch”) has more than declaratory and evidence purposes. It constitutes the very act, and is an essential condition of the passing of title or other property rights.
- An entry in the Land Register constitutes an irrefutable presumption that the recorded interest validly exists, at least vis-a-vis a bona fide purchaser. A bona fide purchaser may rely not only on the nonexistence of unrecorded interests, but also on the correctness of an existing party. This is why title insurance in Germany is not necessary and does not exist.

V. Financing

- The customary form of mortgage in Germany is the negotiable mortgage (“Hypothek”), which provides a certain protection to a bona fide purchaser from having the mortgage invalidated by defences that may exist against the underlying claim.
- A frequently used form of the real property lien in Germany is the non-accessory mortgage (“Grundschuld”). The non-accessory mortgage, unlike the mortgage, is not dependent upon the existence of a valid underlying claim. It is an abstract promise by the owner of a property to pay a certain sum “out of the property”.
- German bank lenders prefer the Grundschuld over the mortgage because it can be transferred or liquidated irrespective of the underlying claim and irrespective of whether the underlying claim belongs a third party or whether the claim is subject to defences of the debtor.

VI. Building Law

- In Germany, zoning and building laws are federal laws. The three most important statutes are
 - the Building Act (“Baugesetzbuch”),
 - the Urban Renewal Act, and
 - the Building Use Ordinance.
- The German states have some jurisdiction over regional planning and over substantive and procedural issues of building permits. Counties and municipalities are entitled under the Building Act to develop master plans for land use and local zoning ordinances.

Tax Issues

I. Acquisition of real estate

- Real-property transfer tax (“Grunderwerbsteuer”)

Subject to tax is the transfer of ownership of real estate (land or land and building) with some exemptions. The rate is 3.5% of the assessable real-property value. Without any agreements the real-property transfer tax has to be paid half by the buyer and half by the seller. However, normally it is agreed that only the buyer pays the real-property transfer tax.

- VAT (“Umsatzsteuer”)

The acquisition of real estate is normally exempt from VAT. If the option to VAT has been used, the buyer has to pay 16% of the real-property value. Depending on the specific situation this can make sense, because then he can deduct the VAT that he has incurred in the tax period.

II. Ongoing taxation after purchase

- Real-property tax (“Grundsteuer”)

The tax is collected by local government agencies and is paid by the owner of the real estate. The tax sum depends on the value of the property in connection with the rate of assessment valid in the community. The tax rate is 0.26-0.35% of the value of real estate, multiplied by the rate of assessment of the community (usually between 350-550%).

- Income tax (“Einkommensteuer”)

The difference between the earnings from the real estate minus deductions such as depreciation, interests, etc. is subject to income tax as well as the so-called solidarity surcharge. The maximum tax rate for an individual in 2003 is 51.5% (2004: 49.5%; from 2005 on: 44.3%).

- Net wealth tax (“Vermögensteuer”)

Net wealth tax has not been levied since 1995.

III. Sale

- Capital gains tax

Private investment gains are generally tax-exempt, provided the real estate was held longer than ten years. If the real estate is sold during the statutory period of limitation for speculative transactions, the capital gain is subject to income tax (see II).

A capital gain deriving from the sale of real estate that has been held for more than ten years is taxable when the vendor acts as a dealer of real estate; this is normally the case if the taxpayer sells more than three items of real estate within five years.

- Real-property transfer tax (“Grunderwerbsteuer”)

See “Acquisition of real estate”

- VAT (“Umsatzsteuer”)

See “Acquisition of real estate”

IV. Gratis conveyances

- Inheritance tax/gift tax (“Erbschaftsteuer/Schenkungssteuer”)

The tax is applied on net asset transfer either by inheritance or by lifetime gift. Tax rates vary, according to (a) the amount of inheritance or gift and (b) the degree of relationship between the deceased and the heir or between donor and donee, between 7% and 50% with progressive rates. Personal allowances according to the degree of relationship vary considerably; they amount to 307,000 € for a spouse and 204,000 € for a child.

- Capital gains tax

There is no capital gains tax on a gratis conveyance.

- Real-property transfer tax (“Grunderwerbsteuer”)

There is no real-property transfer tax on a gratis conveyance.

Contact

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