



# Unlawful employment of third-country nationals in Austria

Prisca Ebner



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## SUMMARY

This study examines the unlawful employment of third-country nationals in Austria in the period from 2017 to 2023 and thus builds on a previous study conducted by the European Migration Network (EMN) in 2016/2017. This publication is the Austrian contribution to the EMN comparative study “Illegal employment of third-country nationals: 2017–2022 situation analysis”.

The study provides an overview of risk areas and current trends, and analyses measures to prevent and identify unlawful employment. It also discusses possible consequences for employers and third-country nationals as well as challenges and good practices. In principle, the national legal, political and operational framework regarding the unlawful employment of third-country nationals in Austria has not changed significantly since 2016/2017. However, new trends and developments have emerged, which have also led to new challenges and approaches. The key findings are summarized below.

### **Overview of unlawful employment of third-country nationals**

The Anti-Fraud Office at the Federal Ministry of Finance regularly conducts risk assessments in the sectors most affected by unlawful employment. The focus in Austria continues to be, in particular, on the sectors of catering and tourism, agriculture and forestry, and construction. One new area of risk is van delivery services. Generally speaking, unlawful employment in Austria does not usually take place in large companies directly but via subcontractors. In recent years, there has also been an increase in the number of third-country nationals posted to Austria via other European Union Member States.

One key development during the period under review is a reversal of the trend in the origin of persons suspected of being unlawfully employed in Austria: since 2020 the majority have come from third countries, whereas the individuals identified in previous years were predominantly European Union citizens. Cases of exploitative working conditions and unlawful employment of third-country nationals came to public attention in Austria during the COVID-19 pandemic. In this context, an increased risk of exploitation and a rise in existing vulnerabilities were also observed in 2020 and 2021.

### **Prevention and identification of unlawful employment**

During the period under review, existing measures to prevent the unlawful employment of third-country nationals were continued. In practice, new IT systems have been developed and are in use in the private sector, in particular in the construction industry. These IT systems check the relevant data and the completeness of documents and permits before employees are hired, which is intended to prevent unlawful employment.

Measures to identify unlawful employment have remained the same since 2017. The Financial Police continue to carry out on-site checks on businesses, with the number of checks remaining fairly constant in the period from 2017 to 2022. One practical innovation will be the planned use of digital document scanners in checks conducted by the Financial Police.

## **Consequences for employers and third-country nationals**

In Austria, it is always the employer that is sanctioned in cases of unlawful employment. This may involve, in particular, the employment of a third-country national who has not been declared to the social insurance system as required and/or does not have the corresponding approval of the labour market authorities or residence permit. Sanctions against employers remained largely unchanged since their deterrent effect is considered to be sufficient by the Federal Ministry of Labour and Economy. However, legal amendments were made in relation to the nature of these sanctions.

In Austria, an employee cannot be penalized for unlawful employment. However, there may be consequences under aliens law for unlawfully employed foreign nationals. There are no plans to regularize employment or irregular residence. In any case, foreign nationals have the same legal rights towards their employer as Austrians, irrespective of their residence permit and regardless of whether or not they have a valid employment contract. As a result, unlawfully employed third-country nationals can access the same support services and complaint mechanisms. In practice, however, asserting and enforcing their rights is seen as a key challenge since unlawfully employed third-country nationals make very little use of the existing mechanisms.

## **Conclusions**

The relevance of the issue of unlawful employment increased in the Austrian context in the period from 2017 to 2023. The central finding of this study is that while the legal framework has remained almost unchanged and the scope of inspection activities relatively constant, there has been a sharp increase in the number and proportion of identified cases of third-country nationals suspected of being unlawfully employed. In order to address this issue, it will be necessary to tackle various challenges in terms of prevention, identification and sanctions, as well as with regard to the consequences for third-country nationals and the assertion of relevant rights, and to build on appropriate good practices.

# I INTRODUCTION

The unlawful employment of migrants from countries outside the European Union (third countries) is a complex issue that affects policy in the fields of migration, labour, society and taxation, as well as impacts the corresponding rights of individuals. The prevention of unlawful employment therefore lies at the interface between these areas. The following chapter outlines the situation in Austria before looking at the background to the study and the European Union context. It also examines key definitions, objectives and methodological aspects of the study.

## I.1 Background

Employment relationships that are not reported to the authorities or that take place outside the legal framework are part of a country's informal economy.<sup>1</sup> In Austria, the share of the informal economy in relation to gross domestic product (GDP) in 2023 is calculated to be around eight per cent. This puts Austria at the lower end compared to other countries in the Organisation for Economic Co-operation and Development (OECD average: 12%; Schneider and Boockmann, 2023:24). The share of GDP represented by the informal economy has risen in relation to 2019. This rise is explained by the poor economic situation, the impact of the COVID-19 pandemic and the Russian war of aggression against Ukraine (Austrian Federal Economic Chamber, 2023a; Schneider and Boockmann, 2023:24). A Eurobarometer survey conducted in 2019 showed that a third of Austrians knew someone (irrespective of citizenship) who worked without declaring income, with 12 per cent of Austrians saying that they had acquired goods or services in the past year where they had good reason to assume that they included undeclared work (European Commission, 2020b:12, 34). This mainly involved hairdressing or beauty treatments, repairs or renovations, cleaning or ironing, and gardening (European Commission, 2019:1). The majority of respondents in Austria (54%) thought there was a high risk that the authorities would detect undeclared income (European Commission, 2020b:78).

As for the employment of migrants, not all third-country nationals residing in Austria are allowed to work here. The conditions under which most third-country nationals<sup>2</sup> may lawfully take up employment in Austria are laid down in the Act Governing the Employment of Foreign Nationals.<sup>3</sup> Third-country nationals who do not have free access to the labour market require an official permit to take up gainful employment in Austria. An employer may only employ third-country nationals (Art. 3 para 1 Act Governing the Employment of Foreign Nationals) if the third-country national has a valid permit for this employment (e.g. Red-White-Red Card [Plus], European Union Blue Card, intra-corporate transferee permit, family member permit or Permanent Residence – European Union residence permit), or if the employer has been granted an official permit (work permit, posting permit or confirmation of notification) for the specific third-country national.

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1 The informal economy (shadow economy), broadly defined, refers to activities aimed at generating income where recording, taxation and state regulation are avoided (Schneider and Boockmann, 2023:4).

2 Persons who are excluded from the scope of the Act Governing the Employment of Foreign Nationals include (Art. 1 para 2), for example, persons entitled to asylum and subsidiary protection, researchers, media reporters and diplomats.

3 Act Governing the Employment of Foreign Nationals, FLG No. 218/1975 in the version of FLG I No. 84/2023.



According to the Financial Police, no major changes have been made relating to the unlawful employment of third-country nationals; only minor legal amendments have been made.<sup>4</sup> There are also currently no legal or policy changes planned.<sup>5</sup> In general, the legal framework in this area was characterized by continuity between 2017 and 2023, and political strategies have not changed significantly either. A possible reason for this could be the fact that there were five changes of government during this period, which limited the implementation of government plans (Federal Chancellery, n.d.).<sup>6</sup> At the same time, the trends and developments regarding the unlawful employment of migrants have changed significantly during this period (see [Chapter 2](#)). Third-country nationals working unlawfully in Austria are a very heterogeneous group. They include both highly qualified and low-skilled workers, and almost all sectors are affected (Yun, 2023:246). Students (Egg, 2022), asylum-seekers (Ebner, 2023) and platform workers are among the groups concerned (Fairwork, 2022). It can also be assumed that many migrants who have either no or only a precarious residence status are in work (Homberger and Güntner, 2022:36). The small amount of data available on the unlawful employment of foreign nationals highlights certain risk sectors in Austria, such as the construction industry, catering, agriculture, care work and small-scale industry (Biffi, 2023:184; see [2.1](#)).

## 1.2 European Union context<sup>7</sup>

According to the European Commission, unlawful employment decreases tax revenues, undermines the financing of social security systems and distorts fair competition among firms (European Commission, 2007). In addition to this negative economic impact, it also negatively impacts working condition standards, employment regulations and employees' rights. In general, unlawful employment often takes place under precarious conditions, which makes employees more susceptible to exploitation. Hence, preventing unlawful employment is a policy objective and priority for the European Union and its Member States (EMN, 2023a).

At the intersection between employment and migration policies, competencies within the European Union differ:<sup>8</sup> Member States are primarily responsible for employment policy, while migration policy is a competence that is shared between the European Union and its Member States. In 2009, the European Commission introduced the Employers' Sanctions Directive to tackle unlawful employment and to increase coordination.<sup>9</sup> The directive regulates action against the unlawful employment of *irregularly* staying third-country nationals. The measures cover prevention, detection and sanctions, and seek to deter employers from engaging in unlawful employment practices as well as to increase protection of irregularly staying third-country nationals from exploitative employers. Since then, the need for joint action against unlawful employment has been reiterated, for example in the 2015 European Agenda on Migration, in the 2020 New Pact on Migration and Asylum, and in the 2021 Communication on the Employers' Sanctions Directive (European Commission, 2015a, 2020a, 2021a).

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4 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

5 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

6 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

7 Details on the European Union context based on EMN, 2023a.

8 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47.

9 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24.

Furthermore, efforts to ensure decent working conditions and to protect migrant workers from exploitation are on the European agenda, as are work inspections. The Seasonal Workers Directive<sup>10</sup> of 2014 sets out the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. The European Union Action Plan against migrant smuggling for the period from 2015 to 2020 stated the need to identify targets for the number of inspections to be carried out every year in the economic sectors most exposed to unlawful employment of irregularly residing migrants (European Commission, 2015b). The prevention of exploitation and ensuring the protection of migrants was reiterated in the renewed European Union Action Plan against migrant smuggling for the period from 2021 to 2025 (European Commission, 2021b). Additionally, in 2016 the European Platform tackling undeclared work was set up between labour inspectorates and other enforcement authorities to improve cooperation, share good practices and identify common principles for inspections.<sup>11</sup> In December 2021, the European Commission also presented a proposal for a directive to improve working conditions in platform work.<sup>12</sup> Regarding the Employers' Sanctions Directive, the importance of ensuring effective mechanisms for recovering unpaid wages, lodging complaints and reporting labour exploitation was also highlighted (European Commission, 2021a).

### 1.3 Scope and definitions

The European Migration Network (EMN) conducted a study titled “Illegal Employment of Third-Country Nationals in the EU” back in 2016/2017. This study concluded that protective measures and risk assessments need to be strengthened in order to improve the identification of unlawful employment (EMN, 2017:45). Therefore, a follow-up study was conducted in 2023, which provides an overview of the unlawful employment situation of third-country nationals in Austria from January 2017 to October 2023 (for data: 30 June 2023).<sup>13</sup> This Austrian contribution to the EMN study provides insights into new developments, policies and the legislative framework as well as measures to counter the unlawful employment of third-country nationals in Austria. It also addresses sanctions for employers, the rights of and possible consequences for unlawfully employed third-country nationals, and relevant challenges and good practices since 2017.

This study at hand focuses primarily on the unlawful employment of third-country nationals, that is employment outside the current legal framework of persons from countries outside the European Union. In Austria, this relates principally to offences against the Act Governing the Employment of Foreign Nationals.<sup>14</sup> To this end, the analysis looks at the following categories: First, third-country nationals regularly residing in the country but engaged in undeclared work. Second, third-country nationals regularly residing in the country but working outside the conditions of their residence permit or without the approval of the labour market authorities. And third, third-country nationals irregularly staying in the country and engaging in undocumented work.

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10 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, pp. 375–390.

11 Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, 2016, OJ L 65/12.

12 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM(2021) 762 final.

13 An analysis of the Austrian context prior to 2017 can be found here: Heilemann, 2017.

14 Act Governing the Employment of Foreign Nationals, FLG No. 218/1975 in the version of FLG I No. 84/2023.

Where possible, this study also looks at exploitative working conditions. Employers may take advantage of or exploit workers who fall into any of the above three categories. Factors such as unlawful employment, employment in certain risk sectors, a lack of access to the labour market and/or a lack of or precarious residence status increase the risk of labour exploitation. The exploitation of workers is a continuum and can include cases of wage/social dumping and human trafficking (see also 2.3).

