



Mutual Learning Programme

DG Employment, Social Affairs and Inclusion

Peer Country Comments Paper – Austria

Well-functioning cooperation between the authorities as a precondition for fighting undeclared work

**Peer Review on “Control and prevention of undeclared
work in complex chains of economic activity”**

Slovakia, May 2021

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April 2021



EUROPEAN COMMISSION

Directorate-General for Employment, Social Affairs and Inclusion

Unit A1

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1 Introduction

This paper has been prepared for the Peer Review on "Control and prevention of undeclared work in complex chains of economic activity" within the framework of the Mutual Learning Programme. It provides a comparative assessment of the policy example of the host country and the situation in Austria.¹

2 Situation in the peer country

In Austria, undeclared work (in short, UDW) is **defined** in the Austrian Criminal Code (Strafgesetzbuch – StGB) as 'organised' UDW, referring to *professional recruitment or placement of people in independent or dependent employment without the required registration for social insurance or without the required business license (§153e)*. While §153e StGB refers to entities that commercially have a *larger number of illegally employed persons*, UDW practices below the 'larger number of illegally employed persons' are subject to the Austrian General Social Insurance Act (ASVG).

Several types of UDW are practiced, comprising (partly) envelope wages, bogus part-time work, falsely declared employment and underpayment; all of which can relate to different forms of social fraud, such as partial or no payment of social security contributions (European Platform tackling undeclared work, 2017). According to the Austrian Financial Police, **10% of controlled posted or seconded workers to Austria in 2019 were suspected to be underpaid** (Finanzpolizei, 2020). Underpayment, followed by a lack of documents of foreign employers and unwillingness to disclose legally required documents of domestic employers are the most frequent unlawful behaviours fined by the Austrian Financial Police and presented in the Austrian 'LSDB-statistic' (see below; Parlamentsdirektion, 2019). The Austrian **shadow economy**² was the lowest among all EU-28 countries and had further declined over the last decade. However, the size of this economy in percent of GDP is still estimated at 7.8% in 2016 (Schneider, 2016).

Not declaring work seems to be **widely accepted** in Austria, as was revealed by the Eurobarometer in 2019. For instance, 32% of the respondents found it acceptable not to declare the income, if a private person is hired by a private household. Moreover, 33% knew someone personally who had not declared all or parts of their income to Austrian authorities. Also, 4% of respondents have carried out an undeclared paid activity (European Commission, 2020).

Austria has a higher share of **employed foreign nationals** than the EU-28 average (EUROSTAT, 2020). 16.3% of the workforce are from a foreign country and 6.5% of the workforce are non-EU nationals. In 2018, 119 907 Portable Documents A1 **of posted workers** coming to Austria were processed (Kahlert & Danaj, 2021). The labour market share of incoming posted workers is 2.0%. **Temporary work** increased by more than 80% since 2005. In 2019, 85 917 workers conducted temporary work in Austria (Bundesministerium für Arbeit, Familie und Jugend, 2020a).

Austria has a well-developed framework for preventing and fighting UDW (see below). Still, UDW is frequently practiced. Although the number of identified cases decreased over the past years, additional measures, such as expanding liability regulations and ensuring fighting UDW in all economic sectors, are needed in Austria to further reduce UDW, especially in complex chains of economic activity.

¹ The paper was written in collaboration with Nicolas Prinz.

² The *shadow economy* is defined as the legal production of all goods and services that are intentionally withhold from national authorities to avoid taxes, social security contributions, labour market standards (such as minimum wages) and/or (costly) administrative procedures (Schneider, 2016).

