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Article

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CESifo Forum

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Suggested Citation: Danaj, Sonila; Geyer, Leonard (2022) : Posted Workers to Austria: An Unstoppable Trend?, CESifo Forum, ISSN 2190-717X, ifo Institut - Leibniz-Institut für Wirtschaftsforschung an der Universität München, München, Vol. 23, Iss. 03, pp. 15-18

This Version is available at:

<https://hdl.handle.net/10419/263849>

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Posted Workers to Austria: An Unstoppable Trend?

Posting to Austria has become a significant form of temporary cross-border labor supply. In a recent study (Geyer, Premrov and Danaj 2022), we estimated that the pre-pandemic number of postings reached at least 320,480, which represents about 1.7 percent of the work carried out by individuals living in Austria during the same period. Most postings to Austria are from neighboring lower-income countries, such as Poland, Hungary, Romania, the Slovak Republic, Slovenia, and Germany. In this article, we present the trends of postings to Austria and discuss them in relation to some of the prevalent posting drivers like labor cost differentials between sending and receiving countries, wage and social dumping, and the COVID-19 pandemic. Estimates for the 2011–2021 period suggest an overall increase in the number of postings until 2019, an expected decrease during the first phase of the COVID-19 pandemic, followed by a subsequent increase. We discuss whether the growth trend is likely to continue and identify which factors might influence the number of postings to Austria in the near future.

The Posting of Workers Directive 96/71/EC aimed to facilitate the supply of labor for temporary labor market demands raised in the various EU countries by regulating temporary cross-border labor mobility in the framework of the provision of services rather than permanent intra-EU labor mobility (Cremers 2013). Under this framework, workers are sent by their employer to provide a service from their country of residence to another EU country, where they are expected to return to once the job is finished. During their posting, their social contributions continue to be paid in the sending country. Thus, the original driver of posting was to enable labor demand and supply across national labor markets in an expedient and efficient way. In addition, posting aimed to be skills-driven by matching quantitative and qualitative labor shortages and surpluses among the various EU countries (Lens, Mussche and Marx 2022).

Yet, this form of cross-border service provision was not used a lot until the Eastern enlargement of 2004, when the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia joined the European Union. Some of the older Member States imposed restrictions to their labor market for workers from the new Member States for a transitional period of up to seven years (Fihel, Janicka, Kaczmarczyk and Nestorowicz 2015), whose side effect might have been the provision of services becoming an important channel of temporary cross-border labor mobility. Since then, there has been a constant

increase in the number of postings, especially from these “new” Member States (De Wispelaere, De Smedt and Pacolet 2020). Scholars, the EU, and national actors have argued that it is not simply the labor market demand and labor shortages driving the increase, but also the economic disparities and labor cost differentials between the mostly lower-income sending and the higher-income receiving EU countries (Arnholtz and Lillie 2020; Cremers 2011; European Parliament 2017; Fihel et al. 2015). A third set of drivers are arguably the differences in the national regulatory regimes and mechanisms among the EU countries, which have allowed certain labor market actors, such as posting companies and temporary work agencies to go “regime shopping” for the most convenient and cost-efficient regime, which often has been in the lower-income sending country (Houwerzijl 2014). Unfortunately, these practices are questionable at best, if not abusive and conducive to social dumping (Berntsen and Lillie 2015).

AUSTRIAN ANTI-DUMPING MEASURES AND POSTING TRENDS

When transposing the original 1996 Posting of Workers Directive (96/71/EC), Austria also tried to address the issues of wage differences and social dumping in its national legislation. The Law on Anti-Wage and Social Dumping (Lohn- und Sozialdumping-Bekämpfungsgesetz – LSDB-G), which included provisions to enforce the equal pay principle, was adopted in 2011. An amended version of the law (LSD-BG) was passed in 2016 (entering in force in 2017) and included the requirements of the Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

