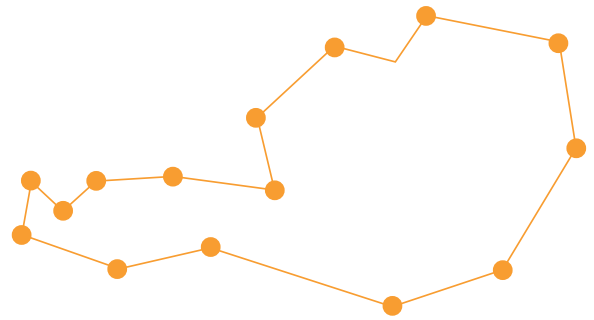





COUNTRY STUDY



AUSTRIA

Transnational Monitoring and Enforcement of Posted Work: The Case of Austria

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This report is mainly based on information derived from a group interview conducted on October 18th, 2017, with representatives from the Austrian Federal Ministry of Labour and Social Affairs, including the head of the Austrian Labour Inspectorate and of the Labour Inspectorate Department responsible for the construction sector, with the head of the Financial Police Vienna, with three representatives from the Construction Workers' Annual Leave and Severance Pay Fund including an inspector inspecting on-site, with representatives from the Vienna Regional Health Insurance Fund, and with a representative from the Chamber of Labour, Vienna. The group interview followed a thematic guideline, it was recorded and transcribed. It lasted three hours and 30 minutes. In addition, BUAK provided information about numbers of inspectors and inspections carried through on construction sites. The online-information tool "Entsendeplattform" (posting online platform) was consulted for information on rights, entitlements of posted workers in Austria, and legal provisions with respect to posting in general.



Mapping national enforcement capabilities

In contrast to generalist, centrally-organised labour inspectorate models (e.g. in the Czech Republic, France or Spain), where inspectorate's responsibilities can include the control of labour relations, occupational health and safety (OHS), social security administration, and legal and illegal work, Austria must be subsumed under the type of "specialist inspectorates". Its main responsibility lies in inspecting occupational health and safety issues and working time (Walters 2016).

When it comes to the inspection of posted workers, their remuneration, social insurance status and working conditions, a variety of authorities are in charge of executing the regulations stipulated in the Anti-Wage and Social Dumping Act (LSD-BG)¹ that implemented the Posting of Workers Directive in Austria. In Austria, not the Labour Inspectorate, but the Financial Police and the Construction Workers Leave and Severance Pay Fund - BUAK (for the construction sector) are the bodies for the inspecting and investigating posted workers' correct remuneration and the compliance of posting firms with the respective regulations; the Competence Center for Combating Wage and Social Dumping (run by the Vienna Regional Health Insurance Fund) validates suspicious cases investigated by BUAK or financial police). The labour inspectorate is in charge of the compliance with occupational health and safety and working time regulations.

Coordinated inspections among investigating authorities also take place. Principally, we have to differentiate between (1) authorities registering posted workers, inspecting posting firms and investigating suspicious cases and (2) enforcing/jurisdictional authorities mentioned in the Anti-Wage and Social Dumping Act (LSD-BG). The LSD-BG defines the tasks and responsibilities of these authorities.

The *registering/inspecting/investigating* authorities include

a) Financial police. This authority is responsible for the inspection of posted workers' payment and social insurance status. They are also the receiving authority of posted workers' registrations/notifications. In addition, they are also in charge of tax investigation, fraud, customs, and illegal employment of foreign workers. The financial police are subordinated to the Ministry of Finance. Currently (2017), the number of overall inspectors is at 450. According to the head of financial police Vienna, it would be necessary to stock up to 600 to fulfil effectively their tasks and responsibilities.

b) Construction Workers' Annual Leave and Severance Pay Fund (BUAK). This is a very important authority in the construction sector. They have the competence to check wages and other workers' entitlements at the construction site, including posted workers. All construction workers in Austria are eligible to special leave entitlements. This means that (also foreign) companies active in Austria with employees are being obliged to pay wage supplements to BUAK for the posting's duration. The supplements only concern annual leave and grant the employee a direct claim to payment of holiday pay against BUAK. Currently (2017), BUAK commands 37 inspectors, experiencing a significant increase from 2011 onwards when the number amounted only to 10 inspectors for whole Austria.

c) Labour inspectorate. This authority is primarily responsible for OSH and working time issues. They do not check wages of posted workers or the state of posted workers' social security status.

d) Competence Center for Combating Wage and Social Dumping, health insurance providers. These authorities validate suspicious cases investigated by BUAK or financial police.