The study also includes cases of “bogus self-employment”, specifically platform work, undertaken by third-country nationals. In addition, displaced persons from Ukraine with temporary protection status are taken into account. The background to this is that although beneficiaries of temporary protection have free access to the labour market, there is still the possibility of undeclared work. International protection applicants are excluded from the scope of this study, due to the diverging regulatory framework between European Union Member States, and given that a previous EMN study conducted in 2022 was dealing with international protection applicants (Ebner, 2023; EMN, 2023b).

Many terms are used in relation to unlawful employment, such as *illegal employment*, *black economy*, *undocumented work* and *undeclared work*. In the context of this study, we wanted to use a description that is as neutral and comprehensive as possible and have therefore chosen the term “unlawful employment”. The following key terms are used in this study, which, unless otherwise stated, are based on the entries in the EMN Glossary on Asylum and Migration Version 6 (EMN, 2018):<sup>15</sup>

**Labour exploitation:** Work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment (FRA, 2015:10).

**Employment:** The exercise of activities covering any form of labour or work regulated under national law or in accordance with established practice for or under the direction and/or supervision of an employer (European Commission, n.d.a).

**Third-country national:** Any person who is not a citizen of the European Union within the meaning of Art. 20 para 1 Treaty on the Functioning of the European Union (TFEU)<sup>16</sup> and who is not a person enjoying the European Union right to free movement, as defined in Art. 2 para 5 Regulation (EU) 2016/399 (Schengen Borders Code).<sup>17</sup>

**Gainful employment:** Persons are considered to be gainfully employed if they have worked at least one hour in the reference week as employees, self-employed persons or family workers. If they have not worked during the reference week due to holidays, illness, parental leave, etc., but are otherwise engaged in work, they are also considered to be in gainful employment (Statistics Austria, n.d.).

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<sup>15</sup> The interactive online EMN Asylum and Migration Glossary can be accessed at <https://home-affairs.ec.europa.eu>.

<sup>16</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, pp. 47–390.

<sup>17</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, pp. 1–52.

**Illegal employment (here: unlawful employment):** Economic activity carried out in violation of provisions set by legislation.

**Irregular migrant:** In the European Union context, a third-country national present on the territory of a Schengen State who does not fulfil, or no longer fulfils, the conditions of entry as set out in Regulation (EU) 2016/399 (Schengen Borders Code), or other conditions for entry.

**Undeclared work:** At European Union level, any paid activities that are lawful as regards their nature but not declared to public authorities, taking into account differences in the regulatory systems of the Member States (ELA, n.d).

**Undocumented work:** Paid employment of migrants without residence and/or work documents (Chamber of Labour et al., 2014:7).

## 1.4 Methodology

The present study was conducted by the National Contact Point (NCP) Austria in the EMN within the framework of the EMN's 2023–2025 Work Programme. The study follows a common study template with a predefined set of questions developed by the EMN in order to facilitate comparability of the findings across all Member States.

Legislative texts, national and international publications, press releases, media reports and websites were used as sources for the Austrian national report. The statistical data presented here were provided by the Financial Police and appropriately structured by the International Organization for Migration (IOM) Country Office for Austria. The analysis of political and legal developments is based on the EMN Austria Annual Reports on Migration and Asylum 2017–2022.<sup>18</sup> In addition, parliamentary correspondence, statements on government bills and media coverage were analysed. To supplement the information obtained from secondary research, qualitative semi-structured interviews were conducted with experts in the fields of the labour market, the employment of foreign nationals and labour law, and/or corresponding written inputs were obtained. As part of this, questions were also asked about challenges and good practice examples. The following experts provided oral or written contributions:

- Heinz Kutrowatz, Head of Staff Unit for International Labour Market Law, III/B/StabiAR, Federal Ministry of Labour and Economy;
- Wilfried Lehner, Head of the Financial Police, Federal Ministry of Finance;
- Johannes Peyrl, Officer, Department for Labour Market and Integration, Vienna Chamber of Labour.

In addition, information from Susanne Kimm (UNDOK – Drop-in center for undocumented workers) and Katie Klaffenböck (Senior Project Coordinator, Counter-Trafficking, IOM Country Office for Austria) was also included in the compilation of the study.

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<sup>18</sup> The EMN Annual Reports are available at [www.emn.at](http://www.emn.at).

The study was conducted by Prisca Ebner (Research Assistant, IOM Country Office for Austria). Martin Stiller (Legal Associate, IOM Country Office for Austria) worked on legal aspects.

The experts mentioned above deserve special thanks for sharing their knowledge and experience through personal interviews and written input. In particular, the author would also like to thank Saskia Heilemann (Head of the Policy Research and Migration Law Unit, IOM Country Office for Austria) for her valuable comments and research guidance. Many thanks also go to Jan Niklas Janoth (Research Intern, IOM Country Office for Austria) for various support services at different stages of the research work.

The study was prepared in close cooperation with the Federal Ministry of the Interior.

## 2 OVERVIEW OF UNLAWFUL EMPLOYMENT OF THIRD-COUNTRY NATIONALS

The extent and prevalence of unlawful employment varies depending on whether it involves private households or companies, on the size of the company and on the particular sector of the economy. In all cases, however, there are employers who are willing to circumvent regulations and take advantage of workers (European Commission, 2021a:1). The workers affected often have no other options or legal alternatives. This chapter examines company profiles and sectors, focusing on those risk areas that are particularly affected by unlawful employment in Austria. In addition, the origin of unlawfully employed persons in Austria is analysed in more detail on the basis of statistical data. The chapter also sheds light on the often precarious situation of the individuals involved and the risk of exploitation.

### 2.1 Risk areas and company profiles

The Anti-Fraud Office at the Federal Ministry of Finance (Financial Police division) is responsible for monitoring unlawful employment in Austria.<sup>19</sup> The Anti-Fraud Office regularly conducts risk assessments to this end. The checks conducted by the Financial Police have always focused in particular on the sectors of **catering and tourism, agriculture and forestry, and construction** (see also 3.2).<sup>20</sup> These sectors were already identified in the 2016/2017 study by the European Migration Network (EMN) as the sectors in Austria most affected by the unlawful employment of foreign nationals (Heilemann, 2017:3, 6). According to the Financial Police, these are typical risk sectors since they require a significant amount of manual work.<sup>21</sup> Across the European Union, the sectors most affected by unlawful employment are labour-intensive and low-skill sectors with a high turnover of staff (European Commission, 2021a:15). The advisory and support practice of the UNDOK – Drop-in center for undocumented workers also shows a difference by gender:<sup>22</sup> undocumented male workers were mainly employed in the construction and hospitality sectors, while undocumented female workers worked in **cleaning and in private households** as well as in the hospitality sector (UNDOK, 2019:12).

Another risk area for the occurrence of unlawful employment is **van delivery services**, an area that has become particularly prominent in recent years according to the Financial Police. There are very few preventive mechanisms in place here, which is seen as a challenge (see 3.4).<sup>23</sup> Common offences in this area include “bogus self-employment”, exploitation of the workforce, and wage and social dumping (Der Standard, 2023). Since 2020, the Financial Police have also noticed an increase in new developments in other sectors, such as **security services, event management and demolition work**. In these sectors, a large number of workers are usually needed for several days at short notice, the work only requires a low-skilled workforce and no permanent

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<sup>19</sup> In addition, there are other inspection authorities in Austria that check the minimum wages and working conditions stipulated, for example, in collective agreements. These include the Austrian Health Insurance Fund, the Construction Workers' Annual Leave and Severance Pay Fund, the labour inspectorates in the federal provinces, the agricultural and forestry inspectorates and the Social Insurance Institution of the Self-Employed.

<sup>20</sup> Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

<sup>21</sup> Interview with Wilfried Lehner, Financial Police, 26 July 2023.

<sup>22</sup> UNDOK is visited by people from various countries and regions of origin. In 2018 and 2019, these were mainly third-country nationals, but also occasionally people from European Union Member States (UNDOK, 2019:12).

<sup>23</sup> Interview with Wilfried Lehner, Financial Police, 26 July 2023.

employment is available. The Financial Police have observed that this work involves a significant number of third-country nationals, possibly because not enough workers can be found in Austria and the companies employing these persons hope that the work will be concluded before the authorities can carry out any checks.<sup>24</sup>

The profiles of companies found to have engaged in the unlawful employment of third-country nationals have remained unchanged since 2017.<sup>25</sup> Accordingly, unlawful employment in Austria does **not** usually take place **at large companies directly** since they have good risk management and appropriate IT systems in place to prevent cases of unlawful employment. One reason for this is that relevant previous convictions under the Act Governing the Employment of Foreign Nationals<sup>26</sup> represent a high risk for companies seeking public contracts (see 4.1).<sup>27</sup> In the experience of the Financial Police, large companies therefore often outsource the risk and the (potentially unlawful) employment of foreign nationals is handled via **subcontractors**. This means that labour is bought in, preventing any unlawful conduct from being attributed to the company itself. If necessary, the subcontractor is dissolved under company law and a new subcontractor is founded, which results in any previous convictions disappearing with the insolvency.<sup>28</sup>

A search of the literature suggests that **posting of workers from third countries** has gained in importance across the European Union in recent years, which also applies to Austria (see [Infobox I](#)). Data on Austria collected by the European Labour Authority (ELA) show that the absolute number of third-country nationals posted to Austria rose from 3,988 in 2019 to 12,798 in 2021, with a decline to 9,046 being observed in 2022 (ELA, 2023:91). One reason for this rise is that due to the labour shortage, companies increasingly have to rely on foreign workers posted<sup>29</sup> to Austria or hired out<sup>30</sup> to Austrian companies by foreign companies (Federal Ministry of Finance, 2022).

### **Infobox I: Posting of third-country nationals to Austria via other European Union Member States**

The majority of all persons posted to Austria continue to be European Union citizens. In 2019, however, third-country nationals accounted for more than one fifth (22%) of all workers posted to Austria. They are mainly from Ukraine, Bosnia and Herzegovina,<sup>31</sup> Serbia and Belarus. The persons concerned are usually posted to Austria via companies located in the following European Union Member States: Germany, Lithuania, Poland and Slovenia.<sup>32</sup> The main sectors in Austria where posted third-country nationals are employed are construction and road freight transport (ELA, 2023:93–98; Geyer et al., 2022:30f.).

24 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

25 Ibid.

26 Act Governing the Employment of Foreign Nationals, FLG No. 218/1975 in the version of FLG I No. 84/2023.

27 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

28 Ibid.

29 Posting occurs when an employer temporarily deploys an employee to another place of work in order to fulfil a contractual obligation, in particular to fulfil a contract for work and services. The posted employee provides their labour to the employer posting them (Austrian Federal Economic Chamber; 2022).

30 International hiring out of workers (personnel leasing) occurs when an employer makes their employee available to a third party on the basis of a leasing agreement. However, this does not mean that the employing party becomes the employer of the leased employee (Austrian Federal Economic Chamber; 2022; migration.gv.at, n.d.b).

31 Recent studies have analysed in more detail the posting of third-country nationals from Bosnia and Herzegovina to the Austrian construction sector via companies based in Slovenia. For details see Danaj et al., 2020; Danaj and Geyer, 2020; Geyer et al., 2022.

32 Ibid.

When workers are posted to another country, challenges such as unlawful employment relationships (e.g. “bogus posting”) and unlawful working conditions (especially wage and social dumping) are widespread (Danaj and Scopetta, 2022; Geyer et al., 2022:34). As a result, for example, of their uncertain legal status and dependence on their employer, employees posted from third countries are more vulnerable than those from European Union Member States and are thus more affected by unlawful employment relationships and violations of labour law (Cukut Krilić et al., 2020:36; ELA, 2023:7; Geyer et al., 2022:39). In the Austrian construction industry in particular, existing laws often appear to be violated (Geyer et al., 2022:34–39). At the same time, the construction industry is relatively difficult to monitor since places of work change frequently and complex subcontracting chains are widespread (van Nierop et al., 2021:67). The Chamber of Labour also highlights the complexity of company constructs and cross-border interconnections in the case of posted workers in the construction industry, which is accompanied by corresponding challenges in the assertion of employees’ rights (see 4.4).<sup>33</sup>

## 2.2 Trends and origins of unlawful employees

One key development during the period under review (2017 to mid-2023) is the reversal of the trend in the origin of unlawfully employed persons in Austria. In the EMN study from 2016/2017 it became clear that unlawful employment mainly concerned employees posted from Eastern European Union Member States and associated cases of wage dumping. In 2015, for example, 73 per cent of all unlawfully employed workers identified in Austria were European Union citizens (Heilemann, 2017:5f.). This is based on data from the Financial Police, which consists of data on persons whose employment has violated labour and social law regulations, if these violations have been reported. These data include reported violations of the Act Governing the Employment of Foreign Nationals, the General Social Insurance Act,<sup>34</sup> and the Act to Combat Wage and Social Dumping.<sup>35</sup> Closer examination of these data reveals a reversal of the trend in 2020 (see Figure 1). In 2022, 59 per cent of workers suspected of being unlawfully employed came from third countries and 32 per cent came from European Union Member States; in 2017, the figures were almost reversed (33% third-country nationals and 56% European Union citizens). The share of Austrians and Other<sup>36</sup> remained constant (10%).