One of the main anti-dumping elements of the Austrian law is the application of the principle of equal wages for posted workers according to national standards of pay and includes rates stipulated in the collective bargaining agreements. Austria applied the



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equal pay principle, although it was not a requirement of the 1996 Directive, to protect national standards and fight any efforts from foreign companies to take advantage of the differences in pay among EU countries and thus engage in wage and social dumping practices. To enforce the equal pay rule, several infringements were outlined in the law supported by tough corresponding punitive measures introduced in 2017. Posting companies found in breach of the Anti-Wage and Social Dumping Law are subject to administrative fines and, based on the severity of the infringement, also banned from engaging in economic activity in Austria.

There is evidence that posting companies violate the equal pay principle and underpay workers on a significant scale and much more frequently than domestic companies. In 2019, the Austrian Financial Police suspected one in ten posted workers to be underpaid (Finanzpolizei 2020). Furthermore, data for the same year suggests that posting companies were 14.7 times more likely to underpay their workers than companies located in Austria (Geyer et al. 2022).

The ongoing violations notwithstanding, Austrian legislation has been considered one of the toughest national enforcement mechanisms against wage and social dumping regarding the posting of workers due to the application of cumulative administrative fines (Krings 2019). According to this approach, posting undertakings and user undertakings are charged for the same violation for each individual worker involved, which could potentially lead to substantially high fines amounting to millions of euros. The measure was considered an important deterrent factor against abusive companies (Danaj and Kahlert 2021; Gagawczuk 2019).

To see how the introduction of the equal pay principle in 2011 and the subsequent introduction of the stronger enforcement measures in 2017 influenced trends of postings to Austria, we examined data collected through two diverse data collection tools: data from the Portable Documents A1 (PD A1) and from the national prior declaration tool. PDs A1 are issued by social security providers in the sending country and

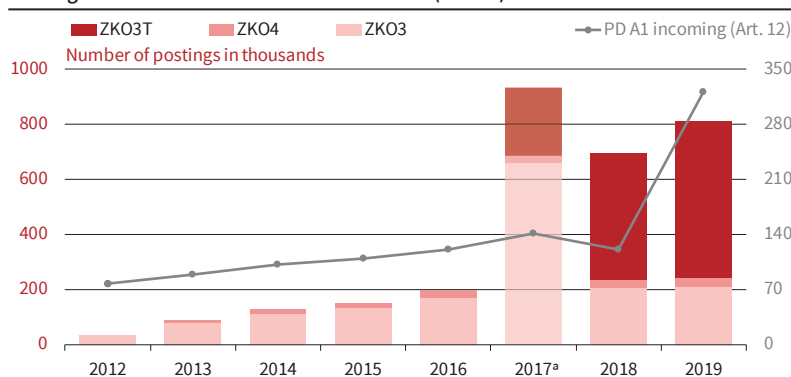
provide evidence that the posted worker is covered by the social security system of the sending country (Regulation (EC) No 883/2004 – on the coordination of social security systems; Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems). A1 forms can be issued according to Article 12 of the Basic Regulation for those employees posted to another EU country, and according to Article 13, for those who work in two or more Member States or the self-employed. In the case of Austria, only data on PDs A1 issued under Article 12 are available and we used these data to calculate lower estimates.

A prior declaration, on the other hand, must be submitted by posting undertakings to the authorities of the receiving country to notify their intention to send posted workers to that country (Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services). In Austria, this is done through the ZKO forms based on the Austrian Law against Wage and Social Dumping (LSD-BG). ZKO forms are issued for general posting (ZKO3), mobile employees in the transport sector (ZKO3T), and cross-border secondments (ZKO4). The difference between postings (ZKO3) and cross-border secondments (ZKO4) is that posted workers provide services in Austria under the direction of the sending company, whereas seconded workers are employed by a foreign undertaking, but work under the direction of an Austrian employer. We used data from both PDs A1 and ZKOs to estimate the number of postings to Austria, i.e., the number of instances in which an individual was sent to Austria to provide a service for a temporary period.

