



The tension between national anti-dumping measures and European Court of Justice decisions: the case of Maksimovic and others versus Austrian public authorities*

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Introduction

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The increase in the number of postings to Austria has pushed national policy makers to pass anti-dumping regulation in 2011, which was revised in 2017 and again in 2021. The law required posting companies to pay posted workers equal rates to workers hired in Austria and prescribed specific punitive measures for offending companies, which made Austria at the time one of the EU countries with the toughest enforcement mechanisms against social dumping regarding the posting of workers. At the European level, the 'equal pay principle' was only introduced in 2018 with the revised Posting Directive (2018/957).

Posting companies, however, have challenged the punitive measures applied by enforcement agencies in Austria through Austrian judicial courts. In 2018, the European Court of Justice (ECJ) decided in 'Maksimovic and others versus Bezirkshauptmannschaft Murtal and Finanzpolizei' that the practice of imposing high, cumulative fines is incompatible with the freedom to provide services in the European Union outlined in Article 56 of the Treaty on the Functioning of the EU. Based on this ruling, the cumulation principle was abolished in the 2021 reform of the Anti-Wage and Social Dumping law.

In this policy brief, we discuss the tension between national anti-dumping measures and the judicial regulation of posting by the ECJ decisions through the

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example of the case ‘Maksimovic and others versus Austrian public authorities,’ and how this decision might affect national authorities’ efforts to prevent and prosecute any potential violations committed by certain posting companies. We start the brief by describing the posting context in Austria and provide an overview of the content of the Austrian anti-dumping regulation. We then outline posting companies’ irregular practices as reported by public authorities and social partners as well as public authorities’ challenges in preventing and prosecuting violations related to the posting of workers. We continue by explaining the involvement of the ECJ in posting cases and the details of the ‘Maksimovic and others’ case. Finally, we discuss the consequences of the ECJ decision, how it is going to influence posting rule enforcement in Austria and the wider EU and conclude with some take away messages and recommendations.

Context: Posting in Austria

Austria is fifth in the rank of EU countries that receive most posted workers, and first in terms of the country that receives most posted workers from its neighbours, which means that the main countries of origin are Germany, Slovenia, Slovakia, and Hungary (Table 1).

Table 1. Posting trends in Austria, 2016-2019

	2016	2017	2018	2019
Estimates of incoming posted workers based on the number of issued Portable Documents A1 forms (PDs A1) according to Article 12	120,150	141,046	119,907	320,480
Estimates of outgoing posted workers based on the number of PDs A1 according to Article 12	62,526	50,303	88,117	98,965
Share in employment of incoming posted workers according to Article 12	2.8%	1.2%	2.0%	2.3%
Main countries of destination for posted workers	DE, CH, IT, FR	DE, CH, IT, FR	DE, IT, CH, FR	DE, CH, IT, FR
Main countries of origin of posted workers received	DE, SI, SK, HU	SI, DE, HU, SK	DE, SI, SK, HU	DE, SI, SK, HU

Source: De Wispelaere et al, 2020; De Wispelaere et al, 2019; De Wispelaere & Pacolet, 2018; De Wispelaere & Pacolet, 2017.



The share of posted workers (as defined by Article 12 of the Regulation no. 883/2004 on the coordination of social security systems) in national employment was 2.3% for Austria in 2019, which is higher than the European average of 0.5% (De Wispelaere et al., 2020). The main sector of activity is construction with about 64.3% of PDs A1 (Article 12) issued to posted workers working in Austria's construction sites in 2017, while the total employment share for this sector reaches 21% (De Wispelaere & Pacolet, 2018).

The Austrian Law on Anti-Wage and Social Dumping is considered one of the most comprehensive and toughest anti-dumping legislations in the European Union (Kahlert and Danaj, 2021; Krings, 2019). Some aspects such as administrative requirements, document keeping, and administrative fines are stricter than what is required under European law as a means of preventing social fraud already at the onset. Fines for violating reporting obligations can range from €1,000 to €10,000 for each worker and from €2,000 to €20,000 in case of repeated offences for omitting notifications of postings to the Austrian authorities, for providing incorrect data in the reports, and for failing to keep the required documents readily available. According to the law passed in 2017, fines could be cumulated and there was no upper limit. If the fines were not paid, employers might face a prison sentence. Based on data reported by public authorities, between May 2011 to January 2019, legally binding decisions were made concerning 2 168 cases of failure to keep documents available (Murr, 2019). As it will be discussed later, the ruling on 'Maksimovic and others' has affected these punitive measures substantially.