3 National policies and measures

3.1 Legislative framework

The Slovakian concept of **dependent work** seems to be closely related to the definition of employees in Austria. According to the Austrian Employment Contract Law Harmonisation Act (Arbeitsvertragsrechts-Anpassungsgesetz), an *employee is someone who undertakes to perform work on the basis of an employment contract with the employer*.³ Several legislations are in place in Austria and at the EU level to combat various types of UDW:

- At the national level, the **Anti-wage and social dumping Act** (LSD-BG / Lohn- und Sozialdumping-Bekämpfungsgesetz) is considered as one of the most comprehensive anti-dumping legislations within the EU (Kahlert & Danaj, 2021 in referring to Krings⁴). The law features the concept of customer liability and improves the aspects of cross-border administrative prosecutions.
- The **Austrian Social Fraud Prevention Act** (SBBG / Sozialbetrugsbekämpfungsgesetz) aims to prevent and control social security fraud and defines customer liability rules.
- Next to the LSD-BG, the **Austrian Act on Secondment of Workers** (Arbeitskräfteüberlassungsgesetz) protects temporary workers in Austria by securing equal work and payment conditions compared to regular employees (Kahlert & Danaj, 2021).
- With regard to posting, the **Posting of Workers Directive** and the **Enforcement Directive** which regulates joint liability in subcontracting chains and exchange of information between the Member States are among the most important regulations at EU level.

3.2 Enforcement authorities

Similar to Slovakia, **different enforcement authorities** control the varying aspects of UDW in Austria. Main actors comprise:

- The **Financial Police** is the national anti-fraud unit at the Federal Ministry of Finance. It performs controls to *detect tax and social fraud* and is the principal organization to fight *illegal employment practices* including *wage & social dumping* (i.e., different types of UDW such as underpayment – see above).
- In contrary to many other EU countries, the **Austrian Labour Inspectorate** is not the key actor for fighting UDW. The Labour Inspectorate however is the main authority for the monitoring of employment conditions in Austria, such as Occupational Safety and Health (OSH). The authority is a department of the Federal Ministry of Labour. It has the competence to inspect employment contracts and controls the compliance with the labour law.
- The **Austrian Health Insurance Institutions** are responsible for collecting social insurance contributions and *legally represent other institutions in all collection-related matters* (European Platform tackling undeclared work, 2017).
- The Construction Workers' Annual Leave and Severance Pay Fund/**BUAK (Bauarbeiter-Urlaubs- und Abfertigungskasse)** is an Austrian-specific authority authorised to perform on-site inspections at construction sites (see also section 3.5).
- Other important partners comprise the **Social partners** (through providing the counselling services, and their involvement in preparing legislation) and the

³ <https://www.usp.gv.at/mitarbeiter/arten-von-beschaeftigung/arbeitnehmer.html>

⁴ Krings, 2019, Posted Workers in Austria. Österreichische Zeitschrift für Soziologie. Vol. 44.

Public Employment Service (issuing employment permits under the Act Governing the Employment of Foreign Nationals; Ausländerbeschäftigungsgesetz / AuslbG). Moreover, the help desk '**UNDOK**', implemented as cooperation between different stakeholders in AT including **NGOs**, offers counselling to employees on their rights and on illegal employment practices.

3.3 Reported violations against the laws

The following data indicate the extent of UDW detected through the actions of the Austrian authorities:

- Between 2011 and 2019, 3 506 incidents have been reported for **underpayment** which involved a total of 14 473 employees. They resulted in requested penalties of approx. EUR 49 million (Austrian 'LSDB-statistic'; Parlamentsdirektion, 2019). Of these, 44% were in the construction sector.⁵
- The Austrian Labour Inspectorate reported 3 544 **violations related to the working time** (of in total 89 214) in 2019 (Bundesministerium für Arbeit, Familie und Jugend, 2020b) which can include underreporting as a specific type of UDW.

The Austrian authorities **cooperate extensively** to fight illegal employment and tackling UDW during all process stages - from joint audits and on-site visits to reporting and issuing fines (see below; European Platform tackling undeclared work, 2017; Kahlert & Danaj, 2021; Hollan & Danaj, 2018).

3.4 Cooperation between the enforcement authorities

According to the Austrian enforcement agencies, cooperation between authorities within Austria with the mission to mitigate UDW works well (see above). This includes cooperation as follows:

- between *different regional offices and the central entities* such is the case with Labour Inspectorates⁶; as well as
- between *different authorities* (e.g., between the Financial police and the Labour Inspectorate).

Cooperation takes place between Austrian enforcement authorities by sharing suspicions on violators, as well as exposed violators, and is legally binding under the SBBG and LSD-BG (see example).