1. Lohn- und Sozialdumping-Bekämpfungsgesetz, Version as of 04.07.2017, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009555>, <http://www.entsendeplattform.at> (English) goo.gl/P5FgYQ



The *jurisdictional authorities* adjudicating and enforcing penalties include the district administration authorities in case of administrative penalties, and labour courts in case of infringements against labour law.

In Austria, collective agreements are binding, hence posting firms have to comply with the respective collective agreement and pay to posted workers what is paid to comparable workers that have their habitual workplace in Austria.

After the implementation of the ED, Austria has established a mandatory notification/ registration system for foreign service providers. In Austria, non-compliance with notification requirements carries along high penalties. Notifications also have to be kept updated. This updating is particularly relevant in the construction sector where the start of the construction works can be delayed due to various reasons. For example, posted workers are deployed later, or more or less workers are posted to the construction site. Authorities report that the selection of inspections on the basis of notification data is not ideal. BUAk estimates that 50% of their inspections of construction sites with posted workers are idle running. The financial police conversely reported that 60% of their inspections are driven by complaints, and resources are absorbed by many small single cases instead of dedicating them to cases based on a profound risk analysis. In addition, a 25% increase of personnel (to 600 inspectors) to the financial police would be needed to exercise their inspection mandate efficiently.

Transnational cooperation

The IMI coordination lies with the Federal Ministry of Science, Research and Economy. However, information requests are not centralized there. Also, the financial police, the competence centre, BUAk, district administration authorities, and specific courts do

have access to IMI. All in all, transnational cooperation with respect to exchange of information and intensify administrative assistance with respect to posting is said to be “rudimentary” and only in its beginnings. There are plans to intensify contacts and exchange with particular countries, especially with Poland.

Interview partners considered the IMI system as a helpful tool to communicate with authorities from countries where information is required. Partly good experiences with information requests, given mostly in time and with relevant answers on the information requested (e.g. economic activities of posting firms in the sending state; identification of employer via UID number, etc.) were reported. In addition, as one representative of the Competence Center for Wage and Social Dumping, highlighted, requests about suspicious companies from the receiving country (Austria, e.g.) can draw particular attention to the authorities from the sending country for this firm, and turn out as a relevant indication for the detection of letter-box companies.

At the same time, communication between Austrian authorities and social insurance funds from sending states (Poland and Slovenia were explicitly mentioned) were reported to be cumbersome. Simply providing (not requesting!) information about social insurance contributions to the social insurance funds abroad, calculated on the basis of the receiving state’s wage level, sometimes turned out to be difficult and tedious. As was explained by several interview partners (BUAk, financial police), it seems that foreign social insurance institutions are not interested in being notified about a posted workers’ actual assessment basis for their social insurance although the temporary (for the time of the posting) higher assessment base would bring higher employers’ contributions and income for the social insurance institutions of the sending state. Another main problem mentioned was the lacking feed-back of authorities (mostly in the sending states) that are executing fines to the authorities (mostly from the receiving countries) having imposed these fines.



Issues specific to the cross-border regulation of posting

Posting of workers to Austria - Data

In 2016, according to the Austrian Ministry of Finance², 67.279 posting notifications have been submitted. In 2017, this number has been exploding due to updated notifications from companies providing transport services (see below) to more than 500.000 posting notifications. It has to be taken into account that this number is just the total number of notifications and includes multiple countings (e.g. if the start of a construction site is postponed, data is inserted once again into the system). It is not possible to conclude from this data how many different workers per year have been posted to Austria. For comparison, statistical evidence of BUAK notably for the construction industry counted 13.586 persons per year in 2016 that have been posted to Austria.

Detecting fake posting

All authorities taking part in the group interview and the chamber of labour reported cases of fake posting, i.e. posted workers actually have their habitual workplace in Austria. One main problem is to verify if an alleged posted worker is in fact a posted worker as was raised by the financial police responsible for the inspection of posted workers' pay slips and social security status and the regional health insurance fund responsible for the validation of suspicious cases: Even if inspecting authorities document that the worker's habitual place has been in Austria (i.e. he/she is not a posted worker) it is almost impossible to overrule the binding character of the A1 form in the context of social insurance law (not of labour law!). This means, as long as the issuing authority (from the sending state) does not withdraw this document – often a long process – the worker is regarded from the perspective of social insurance law as a posted worker.