Employer practices and enforcement challenges

Enforcement agencies and social partners report several irregular practices certain posting companies use to reduce costs

Despite the requirement of the Anti-Wage and Dumping law to pay posted workers Austrian rates and additional costs associated with posting (e.g., legal services, costs of keeping documents, tax services, or travel, lodging and accommodation) posting remains beneficial for sending companies from other EU countries. Our research indicates two main reasons for this. Firstly, social contributions continue to be paid in the sending country and percentage differentials in social contributions between most sending countries and Austria are high. For example, social insurance contribution equals 27% of the gross wage in Austria, compared to 16% in Slovenia (Hofstadler et al., 2016). Secondly, most sending countries use their own wage levels as the basis for calculating social insurance contributions, which in the case of lower-income countries lead to further cost reductions. Countries like Slovenia also require companies to calculate and pay contributions based on minimum wage levels, which again leads to lower costs.



Apart from the cost-reduction opportunities provided by the differences in legal requirements across countries, enforcement agencies and social partners we interviewed reported several irregular practices certain posting companies use to reduce costs. These practices include:

- **Miss-reporting posted workers' employment status:** classifying posted employees as too low in the skills or professional levels, to pay them according to Austrian collective bargaining rates for the lower categories; reporting employees as part-time; reporting workers as self-employed; deregistering employees due to sickness or accident.
- **Underpaying social insurance:** paying social insurance for working part-time although workers work full-time; registering posted workers only for a few days to receive the PD A1 documents, but then deregistering them again, although they are still working; engaging in fraudulent issuance of social insurance documents by using fake PDs A1; or registering posted workers for social insurance but not paying their social insurance contributions.
- **Reducing payments to the Construction Workers' Holiday and Severance Pay Fund in Austria (BUAK):** deregistering shift workers; reporting workers as part-time; engaging in pseudo self-employment, i.e., reporting hired employees as self-employed to pay less contributions to BUAK.
- **Holding back daily allowances and other payments:** daily allowances are not considered part of the minimum wage in Austria and are neither taxable nor used as basis for assessing social insurance, which makes it a trivial offence for institutions but might cost workers considerably.
- **Disregarding reporting obligations such as wage records:** according to interviewed stakeholders, some companies nowadays prefer to violate this rule based on an "economic calculation": violating reporting obligations is only a lesser formal offence compared to social fraud. Would the companies disclose wage records which may not be aligned with the regulations, they would risk being convicted for social fraud which carries significantly higher fines.

Enforcement agencies report challenges related to detecting and prosecuting posting companies that break national rules

Enforcement agencies are aware of these practices, but they face several challenges in terms of enforcing EU and national legislation, when it comes to posting. Their challenges relate to detecting and prosecuting offending companies and include:

- **Regulatory differences between sending countries and Austria:** there are considerable differences in legislation in terms of posting rules and obligations, social security, and occupational safety and health. Austrian authorities abide by local legislation and monitor posting companies accordingly. These differences, however, lead to uncertainty about applicable legislation.



- **Language barriers:** direct communication with workers is hindered by the lack of a common language, which influences how inspections are conducted and workers are interviewed on site.
- **Insufficient cross-border information exchange and cooperation:** while enforcement agencies use EU-wide platforms like the Internal Market Information System (IMI) or the Electronic Exchange of Social Security Information (EESSI), these instruments do not fulfil all the needs for a timely and relevant information exchange. Austria is the country that makes use most of IMI (European Commission, 2020). Yet, received responses are sometimes slow and incomplete and therefore might hinder any efforts to prosecute offending companies. EESSI, on the other hand, is still at its trial phase, and Austria has set up the exchange with Slovenia, but the system is still not operational with all EU countries.
- **Appealing fines:** posting companies often appeal the administrative fines issued by enforcement agencies such as the Financial Police. The process can be lengthy and through legal representation some companies have managed to rearticulate the issue and sometimes avoided payments. Hence, according to enforcement agency representatives we interviewed, appeals and legal procedures are used to undermine enforcement.

Earlier ECJ rulings on posting cases

ECJ rulings have mostly prioritized the principle of freedom to provide services in the European labour market

The European Court of Justice has been addressed to deliberate on several complex cases about posted companies' obligations, posted workers' rights and national actors' competences. Cases include disputes on wages and working conditions of posted workers, reimbursement of expenses, the applicability of host country law and collective agreements, social security contributions payment and calculation, and third country nationals (Rasnača and Bernaciak, 2020). Tensions between EC Directives and national legislation have been often settled in favour of European legislation, prioritizing the principle of freedom to provide services, outlined in Article 56 of the Treaty on the Functioning of the European Union against social rights. The most debatable of these cases have been the so-called Laval Quartet, which comprise the following:

- a. **Case C-341/05, Laval un Partneri Ltd, ECR 2007, I-11767.** The Court ruled against the Swedish Building Workers' Union claim and their secondary industrial action as they asked for posted workers to benefit from the Swedish sectoral collective agreement and confirmed the right of the Latvian company Laval un Partneri Ltd to pay their posted workers home country, i.e., Latvian, rates.