In absolute numbers, this means that the number of third-country nationals whose employment breaches the requirements of labour and social law and has been reported to the authorities rose from 4,653 in 2017 to 7,532 in 2022 (+62%). By contrast, the number of European Union citizens concerned fell from 7,770 in 2017 to 4,023 in 2022 (-48%). The number of Austrians concerned was 1,537 in 2017 and 1,093 in 2022. Overall, the number of affected persons remained relatively constant during the period under review (2017: 13,978; 2022: 12,675; see Figure 1). However a decrease was evident during the outbreak of the COVID-19 pandemic, with the number of affected persons declining from 15,663 in 2019 to 11,770 in 2020.

33 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

34 General Social Insurance Act, FLG No. 189/1955 in the version of FLG I No. 110/2023.

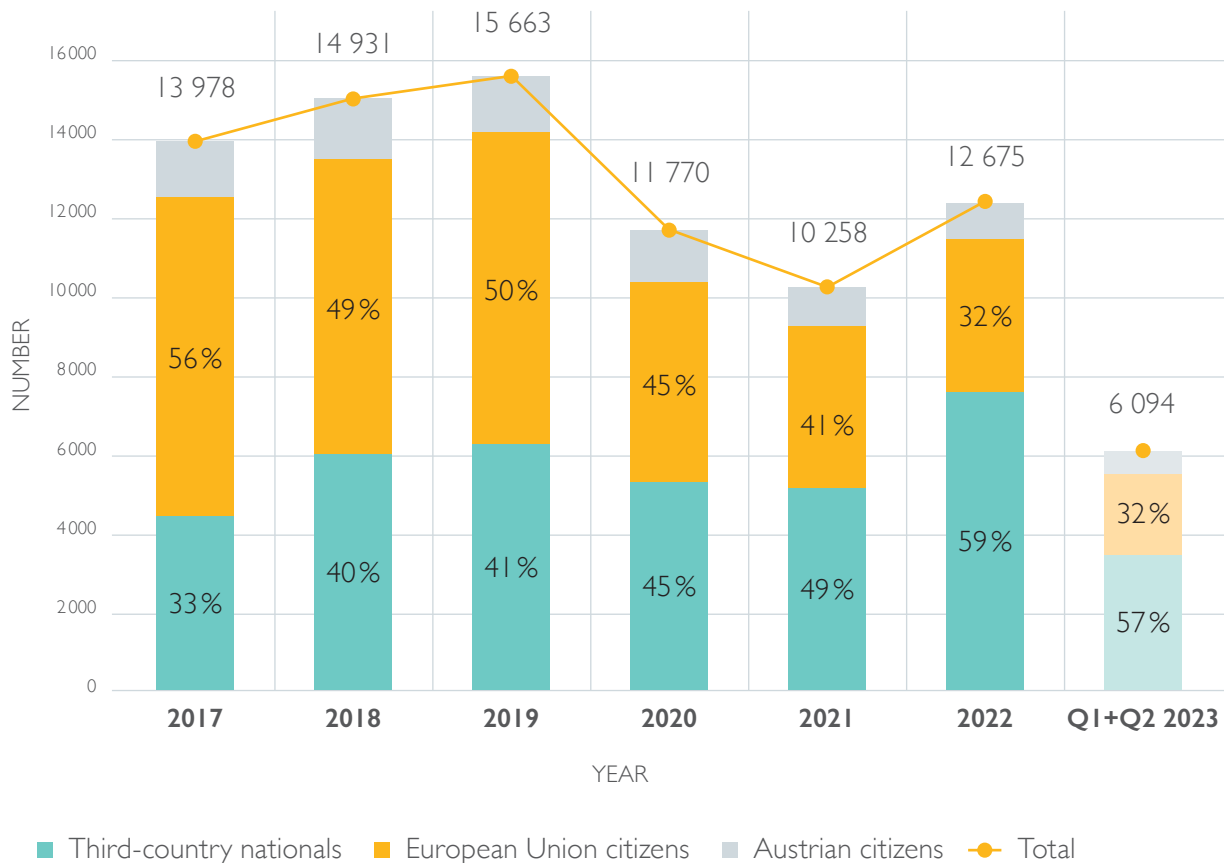
35 Act to Combat Wage and Social Dumping, FLG I No. 44/2016 in the version of FLG I No. 111/2022.

36 This includes third countries that were formerly part of the European Union, as well as EFTA and EEA States.



In addition, the Financial Police reported a growing number of arrests of irregularly staying third-country nationals in the context of workplace checks and an overall increase in the number of unlawfully employed third-country nationals without a residence permit. There is no separate record of this increase in the statistical data, but it is indicated by internal reports.<sup>37</sup>

**Figure I: Persons whose employment breaches the requirements of labour and social law and has been reported to the authorities, by nationality group (2017 to mid-2023)**



Source: Data provided by the Financial Police, 26 July and 2 August 2023.

Note: This data also includes the category other; i.e. third countries that were formerly part of the European Union as well as countries of the European Free Trade Association (EFTA) and the European Economic Area (EEA). The figures for Other are so small that they cannot be shown.

According to the Financial Police, the background for the sharp rise in unlawfully employed third-country nationals is the rising wage levels and the demographic development in the neighbouring countries of Eastern Europe. As a result, many Eastern European workers are increasingly staying in their home countries and their workforce is being replaced in Austria by third-country nationals. This has led to a significant decrease in the unlawful employment of workers from these European Union Member States in recent years, making the unlawful employment of third-country nationals a more economically appealing option for companies by comparison. For the Financial Police, the increase in unlawfully employed third-country nationals is also related

37 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

to the current labour market situation.<sup>38</sup> According to the annual 2022 Skilled Workers Radar of the institute ibw Austria – Research & Development in VET, the shortage of qualified workers in Austria was at the time of reporting at an “all-time high” (Dornmayr and Riepl, 2022). While the number of unfilled vacancies in the first quarter of 2023 exceeded the figures for the last 10 years (Statistics Austria, 2023), the unemployment rate fell to 6.3 per cent in 2022, lower than the levels registered in the years preceding the outbreak of the COVID-19 pandemic (Angel et al., 2023). The labour shortage and the challenge of finding workers through regular channels mean that employers are increasingly taking the risk of unlawful employment.<sup>39</sup>

Information on the nationalities of unlawfully employed third-country nationals can be found in qualitative surveys: stakeholders questioned as part of the Local Responses to Precarious Migrants (LoReMi) research project assume that at present, many of the third-country nationals engaged in unlawful employment in Vienna come from South-Eastern European third countries such as Serbia and North Macedonia (Hombberger and Güntner, 2022:13). An EMN study from 2018 also suggests a link between the effects of visa liberalization and the rise in levels of unlawful employment among third-country nationals in Austria. Experts take the view that many of these third-country nationals entered Austria without a visa but were not permitted to work, which has consequently pushed them into unlawful employment relationships (Stiller, 2018:34, 52). The consultancy practice of UNDOK shows that the majority of persons visiting the drop-in centre as undocumented workers in 2018 and 2019 came from Afghanistan, the Republic of Türkiye, the Islamic Republic of Iran, Serbia, Bosnia and Herzegovina and Ukraine (UNDOK, 2019:12). According to the Federal Ministry of Labour and Economy, there are no known systematic violations of labour and social law by employers in connection with the employment of displaced Ukrainians (Staudacher, 2023).

## 2.3 Unlawful and exploitative working conditions

Employers who employ persons unlawfully frequently exploit them too.<sup>40</sup> The spectrum of ways in which they are exploited is wide and can range from underpayment and other forms of wage and social dumping to human trafficking (see [Infobox 2](#)). A study conducted by the European Union Agency for Fundamental Rights (FRA) in 2015 investigated the severe labour exploitation<sup>41</sup> of mobile European Union citizens and third-country nationals. FRA’s analysis showed that this mostly occurs in the form of particularly exploitative working conditions. However, what exactly these conditions entail is not categorized and is therefore often not perceived. This was also applicable to the Austrian context (FRA, 2015:39). Unlawful employment, a lack of access to the labour market and/or a lack of or precarious residence status increase the risk of labour exploitation (Chamber of Labour et al., 2014; FRA, 2015:46; Hombberger and Güntner, 2022:38).

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38 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

39 Ibid.

40 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

41 The term “severe” refers to forms of exploitation of workers which are criminal under the legislation of the respective European Union Member State and therefore also include slavery, servitude, forced labour and trafficking in human beings (FRA, 2015:10).

## Infobox 2: Labour exploitation as a form of human trafficking

Labour exploitation can also be a form of human trafficking. Such cases have increased in Austria in recent years. In order for a case to be identified as human trafficking, three elements must be present: action, improper means and specific purpose (Art. 104a Criminal Code; Task Force on Combating Human Trafficking, n.d.:6).<sup>42</sup> In Austria, exploitation of labour is understood to mean practices that constitute a reckless exploitation of the persons concerned against their vital interests (Task Force on Combating Human Trafficking, 2021a:3). This is the case if persons receive no or inadequate remuneration for their work for a prolonged period, or if their working hours or conditions are excessively long or unreasonable (MoI, 2021:24).

In 2021, 73 per cent of trafficked persons in Austria came from third countries and 27 per cent from European Union countries (MoI, 2023:24). The completed police investigations into cases of human trafficking found that labour exploitation increased as a form of exploitation in the period from 2017 to 2023. There were three cases of labour exploitation in 2017 (9% of all cases) compared to 15 cases in 2020 (37% of all cases; Criminal Intelligence Service Austria, 2018:3; MoI, 2021:29; Stiller, 2021:14). According to experts, this increase in cases was exacerbated by the COVID-19 pandemic, economic hardship and precarious working conditions (MoI, 2021:31; Stiller, 2021:35f.). The National Action Plan (NAP) on Combating Human Trafficking for 2021–2023 envisages strengthening measures against human trafficking for the purpose of labour exploitation (Task Force on Combating Human Trafficking, 2021b:23–26).<sup>43</sup>

The public became increasingly aware of the issue of precarious and unlawful employment relationships in Austria in 2020 and 2021, mainly in sectors particularly affected by COVID-19 and in “system-relevant” (essential) work (Kimm and Yun, 2021:432). In connection with the employment of third-country nationals during the COVID-19 pandemic, there was a considerable amount of public debate around two cases: First, increased attention was sparked by infection clusters in two mail distribution centres of Post AG (spring 2020). This brought to light the precarious employment conditions of migrant temporary workers, examples of which included an increased amount of overtime, poor hygiene standards, racism and threats of dismissal if an employee took sick leave. Second, irregularities in the production of masks at Hygiene Austria (2021) led to further investigations being carried out. Allegations were made of unlawful employment and violations of labour and social law, primarily in connection with refugee workers. In both cases, it was found that employers had passed some of the responsibility for unlawful working conditions to subcontractors or temporary employment agencies (Birke and Neuhauser, 2023; Neuhauser et al., 2021; Parliament Austria, 2021). Serious cases of labour exploitation and deprivation of rights among foreign<sup>44</sup> seasonal and harvest workers also became public, for example in relation to accommodation and a lack of hygiene standards (Ebner, 2021:10; VIDC and IOM Austria, 2020). In a similar vein, it emerged that third-country nationals were

42 Criminal Code, FLG No. 60/1974 in the version of FLG I No. 100/2023.

43 Implementation is monitored by the Task Force on Combating Human Trafficking. The reports can be found at [www.bmeia.gv.at](http://www.bmeia.gv.at).