This cooperation was enhanced by the **mandatory social security fraud database** under §5 of the SBBG. The Federal Ministry of Finance is obliged to save information about persons and businesses which engaged in social fraud practices, which includes, among other things, the particular type of fraud as well as the amount of underpaid wage and social insurance contributions.⁷ In contrast to the public registry of violators in Slovakia, the Austrian social security fraud database is not publicly available.

Transnational cooperation remains a challenge. Main difficulties are reported regarding monitoring the foreign employers (Hollan & Danaj, 2018), improving the IMI-Internal Market Information System⁸ (Kahlert & Danaj, 2021), and, in general, practiced cooperation with enforcement authority counterparts in other EU countries. This is particularly the case when it is, for instance, required to locate and convict violations of corporations that post workers to Austria but operate from outside of national borders (Kahlert & Danaj, 2021). Cross-border cooperation is needed also to **combat fraud of**

⁵ From a total of 3506 violations, 1570 were un the construction sector.

⁶ The regional branches of the Labour Inspectorate act under the Central Labour Inspectorate.

⁷ According to § 5(7), personal data of a specific suspicion of social fraud must be deleted after five years. If the suspicion of social fraud turns out to be invalid, personal data must be deleted immediately. Data about convicted legal persons is kept for 10 years.

⁸ E.g., IMI does not cover information on social insurance

letterbox companies by avoiding social insurance contributions, taxes and employment legislations (McGauran, 2016 and Jorens & De Coninck, 2019).

3.5 Fighting UDW in complex chains of economic activity

This is tackled through several measures as described below.

Similar to other EU countries⁹, in Austria, important economic sectors where UDW is practiced in complex chains of economic activities, i.e., by involving several entities such as several companies as sub-contractors including temporary work agencies, is the **construction sector** (European Platform tackling undeclared work, 2020), next to the manufacturing and the agriculture sector as well as transport and tourism.

Austria implemented construction-sector specific measures to fight UDW. Under the LSD-BG, the **BUAK** has been authorised to perform checks at construction sites and to file complaints about the underpayment of workers. Currently, 34 inspectors work for the BUAK to ensure equal wages of Austrian and foreign workers (European Platform tackling undeclared work, 2020). Additionally, a **construction site database** has been set up by the BUAK to provide information about the Austrian construction sites. All other enforcement authorities in Austria have access to the database to carry out inspections more efficiently. Since 2018, construction corporations have to report the actual working times of their employees to the BUAK. The **compulsory reporting of full-time and part-time workers** significantly reduced the number of part-time workers on construction sites (European Platform tackling undeclared work, 2020).

In January 2017, the updated law against wage and social dumping added the **customer liability provision**. It states that the customer is also liable to employees posted or subcontracted by their contractor in connection with work performed in Austria. This customer liability provision is binding for workers on Austrian construction sites. In the case of underpayment of cross-border employees, the immediate customer is liable as an employer and the employee can claim wage differences from the Austrian customer through the BUAK (BUAK, 2021).

In addition to the social security fraud database, the Austrian Ministry of Finance is obliged to maintain a **publicly available database on bogus companies**¹⁰ under §8 of the SBBG. The database includes the identity of the corporation or person, the company register number and the business address. Bogus companies which represent a legal person are kept for five years in the public registry. If the Austrian authorities legally establish a bogus company and the Austrian social insurance agencies are not able to determine the employer of the workers at the bogus company, the customer can be held responsible for all underpaid remunerations of the workers, if the customer had reason to believe that the hired corporation is indeed a bogus firm (European Platform tackling undeclared work, 2017).

Self-employed are obliged to take social insurance in Austria, which reduces an incentive for employees to become **bogus self-employed** (European Commission, 2013). Consequently, the number of bogus self-employed in Austria is limited to workers in complex chains of economic activity, mainly in the construction sector, where 'hidden' work can much easier be undertaken. A study of the BUAK evaluated bogus self-employment in construction sites in 2013. Almost 70% of the controlled self-employed showed numerous indications for a falsely registered self-employment (Riesenfelder & Wetzl, 2013).