- b. **Case C-438/05 Viking, ECR 2007, I-10779.** The court ruled in favour of the Finnish ferry company Viking's decision to relocate and establish itself in Estonia under their right of establishment. The Court ruled against Finnish unions' industrial action against the company's decision, which unions considered driven by the intention to evade the binding Finnish collective bargaining agreements.
- c. **Case C-346/06 Rüffert, ECR 2008, I-1989 & Commission v. Luxembourg, ECR 2008, I-4323.** In these cases, the court declared that collective agreement clauses in public procurement law (Germany) and national implementation legislation (Luxembourg) of the Directive were contrary to community law.

One exception is case **C-396/13 Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna**, where the ECJ decided in favour of Finnish Unions' claim that they are entitled to represent posted workers in their claims against their employer, and that posting companies should pay wages, bonuses, and other benefits to posted workers based on the rates stipulated in the Finnish sectoral collective agreement.

The revised 2018 Directive also stipulates that host country pay scales including collectively bargained wages should be applied for posted workers. Hungary and Poland sought the annulment of the Amended EC Directive 2018/957 by the ECJ, drawing attention to the protectionist nature of the revised directive, which would hinder the implementation of the treaty principle of freedom of movement for labour and services. The ECJ dismissed their actions by arguing that the adjustment was necessary by providing adequate social protection and addressing the rising un-level playing field between undertakings from sending and receiving countries and the structural differentiation of rules on wages applicable to respective workers. In this case, differently from the earlier Laval Quartet decisions, the ECJ decided in favour of social protection over economic freedom.

The case 'Maksimovic and others'

In 2018, the ECJ was asked to rule on four cases (C-64/18, C-140/18, C-146/18 and C-148/18), which raised the issue of administrative penalties foreseen in Austrian national law against social dumping. These cases were joined and addressed in one ruling referred to as 'Maksimovic and others versus Bezirkshauptmannschaft Murtal and Finanzpolizei'. "Maksimovic and others" involved the Austrian paper-pulp company Zellstoff Pöls, which tasked an Austrian engineering firm to make repairs, which then subcontracted the



Croatian company Maksimovic to do the work. When visiting the construction site three times, the Financial Police were not provided with the necessary documentation for 217 posted workers including 200 Croatian, Serbian and Bosnian workers. Maksimovic and the Austrian engineering company as third-party employer were fined €13 million for not complying with administrative obligations and payroll documentation. If not paid, this fine could be converted to a prison sentence for each responsible agent according to Austrian law.

The persons subject to these penalties appealed. In response, the Styrian Regional Administrative Court requested a preliminary ruling from the ECJ about the practice of administrative authorities to penalize posting companies for not providing documentation and for failing to report the posting of workers to the central coordinating office.

The ECJ ruled:
“...it is clear that national legislation imposing penalties on both a service provider and the recipient of those services for non-compliance with such obligations which, as such, constitute restrictions on the freedom to provide services, is likely to render the exercise of that freedom less attractive.”

ECJ Rulings

The Styrian Regional Administrative Court asked ECJ the following question: Is national law precluded from imposing heavy and cumulative fines and imposing imprisonment if fines are not paid?

The ECJ ruled that the Posting of Workers Directive and the Enforcement Directive are not relevant for answering the above question, because they are not concerned with monitoring measures. Instead, the ECJ concluded that the practice of imposing high, cumulative fines is incompatible with the freedom to provide services in the European Union outlined in Article 56 of the Treaty on the Functioning of the EU.

The ECJ also concluded that the severity of the penalty must be commensurate with the seriousness of the offence, even if national legislation regards the penalty as commensurate. In this case, the administrative or punitive measures permitted under Austrian legislation must not surpass necessary measures to reach the objectives legitimately pursued by that legislation. Therefore, high, cumulative administrative fines, imposed by the Austrian legislation, are not permitted.

Posting to Austria after ‘Maksimovic and others’

The court’s ruling that the practice of high, cumulative fines is incompatible with the freedom to provide services has implications for the Austrian context but also for the European Union one.



This ruling put a question mark on the Austrian measures of high, cumulative fines and the way Austrian enforcement agencies monitor the implementation of the Austrian Anti-Wage and Social Dumping Law. In light of the ‘Maksimovic and others’ ruling, Austrian legislators took until July 2021 to make an amendment to the Anti-Wage and Social Dumping Law that entered into force in September 2021, and which abolished the option for cumulative fines (Federal Law Gazette I No. 174/2021).