44 Media reports referred to affected migrants from European Union Member States and third countries, especially from South-Eastern Europe (Behr, 2020; Kainrath, 2020; ORFat, 2020a, 2020b).

subject to unlawful working conditions while making Amazon deliveries (Kohlenberger et al., 2021) or working in the cleaning industry during the COVID-19 pandemic (Stadler, 2020).

Platform work was also the subject of public discussion during the period under review due to the significant expansion of food and grocery deliveries as a result of the COVID-19 pandemic (Fairwork, 2022:4). Labour and social law issues, for example, were raised by the Chamber of Labour (Chamber of Labour, n.d.). A report produced by Fairwork on platform work in Austria, which was also picked up by the media, revealed the working conditions on various digital labour platforms and the disproportionate share of migrant workers. Cases of “bogus self-employment” and unlawful employment were also uncovered in the report (Fairwork, 2022:4). In the political arena, the issue was mainly discussed in connection with the planned European Union directive on improving working conditions in platform work (Parliamentary Administration, 2023).

The risk of exploitation and unlawful working conditions had already been high in all these sectors, but this was further exacerbated by the COVID-19 pandemic. The reasons for this often include dependence on employers and the precarious economic and residence permit situation of the persons concerned (Birke and Neuhauser, 2023:16; Yun, 2023:248). Unlawfully employed third-country nationals were particularly affected by the COVID-19 pandemic since they were unable to be officially registered for short-time work, sometimes had to continue working in disregard of COVID-19 safety regulations, or lost their income and did not have access to social or support services. These factors increased existing vulnerabilities. At the same time, it was particularly difficult for employees who had no or only a precarious residence status to speak up about unlawful practices (Kimm and Yun, 2021:432f.; Kohlenberger, 2020; UNDOK, 2021a, 2021b). Accordingly, UNDOK recorded an increase in the number of enquiries during the COVID-19 pandemic (UNDOK, 2021b).

## 3 PREVENTION AND IDENTIFICATION OF UNLAWFUL EMPLOYMENT

The prevention of unlawful employment of third-country nationals continues to be a national priority in Austria. There is still a focus on the identification of irregularly staying and unlawfully employed third-country nationals (Heilemann, 2017:5).<sup>45</sup> The following chapter provides an insight into preventive measures in Austria as well as measures to identify unlawfully employed third-country nationals, such as Financial Police checks and (inter)national cooperation. It also discusses challenges and good practices to counter unlawful employment.

### 3.1 Policies and measures for prevention

The legal framework for the prevention of unlawful employment is laid down in the Act Governing the Employment of Foreign Nationals.<sup>46</sup> Since 2016/2017, no new prevention measures and/or incentives to prevent unlawful employment have been introduced that specifically target employers or third-country nationals.<sup>47</sup> This is due to the fact that the existing measures are considered to be sufficient by the Federal Ministry of Labour and Economy.<sup>48</sup> The existing prevention measures in Austria include, in particular, information and support services for foreign employees (see [page 15](#)) and the obligation for employers to report the employment of foreign nationals (Heilemann, 2017:7ff.). To this end, companies are obliged to report the start and end of employment relationships with foreign workers to the Austrian Public Employment Service within three days (Public Employment Service, 2022).

In addition, working and wage conditions and social security regulations are checked as part of the labour market authority's admission procedures for third-country nationals.<sup>49</sup> Accordingly, granting of a work permit is subject to a number of conditions (Art. 4 Act Governing the Employment of Foreign Nationals). The work permit is applied for by an employer for the employment of a specific third-country national. The requirements for a work permit include the following (Art. 4 para 1 subpara 1–II Act Governing the Employment of Foreign Nationals): (a) the employer complies with pay and working conditions, including social security regulations, (b) the foreign national has not committed repeat infringements by working without a work permit during the past 12 months, and (c) the employer has not repeatedly employed foreign nationals in contravention of statutory provisions during the 12 months prior to submission of the application (Ebner, 2023:17).<sup>50</sup>

The Federal Ministry of Finance is responsible for monitoring compliance with the Act Governing the Employment of Foreign Nationals, and the Financial Police are entrusted with identifying unlawfully employed workers (Federal Ministry of Finance, n.d.). The checks carried out by the Financial Police are central to the

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45 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

46 Act Governing the Employment of Foreign Nationals, FLG No. 218/1975 in the version of FLG I No. 84/2023.

47 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023; written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

48 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

49 Ibid.

50 In addition, a work permit can only be issued if the situation and development of the labour market permit such employment (labour market test) and if it does not conflict with important public or overall economic interests.

prevention of unlawful employment (see 3.2). In combination with the high penalties, these are considered to have a deterrent effect.<sup>51</sup> The checks are based on risk monitoring carried out by the Financial Police (see 2.1), although nothing significant has changed in the scope or the way in which the process is conducted since 2017.<sup>52</sup> The activities of the Financial Police and their findings<sup>53</sup> are recorded in a data and information system, and statistically evaluated, for risk monitoring purposes. Risk sectors are identified from this data pool (EMN, 2015). The results are used to focus inspections on the risk sectors identified and to carry out targeted inspections in low-risk sectors in order to monitor any potential new developments (Heilemann, 2017:11).

The Financial Police referred to a new practical development in the private sector, in particular in the construction industry, where **new IT systems** developed over the past few years are designed to protect companies from accidentally employing staff unlawfully. These IT systems run automatically in the background, for example in order to check personal data and the completeness of the relevant documents and permits before a potential employee is hired. The inspection authorities have remote access to some of these systems, which is seen positively by the Financial Police.<sup>54</sup> The Construction Workers' Annual Leave and Severance Pay Fund followed a similar approach by introducing a construction ID card in 2021.<sup>55</sup> The aim is for building site managers to be able to use the construction ID card to check whether the foreign employee has the required documents and permits. Inspection authorities can also access these data in order to speed up control procedures at the building site (see also 3.4; Ebner, 2022:15f).<sup>56</sup> This system was at an early stage of implementation at the time the study was compiled (autumn 2023) and only a few construction ID cards have been issued so far.<sup>57</sup>

To prevent unlawful employment, there are various information channels and measures in place for third-country nationals providing information on their rights. The information is available to regularly and irregularly staying third-country nationals. The UNDOK – Drop-in center for undocumented workers, for example, offers information and advice in different languages, including Arabic, Bosnian/Croatian/Serbian, English, German, Russian, Turkish and Ukrainian.<sup>58</sup> The website of the Austrian Federal Government ([www.migration.gv.at](http://www.migration.gv.at)) also offers information in German and English in connection with residence/settlement in Austria and access to the labour market.<sup>59</sup> Another example is the Austrian trade union for production workers (PRO-GE). In cooperation with non-governmental organizations, it runs a multilingual information campaign for seasonal agricultural workers (Sezonieri campaign), which also includes information and advice on rights (Sezonieri, n.d.b).

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51 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

52 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

53 In particular, this concerns the companies and employees checked, sectors, the unlawfully employed Austrian and foreign nationals identified, and the number and type of violations.

54 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

55 Amendment to the Construction Workers' Annual Leave and Severance Pay Act, FLG I No. 157/2021.

56 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

57 Written input: Wilfried Lehner, Financial Police, 24 November 2023.

58 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

59 Ibid.

### 3.2 Identification checks by the Financial Police

The Financial Police conduct general checks to detect cases of unlawful employment.<sup>60</sup> Most of these checks are carried out based on information or leads received from, for example, private individuals, colleagues, other companies or other authorities, including health and sanitation inspectorates, or social partners (APA, 2023; Jandl et al., 2008:57). In addition, the Financial Police pursue their own inspection strategy based on a risk monitoring system (see 3.1). Given that the nationality and residence status of persons subject to checks is generally unknown beforehand, the procedure is the same for all employees (Heilemann, 2017:13).

According to the Financial Police, there have been no changes in the area of operational frameworks and official work carried out in the course of inspection activities since 2016/2017. This also applies to the scope or nature of checks to identify unlawful employment of third-country nationals.<sup>61</sup> One practical innovation to be introduced in 2024 will be the use of digital document scanners in checks conducted by the Financial Police. This is designed to make it easier to detect forged identity documents. The aim is to provide each Financial Police team with digital document scanners and the corresponding software, which can autonomously detect forgeries of travel documents and identity cards.<sup>62</sup>

There were only slight fluctuations in the total number of checks carried out on businesses between 2017 and mid-2023. Table 1 below shows the number of inspections carried out annually and sets out the percentage attributable to the various sectors. The number of checks has remained relatively constant during the period under review, fluctuating between 26,880 in 2017 and 29,303 in 2020, with an average of 27,849 checks carried out annually during the period from 2017 to 2022. This is a slight decrease over the period from 2014 to 2016, when the average number of businesses checked annually was 31,000 (Heilemann, 2017:16).

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60 For more information and details see Heilemann, 2017.

61 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

62 Ibid.

**Table I: Number of businesses checked by sector (2017 to mid-2023)**

	2017	2018	2019	2020	2021	2022	1 <sup>st</sup> half of 2023	Total	Share
<b>A - Agriculture and forestry</b>	586	500	388	392	468	446	165	<b>2 945</b>	<b>2%</b>
<b>B - Mining</b>	24	36	29	46	43	37	16	<b>231</b>	<b>&lt;1%</b>
<b>C - Manufacturing of goods</b>	1 287	1 341	1 290	1 623	1 630	1 353	702	<b>9 226</b>	<b>5%</b>
<b>D - Energy supply</b>	32	35	23	35	43	47	28	<b>243</b>	<b>&lt;1%</b>
<b>E - Water supply and waste management</b>	83	71	80	105	76	65	34	<b>514</b>	<b>&lt;1%</b>
<b>F - Construction</b>	5 512	5 810	6 487	8 718	7 215	6 833	3 644	<b>44 219</b>	<b>25%</b>
<b>G - Wholesale and retail trade</b>	3 082	3 088	2 690	3 043	3 219	2 767	1 292	<b>19 181</b>	<b>11%</b>
<b>H - Transportation</b>	2 752	3 564	3 710	3 438	3 462	2 956	1 602	<b>21 484</b>	<b>12%</b>
<b>I - Accommodation and food service activities</b>	4 910	4 798	4 121	2 972	2 905	4 094	1 860	<b>25 660</b>	<b>14%</b>
<b>J - Information and communication</b>	144	145	122	196	278	209	80	<b>1 174</b>	<b>1%</b>
<b>K - Financial and insurance activities</b>	128	133	152	201	173	184	95	<b>1 066</b>	<b>1%</b>
<b>L - Real estate activities</b>	551	615	579	704	720	635	306	<b>4 110</b>	<b>2%</b>
<b>M - Professional/technical activities</b>	666	671	757	891	957	813	374	<b>5 129</b>	<b>3%</b>
<b>N - Administrative and support service activities</b>	1 488	1 749	1 870	2 042	2 207	2 168	1 169	<b>12 693</b>	<b>7%</b>
<b>O - Public administration</b>	30	20	23	22	20	45	14	<b>174</b>	<b>&lt;1%</b>
<b>P - Education</b>	81	119	76	109	126	99	61	<b>671</b>	<b>&lt;1%</b>
<b>Q - Health and social work activities</b>	224	211	191	232	239	160	83	<b>1 340</b>	<b>1%</b>
<b>R - Arts, entertainment and recreation</b>	512	397	395	274	273	277	128	<b>2 256</b>	<b>1%</b>
<b>S - Other service activities</b>	986	1 344	1 413	1 058	1 352	1 206	703	<b>8 062</b>	<b>4%</b>
<b>T - Private households</b>	3 793	3 475	3 184	3 184	2 554	1 729	806	<b>18 725</b>	<b>10%</b>
<b>U - Extraterritorial organizations</b>	1	0	1	3	3	2	1	<b>11</b>	<b>&lt;1%</b>
<b>Missing</b>	8	14	21	15	273	812	431	<b>1 574</b>	<b>1%</b>
<b>TOTAL</b>	<b>26 880</b>	<b>28 136</b>	<b>27 602</b>	<b>29 303</b>	<b>28 236</b>	<b>26 937</b>	<b>13 594</b>	<b>180 688</b>	<b>100%</b>

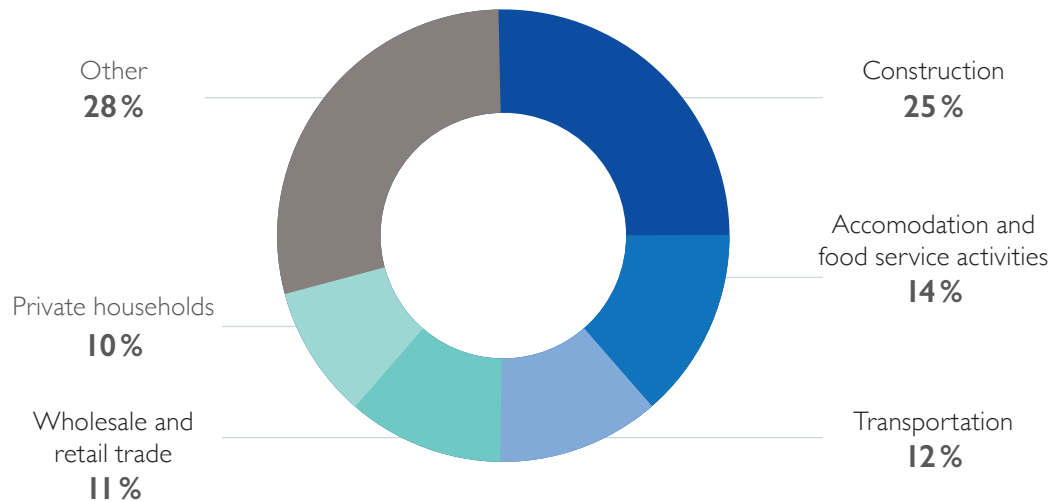
Source: Data provided by the Financial Police, 26 July and 2 August 2023.