In addition, the Austrian financial police report the easy manipulation of the paper version of A1 form. Authorities should know for sure how and with which assessment basis the (posted) workers are registered in their countries of origin. The A1 form in its paper version should from the perspective of the Austrian authorities not be regarded as a sufficient proof. However, it is up until now. In this respect, the obligatory online documentation of the social insurance status of the driver would be incisive to be able to check immediately his status in his/her country of origin. Such a system is in place for the European-wide verification of VAT number validity (MIAS-System).

In case of fake posting, the WHOLE labour-law related statutes are then in place for these workers (as for a worker employed in Austria). Fake posting occurs for example when workers are employed by a company from abroad even though this company does not exist or just exists as a letter-box company. This practice is common in construction but also in road haulage.

Underpayment

In Austria, one representative of BUAK, investigating underpayment in construction, estimates that underpayment in suspected cases of the construction sector amount to 50% of the entitled remuneration. 44 out of 100 inspected cases are suspected of underpayment.

In many cases, however, the results of the investigating authorities do not hold before court because new relieving documents are brought forward by employers or posted workers withdraw their testimony. Nevertheless, in 2016 charges against underpayment turned out to be successful in 1.106 cases (all sectors), which ended in a final conviction of employers (551 domestic, 555 foreign employers) affecting 2.297 workers (877 domestic and 1.420 foreign workers³). Financial penalties amounted to 7.318.190 Euro.



2. https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_11126/imfname_626043.pdf
3. "Summary of the LSDB-statistics", https://www.wko.at/branchen/sbg/transport-verkehr/autobus/LSDB-Statistik_Zusammenfassung_20161130.pdf



Are transport workers posted workers?

Specific problematic constellations can be found in the transport sector when drivers provide cross-border services (Haidinger 2017). Europe-wide, different interpretations of the PWD with respect to “mobile workers” such as drivers, are applied. In Austria, all traffic, except of transit, is subject to the posting of workers’ regulations. Up until recently (2016/2017) road haulage cross-border services, including cabotage operations, were seldom regarded as “posted work”. Accompanying the revision of the Anti-Wage and Social Dumping Act (LSD-BG), the transport sector was explicitly mentioned as being subject to this law. An explanatory note was published by the ministry of social affairs because service providers did not consider the transport sector as being subject to the posting of workers’ regulations. Hence, this note explicitly explains cases of the posting of workers as defined in the LSD-BG for the transport sector. Only since the beginning of 2017, posting notifications of transport companies are identified, the numbers exploded: According to a written request for information by email, from Jan 2017 to Oct 2017, the financial police reported 500.000 notifications in the transport sector alone. This is a very high number; however, it does not say anything about the number of individual posted workers; it is just the total number of notifications and includes innumerable multiple counting.

Liability of contractors

In Austria, the Anti-Wage and Social Dumping Act foresees the liability of the direct contractor (and in specific cases also of the principal contractor) against withheld wages. This only applies for construction works and related cleaning works. Posted workers can assert their claims (in case the direct employer is not paying) to the applicable minimum wage in Austria against the client commissioning the construction/cleaning works. A claim can be asserted against the principal client in specific circumstances, i.e. if prior to commissioning the works the principal client was aware that this amount would not be paid.

To assert claims, the worker has to inform the Construction Workers’ Holiday and Severance Pay Fund (BUAK) of the pay claim by no later than eight weeks from when the pay was due. The BUAK investigates the details on which the pay claim is based and supports employees in calculating the amount of claimed wages and in identifying the client potentially liable for covering the claim. Finally, BUAK informs the client, the contractor and the employee of the results of the investigations. If the client does not, however, pay the amount specified by the BUAK, the employee must bring in a civil action against the client. From the perspective of BUAK and the Chamber of Labour, an institution supporting workers to claim labour rights, the period for stating the claims is unrealistically short. Hence, the abolition of this expiry period would be helpful for posted workers, according to the Chamber of Labour. In addition, as the representative of the Chamber of Labour states, the enforcement of liability claims is “illusionary”, if a posted worker does not receive institutional support or accompaniment in this procedure:

„It is unlikely that a construction worker coming from Romania to Austria knows what to do when his employer does not pay, or even that the possibility to claim the contractor exists, what steps he must take and when.”