The **Austrian Act on Secondment of Workers** protects temporary workers by securing equal work and payment conditions compared to regular workers, similar to posted workers in the LSD-BG. Hence, national and foreign temporary work agencies need to **report the employment of their workers** prior to commencement of work,

⁹ 21% of the undeclared jobs are in the construction industry (European Commission, 2019).

¹⁰ Bogus companies frequently pursue wage and social fraud practices (§8 SBBG).

pay according to the collective agreements, provide continued remuneration in cases of illness or accident, grant annual leave entitlements and comply with all relevant regulations (e.g., working time, termination and dismissal, maternity protection, safety and health; Kahlert & Danaj, 2021). A failure to provide such notice to the Central coordination agency¹¹ can be fined with up to EUR 10 000.

According to Heilemann (2017), the Financial Police especially prioritises the identification of **illegally employment of third-country nationals** (TCNs). However, the main form of illegal employment involves wage dumping of **posted workers** from EU Member States: 73% of the identified illegal employees in Austria were EU citizens. The LSD-BG is the main national law concerning posting after being implemented in 2017 and requires a minimum remuneration, an annual leave entitlement, an entitlement to compliance with working hours and rest periods and provisions governing the posting and hiring out of workers on a cross-border basis to all workers posted to perform work in Austria (Kahlert & Danaj, 2021). Furthermore, Austrian employers are obliged to report the employment of their posted workers to the Central Coordination Agency prior to starting work.

4 Considerations for future policies and initiatives

Considerations for future policies and initiatives identified for the Host Country Slovakia when compared with the Peer country Austria are the following:

- **Decentralisation vs. centralisation of inspections:** Though centralisation of inspections under the labour inspectorates may have advantages, various fields relating to UDW, especially in the field of complex chains of economic activity, are to be controlled and violations fined under *different laws such as labour law, criminal law, social law and employment law of foreign nationals*. These areas that are not under the responsibility of a single institution (e.g., wages, social contributions, employment conditions, etc.). Instead of the centralisation of inspections, *developing and strengthening cooperation* such as regulating the cooperation in laws (Austrian LSD-BG and SBBG – see example) is recommended.
- **Public registry of violations of labour & social security legislation including bogus companies:** In Austria, the expansion of the public registry is discussed by scholars to further combat social dumping. Riesenfelder et al. (2019), for instance, recommend to publish company names in case of violations against LSD-BG (similar to the social fraud database under SBBG). Rather than easing regulations, expanding rules should be discussed in Slovakia (e.g., publishing companies names that violated labour or social security legislation, banning violating firms from public funds such as the European Social Fund).
- **Liability regulations:** Riesenfelder et al. (2019) recommended expanding liability regulations for prime contractors. Strengthened liability regulations should be addressed at EU level and further specified by rules at national levels (such is the case with the LSD-BG in Austria¹²) due to the transnational dimension of work (such as posting of workers, temporary work agencies within EU, temporary work of TCN, etc.). We furthermore have been informed that the Austrian National Action Plan of Human Trafficking 2021-2023 aims at setting new actions (e.g., introducing quality labels for chains, guidelines for firms).¹³

¹¹ <https://www.bmf.gv.at/en/topics/combating-fraud/zko.html>

¹² LSD-BG: §8 regulating reliability of workers from third countries, §9 on customer liability of posted/temporary workers in construction and §10 on the liability of sub-contractors.

¹³ Discussions during the Working group "Labour exploitation and human trafficking" (25 February 2021) and a follow-up phone call with the Austrian Social Ministry (3 March 2021).

5 Questions

- In how far does the EU legislation (e.g., Posting of Workers Directive and Enforcement Directive) assist in fighting UDW in Slovakia?
- What role do social partners play in practice in the preparation of legislation in fighting UDW? To what extent does the real distribution of power of social partners influence the discussions on changes regarding fighting UDW (e.g., grace period /additional possibilities for employers to intervene, shortening the length of publishing company names who violated against laws)?
- Why should a two-stage evaluation/inspection processes be envisaged that may lead to enhanced mistrust in authorities?
- Why are some cases reported as undeclared actually legal (= not illegal) in the Slovak Republic? (see p.2; first para).

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Annex 1 Summary table

The main points covered by the paper are summarised below.