Note: For details on the Austrian Statistical Classification of Economic Activities (OENACE 2008), see [www.statistik.at](http://www.statistik.at).



Among the businesses inspected during the period from 2017 to mid-2023, the top five sectors were construction (25%), accommodation and food service activities (14%), transportation (12%), wholesale and retail trade (11%) and private households (10%). This list coincides with the known risk sectors (see 2.1 and Figure 2).

**Figure 2: Top five sectors for businesses inspected between 2017 and mid-2023**



Source: Data provided by the Financial Police, 26 July and 2 August 2023.

The Financial Police have extensive powers when it comes to detecting cases of unlawful employment (Deutsch et al., 2014:481ff.; Lindmayr, 2012:67ff.). Employees are questioned, their documents examined and the respective information checked against the existing databases during on-site checks on businesses. The Financial Police check whether the workers have the relevant permits under labour law and under residence and settlement law, whether there is a case of criminal underpayment under the Act to Combat Wage and Social Dumping,<sup>63</sup> and whether there are any indications of violations of the General Social Insurance Act<sup>64</sup> (Heilemann, 2017:15).

Cases of unlawful employment (i.e. violations of Art. 28 Act Governing the Employment of Foreign Nationals) identified by the Financial Police are reported to the relevant administrative penal authorities without delay and charges are then pressed against the employer. Particularly serious cases of unlawful employment (i.e. violations of Art. 28c Act Governing the Employment of Foreign Nationals)<sup>65</sup> are reported to the public prosecutor's office (Deutsch et al., 2014:525f.; see 4.1). The Financial Police also have the right to arrest foreign nationals if, due to exigent circumstances, there is no time to wait for officers of the official security service to intervene. Additionally, there must be grounds to assume that such foreign nationals work or wish to work in Austria without being entitled to do so and that such foreign nationals are not lawfully staying in Austria. Each foreign national arrested must then be handed over promptly to the aliens police authority or the nearest law enforcement office (Art. 26 para 4 Act Governing the Employment of Foreign Nationals).

63 Act to Combat Wage and Social Dumping, FLG I No. 44/2016 in the version of FLG I No. 111/2022.

64 General Social Insurance Act, FLG No. 189/1955 in the version of FLG I No. 110/2023.

65 This applies to the unlawful employment of: a relatively large number of foreign nationals without the right of residence, a foreign minor without the right of residence, a foreign national without the right of residence under particularly exploitative working conditions, or a foreign national without the right of residence in knowledge of them being trafficked (Art. 104a Criminal Code), using the work or services provided under coercion.

Apart from the creation of the construction ID card (see 3.1), no new measures have been put in place since 2016/2017 to ensure that checks carried out to detect cases of unlawful employment of third-country nationals are effective and adequate.<sup>66</sup> In 2022 the Financial Police reported that 30 per cent of all checks result in the detection of various forms of unlawful employment (see 2.2), thus indicating that the inspection methods used are targeted and successful (APA, 2023). But given that checks are only carried out on a small proportion of all employers, the true extent of unlawful employment is likely to be higher (Herz, 2022:14 ; see table 1).

### 3.3 National and international cooperation

The Financial Police is continuously cooperating with the Federal Ministry of Labour and Economy, which is responsible for developing and implementing laws governing the employment of foreign nationals (Heilemann, 2017:13). The Financial Police also highlight their effective continued cooperation with the police when it comes to apprehending unlawfully employed third-country nationals. There is also coordination and an exchange of information with other relevant players, for instance with the inspection bodies of the Construction Workers' Annual Leave and Severance Pay Fund and the labour inspectors in the provinces.<sup>67</sup> Inter-agency cooperation was addressed in the media with focused campaigns against unlawful employment in the provinces, for example with the criminal intelligence service in the provinces, the Public Prosecutor's Office for Combating Economic Crime and Corruption, the social security bodies, the aliens police and the Federal Office for Immigration and Asylum (Der Standard, 2022; Federal Ministry of Finance, 2022; Mol, 2022). The UNDOK – Drop-in center for undocumented workers also continues to serve as an important interface. This initiative is funded by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection and involves various Austrian players, such as representative bodies for workers and civil society organizations (UNDOK, n.d.). UNDOK regards the cooperation and exchange of information between stakeholders as crucial for supporting and advising undocumented workers (UNDOK, 2019:5).

Since 2016/2017 there have been no significant new developments in how the national authorities and other organizations cooperate to detect or identify cases of unlawful employment.<sup>68</sup> However, in July 2022 there was an amendment to the Act Governing the Employment of Foreign Nationals<sup>69</sup> whereby the powers of the Anti-Fraud Office were extended. This made it possible for the public prosecutor's office to obtain assistance from the Anti-Fraud Office and its bodies when prosecuting criminal offences (Art. 28c para 5 Act Governing the Employment of Foreign Nationals). This means that these offences can be investigated by the Financial Police and autonomously reported to the public prosecutor's office. Previously, the Financial Police had handed these cases over to the federal police. The Financial Police consider this to be a positive change, pointing out that it will simplify procedures since criminal offences are already detected by the Financial Police during their checks.<sup>70</sup>

In addition, two EU-wide cooperation initiatives have come about in recent years according to the Financial Police. First, the European Labour Authority (ELA) has been instrumental in strengthening the exchange of

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66 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

67 Ibid.

68 Ibid.

69 Amendment of the Act Governing the Employment of Foreign Nationals, the Labour Market Promotion Act, the Settlement and Residence Act and the Aliens Police Act 2005, FLG I No. 106/2022.

70 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

information and organizing visits to Austria by inspection authorities from other European Union countries, for instance representatives from Denmark, Hungary and Slovenia. The Financial Police aim to strengthen international cooperation, particularly with neighbouring countries, through this cooperation.<sup>71</sup> Second, Austria is also involved in EU-wide initiatives promoting collaborative data analysis. One such example is “Smart enforcement for resilient, sustainable and more efficient transport operations” (European Commission, n.d.b), a project that aims to create links between existing transport information such as tachograph and road operator data. In the view of the Financial Police, this presents an opportunity for employment relationships to be checked on the basis of existing data, without additional costs for companies. A prerequisite here is the clarification of legal matters, including those relating to data protection.<sup>72</sup>

### 3.4 Challenges and good practices

With regard to challenges and good practices in the prevention and identification of unlawful employment, it must be emphasized that a breakdown of unlawfully employed workers by nationality group is only possible to a limited extent. The following challenges and good practices were identified through expert interviews and written contributions and contextualized with secondary literature where relevant.

#### Challenges

- One challenge identified by the 2016/2017 EMN study was that foreign employees need more information about their rights (Heilemann, 2017; UNDOK, 2015). In the experience of the Chamber of Labour, however, a challenge that has emerged in recent years is that although many of those in precarious and/or unlawful employment know their rights, they do not assert them.<sup>73</sup> If the workers in question assert their rights, this can also lead to the detection of cases of unlawful employment. As far as the Chamber of Labour is concerned, one key obstacle in this regard is the fact that these persons often cannot see any personal advantages to be gained from asserting these rights, so they do not make their unlawful employment relationships known (see 4.2).<sup>74</sup>
- According to the Financial Police, van delivery services are a risk area for unlawful employment (see 2.1). There are currently very few preventive mechanisms – such as tachographs or digital control systems – in this area, which represents a major challenge. Large logistics operations for parcel delivery to private households generally use tracking systems that can also be read by the Financial Police, for example in order to detect whether an employee is working more hours than permitted. Challenges remain, however, such as when unlawfully employed persons use the tracking ID of lawfully employed workers (known as “hijacking”).<sup>75</sup>

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71 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

72 Ibid.

73 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

74 Ibid.

75 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

- Despite changing trends and new IT systems for the prevention of unlawful employment, the Financial Police see the continued existence of a number of challenges: pre-employment identity verification systems do not yet work well enough and the Financial Police have observed an increasing level of fraud with these systems. In addition, the IT systems sometimes still have technical problems and are not yet used across the board. Furthermore, the identity of the persons and the documents submitted still have to be checked on site (see 3.1).<sup>76</sup>
- The key challenge for the Financial Police in terms of identification remains the fact that laborious physical on-site inspection procedures are required to detect unlawful employment relationships. False identity claims and forged identity documents currently pose a major challenge for the Financial Police: examples of false identity claims include cases in which, instead of the person who is actually (unlawfully) working, another person (who is lawfully permitted to work) is registered. The Financial Police have recently been detecting forged documents among third-country nationals on a more frequent basis, especially counterfeit identity cards from other European Union countries, since it is easier and cheaper to forge these kinds of documents than passports. A further trend cited by the Financial Police involves several third-country nationals using the same forged travel document as identification, which is difficult to check due to a lack of identity matching. According to the Financial Police, false claims regarding working hours are another challenge. A common example is that third-country nationals with regular residence in Austria are registered for fewer hours than they actually work; for instance, their employment may be misleadingly registered as being “below a marginal earnings threshold” (*geringfügig*). The task of checking actual working hours in this case is very laborious and complex.<sup>77</sup>
- Unlawful forms of employment are a challenge in the construction industry (see also 2.1).<sup>78</sup> The Construction Workers’ Annual Leave and Severance Pay Fund recommends the initiation of multilingual information campaigns in the construction sector on labour rights, sanctions for employers who employ workers unlawfully and consequences for workers (European platform tackling undeclared work et al., 2020:26).
- In UNDOK’s view, restrictive labour market access is a structural challenge in the prevention of unlawful employment of third-country nationals in Austria. Unlawful employment is often an economic necessity for persons without labour market access in Austria. This creates dependencies on employers and is sometimes exploited by them to undermine labour and social law standards or collective agreements (UNDOK, 2019:2). In this sense, free labour market access for third-country nationals in Austria is viewed as an important mechanism for preventing unlawful employment (Yun, 2023:254).

## Good practices

- From the perspective of the Federal Ministry of Labour and Economy, it is good practice to examine working and wage conditions and also social security regulations as part of the labour market admission procedure for third-country nationals. At the same time, this practice is also a legal requirement and

<sup>76</sup> Interview with Wilfried Lehner, Financial Police, 26 July 2023.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.; interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

ensures that these conditions are complied with (Art. 4 para 1 subpara 2 Act Governing the Employment of Foreign Nationals), as non-compliance means that admission to the labour market is refused. It is also checked whether the employer has already been sanctioned for unlawful employment within the last 12 months. If an employer nevertheless employs workers unlawfully, heavy sanctions may be imposed (for details, see 4.1).<sup>79</sup>

- All experts interviewed as part of the study regard checks as the central measure to identify unlawful employment.<sup>80</sup> The Chamber of Labour adds that it would make sense to expand the corresponding inspection authorities to increase their capacity.<sup>81</sup> The Financial Police consider the development of IT systems (see 3.1) to supplement the existing measures as good practice in the prevention of unlawful employment. Due to existing challenges, however, they are only useful as a supplement to on-site checks.<sup>82</sup>
- The Chamber of Labour sees the language courses offered by the Sezonieri campaign<sup>83</sup> for harvest workers and seasonal workers, during which their rights are explained to them (Sezonieri, n.d.a), as an example of good practice in the prevention of unlawful employment. Information about rights is integrated into another measure (language courses) and at the same time, support is offered so that workers can assert these rights if necessary (see 3.1).<sup>84</sup>

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79 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

80 Ibid.; interview with Wilfried Lehner, Financial Police, 26 July 2023; interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

81 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

82 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

83 The SEZONIERI Campaign for the Rights of Seasonal Harvesters in Austria is a joint initiative of trade unions and civil society actors, cf. Sezonieri, n.d.b.