In general, the experts’ group discussion considered it more efficient to limit the possibilities for subcontracting tasks beforehand than to claim for withheld entitlements from the contractor afterwards. This possibility exists in public procurement of construction works: The subcontracting of specific core tasks can be forbidden by the public procurer; in addition, all subcontracting entities have to be announced in the bid; firms can be excluded if they have a record of convictions of underpayment or the illegal employment of foreign workers.



Posted workers' awareness of rights and entitlements: information, counselling and enforcement

Main information for posted workers and for posting employers that summarises among other aspects Austrian minimum wage requirements and employment regulations and the steps required to ensure compliance with these laws, can be accessed on a multilingual website: http://www.entsendeplattform.at/cms/Z04/Z04_10/home. The website is well-frequented. Since beginning of 2017, 1.000 requests for information via email have been received (info of the Ministry of Social Affairs). One problem identified was that mainly employers are reached by the site. It is difficult to get workers draw information from written sources. It would be helpful to bring information directly to the workers. Experts stated the Anti-Wage and Social dumping Act itself (one of the "cruellest" in Europe due to its high fines and comprehensive paragraphs), the online information platform, a good networking between authorities and the legislative having prepared and revising the law if necessary, and the notification requirements for posting, are important measures of prevention of wage and social dumping in posting arrangements. Still poorly developed, however, is the direct contact and information of the posted workers.

Hence, the main problems identified to make the existing posting regulations work out for the posted workers themselves, were a) a lacking information policy to posted workers about their rights and entitlements that efficiently reaches them and b) the effective enforcement of entitlements.

First, inspection authorities in Austria (financial police, BUAK, Competence Center for Wage and Social Dumping) do not primarily have the mandate to actively inform posted workers about their rights and entitlements. BUAK generally informs posted workers about their entitlements and rights (in its office and

online) but does not actively accompany posted workers to pursue their claims in case of a suspicious underpayment⁴. As was mentioned by the BUAK representative, it would be crucial to reach posted workers personally. The online posting platform does give all the necessary and relevant information, however written and impersonal information is less accessible than information provided face-to-face.

Second, BUAK does not represent posted workers before court to claim their wages when underpayment has been detected. This is due to the different kind of law in place: Offences against occupational health and safety as well as underpayment of posted workers by their employers are subject to public law resulting in administrative penalties of the employer enforced by district administration authorities. Non-paid wages however have to be claimed individually, legal proceedings are subject to civil right. In Austria no collective complaint can be made for non-paid wages. The main problem is: at what point will a posted worker expose themselves and risk a legal action against his/her employer?

An important policy solution would be the possibility to claim wages collectively ("Verbandsklage") and to install an institution in charge for representing posted workers before court. In Austria, this could be the Chamber of Labour, the statutory representative body of employees having their habitual workplace in Austria. Since posted workers do not have their habitual workplace in Austria, they do not pay the compulsory membership fee and therefore are not covered by legal protection.

4. BUAK is a unique institution for the construction sector, in other sectors no particular sector-related information policy for posted workers by authorities exists.



The Enforcement Directive

In Austria, regulations stipulated in the Anti-Wage and Social Dumping Act (LSD-BG) intend to combat wage and social dumping, especially in cross-border constellations. It entered into effect as of 1 May 2011, and has been in force since then. It covers all workers who have an employment based on a contract under private law with an Austrian employer as well as workers who have their habitual place of work in Austria or are posted or hired out to Austria but are employed by a foreign employer. In January 2017, a revision of the LSD-BG became effective. It transposes the Enforcement Directive 2014/67/EU⁵ concerning the posting of workers in the framework of the provision of services into national law. Hence, the Act stipulates claims that can be made for entitlements based on labour law and measures to protect them specifically in case of posting and hiring-out of workers. The measures include:

- notification and reporting requirements: posted workers have to be notified with the financial police;
- keeping reporting, wage and salary documentation (A1 social security document, records of hour worked, pay documents, etc.);
- liability provisions especially for the construction sector, general contractor liability in case of public sector client;
- penal provisions, prohibition of services, payment freeze, security deposit; enforcement of fines in administrative penalty law: Fines amount between 500-50.000 Euro. Violations of reporting obligations and the obligation to keep documents readily available in cases can be penalised with fines between 1.000 and 20.000 Euro (in case of repetition). The Act foresees - to a certain extent- the possibility of forbearance of fines for the employer accused of underpayment if the acknowledge their faults and pay the missing wages to the respective employees (Nachsichtsregelung).