Situation in the peer country

- Undeclared work is defined in the Austrian Criminal Code (Strafgesetzbuch/ StGB).
- Several types of UDW are practiced, comprising (partly) envelope wages, bogus part-time work, falsely declared employment and underpayment; all of which relate to different forms of social fraud, such as partial or no payment of social security contributions.
- In Austria, 10% of controlled employees in 2019 were underpaid.
- Not declaring work seems to be widely accepted in Austria.

National policies and measures

- The Austrian Anti-Wage and Social Dumping Act (LSD-BG / Lohn- und Sozialdumping-Bekämpfungsgesetz) is considered as one of the most comprehensive anti-dumping legislations within the EU.
- Austrian authorities extensively cooperate to fight illegal employment and tackling UDW during all process stages – from joint audits and on-site visits to reporting and issuing fines.
- Austria implemented specific measures to fight UDK in the construction sector: under the LSD-BG, the sector specific body BUAKE has been authorised to perform checks at construction sites and to file complaints about underpayment of workers.

Considerations for future policies and initiatives

- Instead of centralisation of inspections, developing and strengthening cooperation arrangements is recommended (e.g., laying down cooperation in laws as is the case in the Austrian LSD-BG and SBBG – see example below).
- Rather than easing regulations strengthening and expanding rules to fight UDW should be discussed such as publishing company names that violated against labour and/or social security legislation.
- Liability regulations should be addressed at EU level and further specified by rules at national levels (such is the case with the LSD-BG in Austria within §8 regulating the reliability of workers from third countries, §9 regulating customer liability of posted/temporary workers in the construction sector and §10 regulating the liability of sub-contractors).

Questions

- In how far does EU legislation (e.g., Posted of Workers Directive and Enforcement Directive) assist in fighting UDW in Slovakia?
- What role do social partners actually play in practice in the preparation of legislation in fighting UDW? To what extent does the real distribution of power between employers and employee representatives influence the discussions on changes regarding legislation and enforcement of violations in fighting?
- Why should a two-stage evaluation/inspection processes be envisaged that may lead to enhanced mistrust in authorities?
- Why are some cases reported as undeclared actually legal (= not illegal) in the Slovak Republic? (see p.2; first para).

Annex 2 Example of relevant practice

Name of the practice:	Anti-Wage and Social Dumping Act (LSD-BD) and the Austrian Social Fraud Prevention Act (SBBG): Cooperation among authorities
Year of implementation:	LSD-BG: 2017; SBBG: 2016
Coordinating authority:	LSD-BG: Anti-fraud office (<i>Amt für Betrugsbekämpfung</i>)
Objectives:	To establish well-functioning cooperation among all authorities to combat social fraud (§4 SBBG) and to tackle illegal temporary work (§16 LSD-BG)
Main activities:	<p>Mutual Assistance and cooperation among authorities in Austria is laid down in legislation and according to authorities is also well-functioning (Kahlert & Danaj, 2021; European Platform tackling undeclared work, 2017). Cooperation is repeatedly discussed with the aim of strengthening the interfaces and establishing enhanced information flows. The following authorities are involved:</p> <ul style="list-style-type: none"> • <i>in the LSD-BG (§11)</i>: The Anti-fraud office (with the Financial Police as the control unit); Competence Centre LSDB; Austrian Health Insurance; BUAK; Administrative authorities at district level (Bezirksverwaltungsbehörden); and Central Coordination unit. • <i>in the SBBG (§3)</i>: 1) as cooperation authorities: The Anti-fraud office; tax authorities; Austrian Health Insurance; BUAK; Austrian Insolvency Remuneration Fund (Insolvenz-Entgelt-Fonds-Service GmbH); and Security services; and 2) as information agents: Administrative authorities at district level; the licensing authorities; the Labour Inspectorate; and the Public Employment Service. <p>The LSD-BG is regarded as essential foundation against dumping practices and UDW, with preventive and universally beneficial effects (European Platform tackling undeclared work, 2017).</p>
Results so far:	The social fraud database (§5), measures against bogus companies (§8) and the liability for bogus companies (§9) can serve as examples of results achieved with the SBBG.