84 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

## 4 CONSEQUENCES FOR EMPLOYERS AND THIRD-COUNTRY NATIONALS

According to the European Union Commission, proportionate financial and criminal sanctions against employers are key in dissuading them from unlawful employment. Furthermore, it is essential to inform migrants of their rights and ensure that they can lodge complaints and assert claims if their rights as employees are violated.<sup>85</sup> The International Labour Organization (ILO) also emphasizes that controls and dissuasive sanctions are necessary, in particular to protect vulnerable workers such as irregular migrants (ILO, n.d.:63). This chapter looks at sanctions for employers and corresponding policies and measures. It also deals with the labour and social rights of affected third-country nationals as well as assertion of these rights and possible consequences under aliens law. At the end of the chapter there is a description of challenges and good practices in this area.

### 4.1 Sanctions for employers

In Austria, only employers are sanctioned for unlawful employment (see [Infobox 3](#)). Sanctions for unlawfully employed workers were also envisaged under certain circumstances in the Government Programme 2017–2022 of the Austrian People's Party and the Austrian Freedom Party, but this government was dissolved early and no changes were made (Austrian Federal Government, 2017).<sup>86</sup> The current Government Programme 2020–2024 of the Austrian People's Party and the Austrian Green Party contains commitments to step up action against wage and social dumping and to protect the rights of employees (Austrian Federal Government, 2020:127, 184).

#### **Infobox 3: Possible sanctions for employers engaging third-country nationals in unlawful employment<sup>87</sup>**

In Austria, it is always the employer that is sanctioned in cases of unlawful employment. Below are some examples of conceivable variations:

##### Employment of a worker not declared to the social insurance system as required

An employer that employs a person without the required registration for compulsory insurance commits an administrative offence and will be fined between EUR 730 and EUR 2,180 (Art. III para 1 subpara 1 and para 2 General Social Insurance Act). However, it is also possible that the actions described constitute the criminal offence of “organized illegal work” under Art. 153e Criminal Code.<sup>88</sup> Any employer that professionally employs a relatively large number of persons<sup>89</sup> without the required registration for social insurance or without the required business licence is liable to a prison sentence of up to two years.

85 This is stated by the European Union Commission in connection with the unlawful employment of irregularly staying third-country nationals (European Commission, 2021a).

86 Interview with Johannes Peyrl, Chamber of Labour; 18 August 2023.

87 For further details see Heilemann, 2017:17–22.

88 Criminal Code, FLG No. 60/1974 in the version of FLG I No. 100/2023.

89 A “relatively large number of people” is assumed to be around 10 or more persons; see Lindmayr; 2012:72; Supreme Court, 2008.

### Employment of persons without the corresponding approval of the labour market authorities

An employer that employs a person without the corresponding approval of the labour market authorities commits an administrative offence and will be punished with a fine of at least EUR 1,000 per unlawfully employed worker (Art. 28 para 1 subpara 1 Act Governing the Employment of Foreign Nationals).

### Employment of persons without the right of residence

The employment of a foreign minor without the right of residence or of a relatively large number<sup>90</sup> of foreign nationals without the right of residence constitutes an offence and is punishable with a prison sentence of up to six months or a fine of up to 365 daily rates<sup>91</sup> (Art. 28c para 1 Act Governing the Employment of Foreign Nationals). The employer may be punished with a prison sentence of up to two years in particularly serious cases of employment of foreign nationals without the right of residence (Art. 28c para 2 Act Governing the Employment of Foreign Nationals). This applies to the unlawful employment of a foreign person without the right of residence (a) under particularly exploitative working conditions, (b) when work or services are exacted with the knowledge that the individual has been trafficked (Art. 104a Criminal Code), or (c) in cases concerning a relatively large number of persons for longer than one month.

The deliberate exploitation of a foreign person's special state of dependence (resulting from the lack of a residence permit or work permit, for example) to generate a regular income is punishable with a prison sentence of up to three years (see Art. 116 Aliens Police Act).<sup>92</sup>

### Other possible repercussions

- **Exclusion from public contracts and funding:** employers with previous convictions of unlawfully employing foreign nationals will be banned from the award of public contracts.<sup>93</sup> They may also be denied public funding and must pay back any public funds already received if they have been repeatedly convicted of the unauthorized employment of more than three foreign nationals (Art. 30b Act Governing the Employment of Foreign Nationals).
- **Withdrawal of business licence:** persons that have been convicted of "organized illegal work" by a court or sentenced to imprisonment of more than three months or a penalty of more than 180 daily rates, and whose conviction has not been struck from the criminal record, are excluded from operating a business (see Art. 13 para 1 Trade, Commerce and Industry Regulation Act 1994).<sup>94</sup>
- **No entitlement to a work permit:** work permits for foreign employees cannot be issued to an employer that has unlawfully employed foreign nationals repeatedly in the last 12 months (Art. 4 para 1 subpara 5 Act Governing the Employment of Foreign Nationals). The Public Employment Service has had certain discretionary powers in this regard since 1 November 2022 (see [page 25](#)).

90 A "relatively large number of people" is assumed to be around 10 or more persons; see Lindmayr, 2012:72; Supreme Court, 2008.

91 Fines are calculated in daily rates. The daily rate is determined according to the personal circumstances and the economic capacity of the sentenced person at the time of the judgment in the first instance, with a minimum of EUR 4 and a maximum of EUR 5,000 (see Art. 19 of the Criminal Code).

92 Aliens Police Act 2005, FLG I No. 100/2005 in the version of FLG I No. 202/2022.

93 Interview with Wilfried Lehner, Financial Police, 26 July 2023.

94 Trade, Commerce and Industry Regulation Act 1994, FLG No. 194/1994 in the version of FLG I No. 75/2023.

- **Prohibition on the employment of foreign nationals:** employers convicted of unlawfully employing foreign nationals at least three times in the previous two years may be banned from employing foreign nationals for a year (Art. 30 Act Governing the Employment of Foreign Nationals).

Since 2016/2017, there have been no significant amendments to the sanctions to employers for unlawfully employing third-country nationals. This is because the existing measures are deemed sufficient by the Federal Ministry of Labour and Economy.<sup>95</sup> However, certain legal developments have arisen in connection with sanctions during the period under review. The Chamber of Labour cited a legislative amendment in 2021 that abolished the accumulation principle that had hitherto applied in the Act to Combat Wage and Social Dumping.<sup>96</sup> The background to this was a ruling by the Court of Justice of the European Union (CJEU) in 2019, according to which some of the penalties issued by the Austrian government were deemed disproportionate and contrary to European Union law (Parliamentary Administration, 2021). Since this legal amendment came into effect employers only commit a *single* administrative offence (for instance, in cases involving underpayment of workers), irrespective of the number of workers concerned, when they employ one or more workers without providing the appropriate remuneration (Art. 29 para 1 Act to Combat Wage and Social Dumping; Austrian Parliament, 2021:10). Cases involving multiple employees previously constituted multiple administrative offences and therefore resulted in a number of administrative penalties, for which various minimum and maximum penalties were stipulated depending on the number of persons concerned.<sup>97</sup> According to the Chamber of Labour, this diminished the deterrent effect of the penalties issued.<sup>98</sup> Although the Constitutional Court addressed the accumulation principle in the Act Governing the Employment of Foreign Nationals in 2021, it ultimately had no constitutional objections to this principle. The Act Governing the Employment of Foreign Nationals therefore still provides for the accumulation of penalties (Art. 28 para 1 Act Governing the Employment of Foreign Nationals). This means that, for example, multiple administrative penalties may still be imposed in cases involving the employment of several persons without the corresponding approval of the labour market authorities (see [Infobox 3](#)).

Another point that seems worthy of mention is the easing of penal provisions (Art. 4 para 8 Act Governing the Employment of Foreign Nationals),<sup>99</sup> which entered into force on 1 November 2022. Accordingly, the Public Employment Service can choose not to suspend a work permit if an individual engages in unauthorized employment under Art. 4 para 1 subpara 3 and 5 Act Governing the Employment of Foreign Nationals in the event of extenuating circumstances, such as a low level of culpability or the violation being committed for only a short period. The employer must also provide credible evidence that specific measures have been put in place to prevent any further violations. Previously, repeated (twice) unlawful employment of foreign nationals led to no further work permits being issued to the employer concerned or the foreign national in question (Parliament Austria, 2022). This sanction is regarded as a serious encroachment on the freedom to pursue gainful employment and freedom of ownership which, when applied indiscriminately – without taking into consideration the type and duration of the transgression or the level of culpability – meant that systematic and

95 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

96 Amendment to the Act to Combat Wage and Social Dumping, the Temporary Employment Act and the Employment Contract Law Adaptation Act, FLG I No. 174/2021.

97 Cf. Art. 29 of the Act to Combat Wage and Social Dumping in the version of FLG I No. 99/2020.

98 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

99 Amendment of the Act Governing the Employment of Foreign Nationals, FLG I No. 168/2022.



deliberate violations were sanctioned in the same way as merely negligent conduct (Parliament Austria, 2022). This imbalance has been rectified by the new regulation, and the Public Employment Service has been granted discretionary powers when suspending work permits. This must be done in consultation with the Regional Advisory Council, which is made up of social partners.<sup>100</sup>

## 4.2 Rights of third-country nationals

Austrian law provides that foreign nationals have the same rights towards their employers, regardless of whether or not they have a valid employment contract. The existing regulations also do not distinguish between whether a person is staying in Austria regularly or irregularly. The sole decisive factor is employment without a corresponding permit. This means that where foreign nationals are employed unlawfully, they still have the same rights vis-à-vis the employer for the period of the employment relationship as if they had a valid employment contract according to Art. 29 para 1 Act Governing the Employment of Foreign Nationals. These include, in particular, entitlement to payment of outstanding remuneration and, under certain circumstances, claims to compensation for dismissal, bonus payments, compensation for unused annual leave or benefits in kind (Chamber of Labour et al., 2014:10f.; Deutsch et al., 2014:528f.). The legislation also provides for compensation for early termination of employment enforced by inspection bodies. The third-country national is also entitled to compensation from the employer for the costs of transferring the remuneration abroad.<sup>101</sup>

Further, there is no minimum period of employment in Austria that needs to be met for foreign nationals to be entitled to payment of remuneration. This means that the employer is obliged to pay remuneration from commencement of the employment. Pursuant to Art. 29 para 1 Act Governing the Employment of Foreign Nationals, unauthorized employment is deemed to have been in existence for at least three months unless proven otherwise by the employer or the foreign national in question. The Federal Ministry of Labour and Economy also views this regulation as a deterrent for employers. Although the legal assumption does not represent a “minimum period”, it can lead to a more severe range of penalties for employers, which may be applied, for instance, where employers employ a relatively large number of foreign nationals without a right of residence for longer than one month (Art. 28c para 2 subpara 3 Act Governing the Employment of Foreign Nationals; see 4.1). Regarding the remuneration of third-country nationals following a period of unlawful employment, no new mechanisms have been introduced since 2016/2017.<sup>102</sup>

Unlawfully employed third-country nationals have access to the same scope of support services from the Chamber of Labour and have the same mechanisms to lodge complaints as Austrian workers, regardless of whether they are staying in Austria regularly or irregularly.<sup>103</sup> Claims under labour law may be asserted against the employer and claims under social law may be asserted against the relevant authorities/institutions, such as the Public Employment Service or the Austrian Health Insurance Fund. In order to help pursue claims, letters of formal notice from the Chamber of Labour free of charge and, if necessary, representation in the relevant

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<sup>100</sup> For further details see Stiller, 2023.