Complaints and fines following infringements against the LSDB-G – data and execution

Following the legal stipulations and controlling operations of the financial police, the financial police filed 1.244 complaints due to false or missing posting registrations. Fines applied amount to 3.975.154,00 Euro.

Between May 2011 and November 2016, 1.942 charges due to underpayment (963 against domestic and 979 against foreign employers) have been filed amounting to applied fines of 31.322.360 Euro. Of these charges 1.106 cases ended in a final conviction of employers (551 domestic, 555 foreign employers), affecting 2.297 workers (877 domestic and 1.420 foreign workers). Financial penalties amounted to 7.318.190 Euro. 28 final judgements have been imposed for the prohibition of services by the competent district administration authorities. Broken down by industries, construction and related services (630) dominated the convictions for underpayment, followed by catering, trade, and temporary agency. In transport and company cleaning 38, respectively 37 convictions have been spoken out⁶.

BUAK reports that around 53% of contributions to the BUAK are collectible. Executions in cross-border constellations are possible, but costly. Lawyers in the sending countries have to be hired, they are taking care of executing the collection of contributions. Penalties are only issued by administrative courts or district authorities.

5. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1440756056661&uri=CELEX:32014L0067>

6. 874 charges for underpayment in construction and related services. In transport and company cleaning 70, respectively 64 charges have been filed. Numbers retrieved from "Zusammenfassung der LSDB-Statistik", https://www.wko.at/branchen/sbg/transport-verkehr/autobus/LSDB-Statistik_Zusammenfassung_20161130.pdf

The expert from the Ministry of Social Affairs in Austria asserted that the execution of cross-border fines has been implemented in the Anti-Wage and Social Dumping Act, the district administration authorities (who are executing fines) are being trained and sensitized about the respective provisions of the law. In 2018, the ministry together with the district administration authorities will examine how the implementation of the ED works in practice in selected countries sending workers. Dependent of the result of this examination, there will be an approach to the European Commission or the CJEU about the non-adherence of particular countries to the Enforcement directive. It would be crucial that the executing authorities are taking seriously the obligation to feed-back about the execution to the authorities that imposed the fine. Up until now, this obligation does not work systematically but only sporadically. Another principal problem identified by a representative of BUAK was the short lifespan of firms, especially in the construction sector, against the long duration of court proceedings: "Until a verdict is decided the penalty cannot be executed anymore because the firm has vanished or has gone bankrupt." Besides the cross-border execution of fines, the Austrian legislation foresees other measures of penalties: in case of the probable non-payment of fines tax authorities can be authorised to set and collect a provisional security deposit up to the maximum amount of the impending fine (Sicherheitsleistung). In cases of severe infringements, non-resident firms are prohibited of providing services in Austria.

Conclusions

To summarise, Austria has implemented the ED in the Anti-Wage and Social Dumping Act. It is regarded as one of the strictest implementation in Europe with high administrative penalties in case of infringements. Main problems were reported when it comes to effectively and extensively monitor the stipulations and when it comes to the enforcement of posted workers' rights and entitlements. Especially, transnational cooperation between national authorities of sending and receiving states and the enforcement of penalties in a cross-border setting must be improved.

From the point of workers' concerns about underpayment or non-payment of wages, they may be hesitant to contact the relevant state institutions. In Austria, neither labour inspectorates nor other public authorities are the contact points in charge for the enforcement of non-paid wages. They are the inspecting and investigating authorities for the enforcement of public law, i.e. law in place to combat wage and social dumping that penalises employers in case of infringement. Withheld wages must be claimed individually by the workers themselves via labour courts. Hence, it remains unclear and unknown if and to what extent posted workers, whose labour and social rights have been violated, can effectively claim their forgone rights and entitlements.





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