The amendment includes the exemption from the equal pay principle for workers posted to Austria to perform assembly/installation work, commissioning and associated training or repair and service work that cannot be performed by domestic workers for a period of three months. Transit workers who deliver goods produced abroad and those sent to Austria for training purposes are not considered posted workers. Penalty measures have also been revised based on the ECJ ruling recommendation of proportionate penalties. In the current legislation, penalties are framed in five stages of severity of breach of law. Failure to report posting is subject to an administrative fine of up to 20 000 EUR and failure to keep and present the relevant documentation is subject to an administrative fine of up to 40 000 EUR. Underpaying workers can result in fines of up to 400 000 EUR in particularly severe cases. In case of collaboration to remedy the underpayment, the penalty can be reduced to between 100 000 to 250 000 EUR (see 23. § 29 Abs. 1). However, the abolishment of the cumulation principle means that punishment could be less severe in the future especially for companies committing several offences at once. In the past, each offence could be fined individually. The total cost for an employer was hence the fine for an offence (e.g. the fine for not notifying a posting) multiplied by the number of offences (the number of postings that were not notified) which was theoretically unlimited. Under the new law, this is no longer possible.

The ECJ ruling might lead to adjustments to Austria’s Anti-Wage and Social Dumping Law and encourage certain posting companies to engage in ‘economic calculation’ without fully clarifying the question of proportionality of fines

While the amendment addresses the question of proportionality of the punitive measures, critical voices, including the Chamber of Labour, warn that the new legislation might have a negative impact on national efforts to fight social dumping but also more broadly. The first concern is that it might encourage more posting companies to engage in “economic calculation” (APA, 17 June 2021). More specifically, some companies might calculate which rules would be less costly to violate. For example, if the employer knows that the likelihood of an investigation by the Financial Police is normally 10 percent, and the fines are capped at a certain level, the company could calculate whether and when it would make sense economically to take the risk of not paying according to the law and then not provide the wage documents during an inspection. Not presenting documents is also considered a formal or a lesser offence with affordable administrative penalties than if the companies would disclose wage



records that might reveal social fraud. There is a concern that “economic calculation” and with it social dumping practices could become even more attractive in the aftermath of the ECJ ruling and the amendment of the Austrian Anti-Wage and Social Dumping Law, which prescribe administrative fines capped to a certain (affordable) amount (Ungerboeck, 21 July 2021). To discourage such practices would require a tighter monitoring of posting companies by Austrian authorities that might not be necessarily easy to accomplish. The second concern relates to the ‘spill-over’ effect of this particular amendment on the principle of ‘cumulative fines’ which is foundational to the Austrian administrative law and might provide the grounds for unequal treatment between foreign and local companies, thus pressuring for further revision of national legislation (Pflügl, 10 May 2021).

Take-away messages

As one of the main receiving countries for posted workers in the European Union, Austria has addressed the risk of social dumping by passing an Anti-Wage and Social Dumping Law that contained punitive measures against violating posting companies earlier than EU legislation. Research findings suggest that even before ‘Maksimovic and others’, some posting companies were taking advantage of the cross-border labour mobility of workers through irregular practices to their own financial benefit and Austrian enforcement agencies had difficulties in preventing them from doing so. Despite the challenges, such punitive measures seem to have had a preventative effect, which made Austria be considered as a country with a tough stance on social dumping (Kahlert and Danaj, 2021).

The 2019 ECJ ruling on the joined cases ‘Maksimovic and others’ against cumulative fines as disproportionate to the committed offences has had implications for posting to Austria and potentially the whole EU as it weighs in on the overall discussion about balancing freedom to provide services in the common European market with the protection of national standards. The importance of providing adequate standards for workers has now become more concrete in the revised Directive (2018/957) with the incorporation of the equal pay principle. The enforcement of this principle still requires the necessary regulatory mechanisms at the national level, which the Austrian law already had. But as the Austrian example illustrates, rules are not enough, and a need for continuous monitoring and control remains prevalent to ensure their enforcement. The ECJ ruling in favour of the protection of the freedom to provide services against efforts to protect national standards puts a question mark on these national efforts to discourage dubious practices that lead to



social dumping. And by thus doing, it reopens the debate on market making measures and the convergence of labour standards in the EU. In the case of Austria, it has pushed national institutions to reformulate their measures without fully resolving the tension between EU and national regulations, as ‘spill-over’ effects on other national legislation might be triggered. As for the effect of the amended law in fighting wage and social dumping in Austria, we will have to wait and see in the near future.

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