<sup>101</sup> Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

proceedings are available.<sup>104</sup> In addition, the UNDOK – Drop-in center for undocumented workers offers advice on matters of labour and social law relating to residence as well as support in asserting corresponding claims (UNDOK, n.d.). UNDOK also acts as an interface to chambers of labour and trade unions.<sup>105</sup> The interests of irregularly staying third-country nationals can be safeguarded by the Chamber of Labour or by lawyers, theoretically even in the case of return.<sup>106</sup> The transfer of recovered remuneration or sums of money must be made to the account indicated by the relevant employee, regardless of whether it is a domestic or foreign account.<sup>107</sup>

The following procedures are in place for the assertion of claims by unlawful employees, whereby the relevant limitation periods and deadlines must be observed in each case:<sup>108</sup>

- Labour and social court proceedings (civil proceedings): Third-country nationals may submit letters of formal notice of demand for payment to the employer free of charge via the Chamber of Labour in order to assert their claims under labour and social law. This is applicable irrespective of the worker's residence status and as is the case with all employees. They may also make use of legal representation before the civil court, including subsequent collection proceedings.<sup>109</sup> Under certain circumstances, current and former workers may be represented by particular organizations in proceedings before Austrian labour and social courts (see Art. 40 Labour and Social Courts Act;<sup>110</sup> Heilemann, 2017:27). For example, the Chamber of Labour may provide legal representation in labour and social law proceedings, regardless of residence status.<sup>111</sup> If, for example, the employer refuses to make payments that have been claimed, the Chamber of Labour will bring a civil court action free of charge and also represent the unlawfully employed worker in civil court proceedings.<sup>112</sup>
- Administrative (criminal) proceedings: Complaints to administrative (criminal) authorities and judicial prosecution authorities can be lodged by employees themselves or they can have them lodged by the Chamber of Labour free of charge (as is the case with all employees).<sup>113</sup> Only UNDOK, not the Chamber of Labour, can provide support in administrative criminal proceedings. The reason for this is that legal protection in administrative criminal proceedings is not provided for in the Legal Protection Regulation.<sup>114, 115</sup>

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104 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023; interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

105 Written input: UNDOK, 30 November 2023.

106 This is theoretically possible but hardly relevant in practice, as it is de facto almost impossible to pursue rights after a return. Written input: Johannes Peyrl, Chamber of Labour, 1 December 2023.

107 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

108 For more details see Austrian Federal Economic Chamber, 2023b; Heilemann, 2017:26f.

109 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

110 Labour and Social Courts Act, FLG No. 104/1985 in the version of FLG I No. 60/2023.

111 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

112 Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

113 Ibid.

114 Pursuant to Art. 7 para 1 of the Chamber of Labour Act 1992, the Framework Regulation on Legal Protection lays down the principles of the Austrian Chamber of Labour's legal protection activities in matters of labour and social rights. See also Chamber of Labour, 2014; Chamber of Labour Act 1992, FLG No. 626/1991 in the version of FLG I No. 113/2022.

115 Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

### 4.3 Consequences for third-country nationals

In Austria, a foreign employee cannot be penalized for unlawful employment as it is the employer's responsibility to ensure the employment is lawful (Deutsch et al., 2014:506f.). This is related to the consideration that employers should not be able to gain benefit from unlawful employment and workers should be able to assert their rights.<sup>116</sup> Accordingly, there are no fines or prison sentences for foreign nationals for unlawful employment as such. However, there may be consequences under aliens law for unlawfully employed foreign nationals (see Table 2). There are no plans to regularize employment or irregular residence. Trafficked persons have the possibility to apply for international protection or for a Residence Permit for Individual Protection pursuant to Art. 57 para 1 subpara 2 Asylum Act 2005 (see also Stiller, 2021:28).<sup>117</sup>

**Table 2: Possible consequences for third-country nationals, depending on their residence and employment situation, based on case studies**

Regular stay	
<p><b>A</b></p> <p><b>Employment with the approval of the labour market authorities but without registration</b></p>	<p><i>This might apply, for example, if the person could lawfully be employed but is not registered with the authorities and/or does not pay taxes and social security contributions.</i></p> <p>There are no consequences in such cases, especially since the person has a residence permit and unlawful employment is not a punishable offence for the employee; adverse consequences for the employee seem inappropriate here.</p>
<p><b>B</b></p> <p><b>Employment outside the scope of the labour market authorization</b></p>	<p><i>This could apply, for example, where a third-country national is employed by an employer other than the one indicated on the Red-White-Red Card (RWR Card; migration.gv.at, n.d.a), or a third-country student works more hours than allowed and is thus no longer pursuing the main purpose of "study" (Federal Ministry of Labour and Economy, 2023). In this context, "bogus self-employment" is also relevant, as in some cases it is easier to access self-employment than a position as an employee.<sup>118</sup></i></p> <p>In these cases, the residence permit of the third-country national will probably not be extended (Heilemann, 2017:24), which, in the experience of the Chamber of Labour, can particularly affect students.<sup>119</sup></p> <p>Unlawful employment of third-country nationals may also result in the issue of a return decision pursuant to Art. 52 para 4 subpara 1 Aliens Police Act 2005. According to case law of the Supreme Administrative Court, the pursuit of gainful employment without corresponding authorization endangers public order (Supreme Administrative Court, 2020). In such cases, the Federal Office for Immigration and Asylum is required to issue a return decision (Art. 52 para 4 subpara 1 Aliens Police Act), taking into account personal and family life (Art. 9 Federal Office for Immigration</p>

<sup>116</sup> Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

<sup>117</sup> Asylum Act 2005, FLG I No. 100/2005 in the version of FLG I No. 221/2022.

<sup>118</sup> This was applicable in the case of transitional periods during European Union enlargement and is still partly the case for asylum-seekers. Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

<sup>119</sup> Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

	<p>and Asylum Procedures Act).<sup>120</sup> This return decision ultimately leads to the person having to leave Austria. If the person does not comply with the obligation to depart (Art. 55 para 1 Aliens Police Act), they may be deported (if necessary, after being placed in detention pending deportation). In addition, an entry ban can also be imposed in conjunction with the return decision.</p>
<p><b>C</b></p> <p><b>Employment without the approval of the labour market authorities</b></p>	<p><i>This could apply, for example, to persons who have a “Settlement Permit – Gainful Employment Excepted” (Art. 44 Settlement and Residence Act)<sup>121</sup> or a “Settlement Permit – Dependant” (Art. 47 Settlement and Residence Act), which exclude gainful employment.</i></p> <p>If the foreign national has a residence permit but pursues gainful employment without a corresponding work permit, the Federal Office for Immigration and Asylum is required to issue a return decision (Art. 52 para 4 subpara 1 Aliens Police Act), as gainful employment without a corresponding permit endangers public order according to case law of the Supreme Administrative Court (Supreme Administrative Court, 2020; for details see <a href="#">case study B</a>).</p> <p>Regularization of the unlawful employment is out of the question since, according to Art. 4 para 1 subpara 4 Act Governing the Employment of Foreign Nationals, it is a prerequisite for the issue of a work permit that the employment has not yet commenced. Furthermore, according to Art. 4 para 1 subpara 3 Act Governing the Employment of Foreign Nationals, a work permit may only be granted if there are no substantial grounds for non-issue relating to the foreign national personally, such as repeated infringements<sup>122</sup> of the Act Governing the Employment of Foreign Nationals during the past 12 months due to employment without a work permit (Art. 4 para 1 subpara 3 Act Governing the Employment of Foreign Nationals; see <a href="#">4.1</a>).</p>

## Irregular stay

*This could apply, for example, if persons have entered irregularly and do not have a regular residence permit or if they continue to stay and work in Austria after their residence permit/visa has expired. Since a work permit requires regular residence, their employment is unlawful.*

In such cases, there are two interrelated aspects that require consideration:

<p><b>I</b></p> <p><b>Lack of residence permit</b></p>	<p>If a person does not hold a valid residence permit, the Federal Office for Immigration and Asylum is required to issue a return decision against this person (Art. 52 para 1 subpara 1 Aliens Police Act 2005; for details see <a href="#">case study B</a>). In addition, Art. 120 para 1 (a) Aliens Police Act states that foreign nationals who are not staying lawfully in the federal territory of Austria are committing an administrative offence punishable by a fine of at least EUR 500, and in the event of default thereon, with a prison sentence of up to two weeks. A regularization of an irregular stay is not planned in general (for details see Stiller and Humer, 2020:17f).</p>
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<sup>120</sup> Federal Office for Immigration and Asylum Procedures Act, FLG I No. 87/2012 in the version of FLG I No. 221/2022.

<sup>121</sup> Settlement and Residence Act, FLG I No. 100/2005 in the version of FLG I No. 221/2022.

<sup>122</sup> “Repeatedly” can be interpreted as “at least twice”; see Lindmayr, 2012:18.

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### Lack of approval from the labour market authorities

In addition, persons without a valid residence permit who are unlawfully employed may be arrested under certain circumstances. Specifically, the bodies of the Anti-Fraud Office are authorized to arrest foreign nationals on behalf of the aliens police authority (see 3.2) if, due to exigent circumstances, there is no time to wait for officers of the official security service (i.e. the police) to intervene, if (a) there are grounds to assume that these persons work or wish to work in Austria without being entitled to do so, and (b) they are not staying lawfully in the federal territory of Austria (Art. 26 para 4 Act Governing the Employment of Foreign Nationals).

Foreign nationals cannot be penalized for not having a work permit (cf. Art. 28 and Art. 28c Act Governing the Employment of Foreign Nationals), but they may commit an administrative offence if they do not comply with certain obligations to provide information or allow inspection of relevant records (Art. 26 para 1 Act Governing the Employment of Foreign Nationals). In such cases, a fine of at least EUR 150 may be imposed (Art. 28 para 1 subpara 2 (c) Act Governing the Employment of Foreign Nationals). Regularization of the unlawful employment relationship is out of the question (see [case study C](#)).

## 4.4 Challenges and good practices

Challenges and good practices regarding sanctions for employers as well as rights of and consequences for unlawfully employed third-country nationals are identified below. These emerged from expert interviews and written contributions and were contextualized with secondary literature.

### Challenges

- Though sanctions for unlawful employment are only imposed on employers in Austria, these sanctions may also have repercussions for unlawfully employed third-country nationals. For example, third-country nationals may be denied the possibility to obtain a work permit for a year (Ebner, 2023:40; Heilemann, 2017:22) and in certain circumstances there may also be repercussions under residence law (see 4.3 and Chamber of Labour et al., 2014). In order for workers to be able to take action against exploitation, there have been calls for the third-country nationals concerned and their families to have secure residence for the duration of labour law and/or social security law proceedings (Dvořák et al., 2023:5).
- Enforcement of rights in the case of unlawfully employed third-country nationals is seen as a key challenge (UNDOK, 2019:10). The Chamber of Labour states that unlawfully employed third-country nationals make very little use of existing mechanisms for a number of reasons.<sup>123</sup> First, from the personal perspective of those affected, a continuing income can often be more attractive than any possible payment of arrears resulting from the assertion of claims, as in the latter case the income is lost. The potential personal gain is therefore considered too small for workers to actually assert their rights.<sup>124</sup>

<sup>123</sup> Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

<sup>124</sup> According to the Chamber of Labour; this is a general phenomenon, as 90 per cent of all people come to advice sessions only after their employment has ended.

Second, employees with irregular residence, in particular, are afraid of encountering consequences under residence law, since in most cases the authorities would have had no prior knowledge of their residence in Austria (see [Table 2](#)). They may therefore face consequences under residence law if they assert their rights, and employers sometimes use this fact as a means of exerting pressure.<sup>125</sup> The person's desire to remain in the country therefore often has a higher priority than their desire for financial compensation (FRA, 2015:90; Meier, 2014:45, 50). Third, in order to assert rights, workers need to know or be able to locate their employer. This can be challenging in practice, as unlawful employment relationships are often established informally.<sup>126</sup>

- According to the Chamber of Labour, one of the key challenges posed is the cross-border enforcement of penalties. For offences in the context of foreign postings, the employer's registered place of business is not in Austria but rather in another European Union country. This complicates the process of conducting administrative procedures and often makes it impossible to enforce penalties unless the same company becomes active in Austria once more. However, new contracts are often executed by new companies or subcontractors, particularly in the construction industry (see [2.1](#)). Another obstacle is when the employee has already returned to a third country and has to travel to Austria, for example for legal proceedings.<sup>127</sup>

## Good practices

- According to the Federal Ministry of Labour and Economy, high sanctions are an example of good practice as they continue to serve as a proven deterrent against the unlawful employment of third-country nationals.<sup>128</sup> As noted previously in 2016/2017, high penalties combined with checks by the Financial Police serve as an effective deterrent for employers (Heilemann, 2017:22).
- The Chamber of Labour highlights the fact that information leaflets alone are not enough to ensure people are aware of their rights and able to assert them. However, combining this information with other measures, such as integrating information on rights into language courses, has proven successful (see [3.4](#)).<sup>129</sup> Low-barrier access and a target-group-specific approach, as in the case of the UNDOK drop-in centre, are ways of addressing the issue of information on rights. UNDOK has different approaches to reach undocumented workers depending on community and sector.<sup>130</sup>

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<sup>125</sup> Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Written input: Heinz Kutrowatz, Federal Ministry of Labour and Economy, 11 August 2023 and 16 August 2023.

<sup>129</sup> Interview with Johannes Peyrl, Chamber of Labour, 18 August 2023.

<sup>130</sup> Ibid.

## 5 CONCLUSIONS

In the period from 2017 to 2023, there were only minor adjustments to the legal, political and practical framework relating to the unlawful employment of third-country nationals. However, the relevance of this issue has increased in the Austrian context. The central finding of this study is that while the legal framework has remained almost unchanged and the scope of inspection activities relatively constant, there has been a sharp increase in the number and proportion of identified cases of suspected unlawful employment involving third-country nationals. This represents a **reversal of the trend** compared to the 2016/2017 study by the European Migration Network (EMN). At that time, two thirds of cases of suspected unlawful employment involved European Union citizens and unlawful employment of third-country nationals was a marginal issue. This changed in 2020; since that time, third-country nationals have accounted for the largest group of identified cases of persons suspected of being unlawfully employed in Austria. Unlawful employment primarily affects the risk sectors of catering and tourism, agriculture and forestry, and construction. However, the cleaning industry, work in private households, van delivery services and areas in which a large number of unskilled staff are required at short notice are also considered to pose a risk.

The findings of the study point to three background factors that are relevant for analysing this development: First, the **COVID-19 pandemic** made the public more aware of the issue of unlawful employment and highlighted exploitative working conditions. At the same time, the precarious economic and/or residence situation of many unlawfully employed workers increased their vulnerability and dependency. Second, there is currently a severe **labour shortage** across all sectors in Austria. While the unlawful employment of third-country nationals remains a major risk for companies due to the significant penalties involved, the labour shortage means that companies may be prepared to take higher risks to obtain the labour they need. Third, the process of unlawful employment is becoming more complex due to **corporate and subcontractor structures** and **contracting and subcontracting chains**, especially in the construction sector. For example, new recruitment practices have emerged in recent years, such as the (bogus) posting of third-country nationals to Austria via other European Union countries.

The analysis shows that unlawful employment of third-country nationals in Austria poses a complex challenge. It is closely related to other issues, such as labour market access, economic developments, the progress of digital technologies and labour exploitation. In order to address the problem of increasing unlawful employment of third-country nationals, it will be necessary to address various challenges in terms of prevention, identification and sanctions, as well as with regard to the consequences for third-country nationals and the assertion of relevant rights, and to build on appropriate good practices.

### I. Prevention

The prevention of unlawful employment is to some extent related to structural issues, such as labour market access for third-country nationals and the configuration of atypical employment relationships. A further relevant factor is the expansion and further development of IT systems to support companies in documenting all necessary papers and authorizations before hiring a third-country national.

## **II. Identification**

When it comes to identifying unlawful employment, the inspection authorities face challenges related to the falsification of identity documents, identity fraud and bogus working time records. These challenges are being tackled by the use of new digital document scanners. On-site inspections by the Financial Police continue to be considered effective. They are resource-intensive but could be further expanded as their number has remained relatively static.

## **III. Sanctions**

Sanctions for employers who unlawfully employ third-country nationals are considered high in Austria and are seen as having a deterrent effect. However, cross-border enforcement of sanctions remains a major challenge.

## **IV. Consequences for third-country nationals**

Unlawful employment can also have consequences under residence law for third-country nationals, especially if they are staying in Austria without a lawful residence permit. Although there are no fines or prison sentences for unlawful employment as such for foreign nationals, under certain circumstances a return decision and an obligation to depart from the country may be issued.

## **V. Assertion of rights**

A further key element is the assertion of employees' rights. There are mechanisms in Austria to enforce labour and social law rights in the case of unlawful employment, but they are rarely used by unlawfully employed third-country nationals. This raises the question of how information can be communicated effectively and how those affected can be persuaded to actually assert their rights. Low-barrier, target-group-specific approaches and the combination of legal information with language courses and support services appear promising.



# ANNEX

## A.1 List of abbreviations and translations

English term	English abbreviation	German term	German abbreviation
Act Governing the Employment of Foreign Nationals	–	Ausländerbeschäftigungsgesetz	AuslBG
Act to Combat Wage and Social Dumping	–	Lohn- und Sozialdumping-Bekämpfungsgesetz	LSD-BG
Aliens Police Act 2005	–	Fremdenpolizeigesetz 2005	FPG
Anti-Fraud Office	–	Amt für Betrugsbekämpfung	ABB
Asylum Act 2005	–	Asylgesetz 2005	AsylG 2005
Austrian Federal Economic Chamber	–	Wirtschaftskammer Österreich	WKÖ
Austrian Freedom Party	–	Freiheitliche Partei Österreich	FPÖ
Austrian Green Party	–	Die Grünen	–
Austrian Health Insurance Fund	–	Österreichische Gesundheitskasse	ÖGK
Austrian People's Party	–	Österreichische Volkspartei	ÖVP
Austrian Statistical Classification of Economic Activities	–	Österreichische Systematik der Wirtschaftstätigkeiten	ÖNACE
Austrian Trade Union Federation	–	Österreichischer Gewerkschaftsbund	ÖGB
Chamber of Labour	–	Arbeiterkammer	AK
Chamber of Labour Act	–	Arbeiterkammergesetz	AKG

<b>English term</b>	<b>English abbreviation</b>	<b>German term</b>	<b>German abbreviation</b>
Constitutional Court	–	Verfassungsgerichtshof	VfGH
Construction Workers' Annual Leave and Severance Pay Fund	–	Bauarbeiter-Urlaubs- und Abfertigungskasse	BUAK
Coronavirus disease 2019	COVID-19	Coronavirus-Krankheit-2019	COVID-19
Court of Justice of the European Union	CJEU	Gerichtshof der Europäischen Union	EuGH
Criminal Code	–	Strafgesetzbuch	StGB
European Economic Area	EEA	Europäischer Wirtschaftsraum	EWR
European Free Trade Association	EFTA	Europäische Freihandelsassoziation	EFTA
European Labour Authority	ELA	Europäische Arbeitsbehörde	ELA
European Migration Network	EMN	Europäisches Migrationsnetzwerk	EMN
European Union	EU	Europäische Union	EU
European Union Agency for Fundamental Rights	FRA	Agentur der Europäischen Union für Grundrechte	FRA
Federal Law Gazette	FLG	Bundesgesetzblatt	BGBl.
Federal Ministry for European and International Affairs	–	Bundesministerium für europäische und internationale Angelegenheiten	BMEIA
Federal Ministry of Finance	–	Bundesministerium für Finanzen	BMF
Federal Ministry of Labour and Economy	–	Bundesministerium für Arbeit und Wirtschaft	BMAW

<b>English term</b>	<b>English abbreviation</b>	<b>German term</b>	<b>German abbreviation</b>
Federal Ministry of Social Affairs, Health, Care and Consumer Protection	–	Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz	BMSGPK
Federal Ministry of the Interior	Mol	Bundesministerium für Inneres	BMI
Federal Office for Immigration and Asylum	–	Bundesamt für Fremdenwesen und Asyl	BFA
Federal Office for Immigration and Asylum Procedures Act	–	BFA-Verfahrensgesetz	BFA-VG
General Social Insurance Act	–	Allgemeines Sozialversicherungsgesetz	ASVG
Gross domestic product	GDP	Bruttoinlandsprodukt	BIP
ibw Austria - Research & Development in VET	ibw Austria	Institut für Bildungsforschung der Wirtschaft	ibw
International Labour Organization	ILO	Internationale Arbeitsorganisation	ILO
International Organization for Migration	IOM	Internationale Organisation für Migration	IOM
Labour and Social Courts Act	–	Arbeits- und Sozialgerichtsgesetz	ASGG
legislative term	–	Gesetzgebungsperiode	GP
margin number	–	Randziffer	Rz
National Action Plan	NAP	Nationaler Aktionsplan	NAP
National Contact Point	NCP	Nationaler Kontaktpunkt	NKP
Official Journal of the European Union	OJ	Amtsblatt der Europäischen Union	ABl.

English term	English abbreviation	German term	German abbreviation
Organisation for Economic Co-operation and Development	OECD	Organisation für wirtschaftliche Zusammenarbeit und Entwicklung	OECD
paragraph	para	Absatz	Abs.
Public Employment Service	PES	Arbeitsmarktservice	AMS
Red-White-Red Card (Plus)	RWR Card	Rot-Weiß-Rot – Karte (plus)	RWR - Karte
Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetz	NAG
Social Insurance Institution of the Self-Employed	–	Sozialversicherung der Selbständigen	SVS
subparagraph	subpara	Ziffer	Z
Supreme Administrative Court	–	Verwaltungsgerichtshof	VwGH
Supreme Court	–	Oberster Gerichtshof	OGH
Trade union for production workers	PRO-GE	Produktionsgewerkschaft	PRO-GE
Treaty on the Functioning of the European Union	TFEU	Vertrag über die Arbeitsweise der Europäischen Union	AEUV
UNDOK – Drop-in center for undocumented workers	UNDOK	Anlaufstelle zur gewerkschaftlichen Unterstützung undokumentiert Arbeitender	UNDOK

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## EUROPEAN MIGRATION NETWORK

The European Migration Network (EMN) was launched in 2003, by the European Commission and by order of the European Council, in order to satisfy the need for a regular exchange of reliable information in the field of migration and asylum at European level. Since 2008 the Council Decision 2008/381/EC has constituted the legal basis of the EMN. National Contact Points (NCPs) have been established in each European Union Member State (except Denmark) and in EMN Observer Countries (Armenia, Georgia, Montenegro, Norway, the Republic of Moldova, Serbia and Ukraine).

The EMN's role is to provide up-to-date, objective, reliable and comparable information on migration and asylum to European Union institutions and Member States' authorities and institutions with a view to supporting policymaking in the European Union in these areas. The EMN is also tasked with providing such information to the general public.

The NCP Austria – based on an agreement with the Federal Ministry of the Interior – is located in the Policy Research and Migration Law Department of the country office for Austria of the International Organization for Migration (IOM). The IOM office was established in 1952 when Austria became one of the first Member States of the Organization. The main responsibility of the IOM country office is to analyse national migration issues and emerging trends and to develop and implement corresponding national projects and programmes.

The main tasks of the NCPs in implementing the work programme of the EMN include drafting the annual policy reports and studies covering specific topics, responding to ad hoc queries launched by other NCPs or the European Commission, carrying out activities to increase the EMN visibility, and networking within several fora. In addition, the NCPs in each country also set up national networks of organizations, institutions and individuals working in the field of migration and asylum.

In general, the NCPs do not conduct primary research but collect and analyse existing data and information, which are supplemented where necessary through additional information collected directly. EMN studies are prepared in accordance with common study templates in order to achieve comparable results within the European Union and Norway. Since comparing results frequently proves challenging, the EMN has produced a Glossary, which ensures that similar definitions and terminology are used in all national reports.

On completion of national reports, the European Commission with the support of a service provider drafts a synthesis report, which summarizes the most significant results from the individual national reports. In addition, topic-based policy briefs, referred to as EMN Informs, are prepared as succinct summaries and comparisons of national findings on key selected topics. All national studies, synthesis reports, Informs and the Glossary are available on the website of the European Commission Directorate-General for Migration and Home Affairs.



The European Migration Network (EMN) is coordinated by the European Commission with National Contact Points established in each European Union Member State (except Denmark) plus EMN Observer Countries including Norway, Georgia, the Republic of Moldova, the Ukraine, Montenegro, Armenia, and Serbia.  
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