Figure 1 shows the estimates of the number of postings to Austria based on the number of PDs A1 issued under Article 12 for individuals sent to Austria between 2012 and 2019, as well as based on the number of all three types of ZKO forms submitted by EU/EEA posting undertakings to notify their intention to post their workers to Austria for the same period.

As it can be observed from the graphs in Figure 1, estimates drawn from both sets of data indicate a steady increase in the number of postings to Austria since 2012, regardless of the application of the equal pay principle for posting companies. Data from the PDs A1 show a steady increase until 2017, then a drop in 2018, followed by a doubling of the figures in 2019. The number of postings notified through ZKO forms also increased steeply between 2012 and 2016. From 2016 to 2017, the number of postings notified through ZKO forms more than tripled (most likely due to a technical error therefore we present it in vague colors due to unreliability). The numbers fell in 2018, before increasing again between 2018 and 2019. The 2018 drop in both sets of data may be explained as an adjustment period that took place after the intro-

Figure 1
Postings to Austria 2012–2019 Based on PD A1 (Art. 12) and ZKO Forms



* Number of prior declarations not reliable for 2017 (break in the timeseries due to a technical error).

Source: Own visualization with data from De Wispelaere et al. (2020); Financial Police (2020).

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duction of the 2017 Anti-Wage and Social Dumping Law. However, the increase in numbers of PDs A1 and in the overall ZKOs in the subsequent year suggests that the tougher measures introduced in 2017 did not have a lasting deterrent impact on the posting trends.

The continued increase may partially be attributed to companies continuing to underpay their workers. However, the estimated 10 percent of posting undertakings continuing to violate the equal pay principle certainly cannot account for the entirety of the upward trend of postings to Austria.

THE IMPACT OF THE COVID-19 PANDEMIC ON POSTING TRENDS

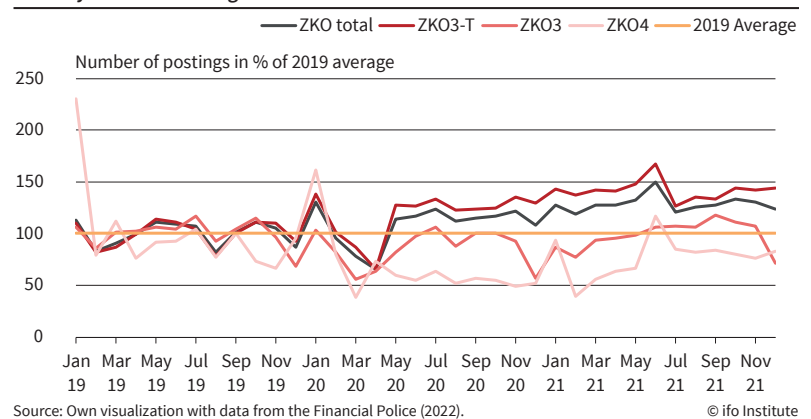
For the 2019 – 2021 period, only the ZKO data are currently available, so we used them to understand the impact of the COVID-19 pandemic on postings to Austria. In Figure 2, we show the number of postings according to the three different categories as well as their evolution in time. The number of secondments (notified through ZKO4) has been the smallest, while the number of postings in all industries except transport (notified through ZKO3) has been about 8.6 times higher than secondments, and the number of postings in transport (notified through ZKO3T) has been 3.6 times higher than the previous category.

The figure shows a steep drop in the number of postings in February, March, and April of 2020 (when the first lockdown was introduced in Austria). This seems to indicate a reduction in posting activity due to the pandemic. The number increased again in May 2020, driven mainly by the increase in numbers of postings notified in the transport sector (ZKO3T). The number of notified postings in this industry increased in May 2020 to 128 percent of the 2019 average and remained well above the 2019 level for the remainder of 2020 and the entire year of 2021. In contrast, the number of postings notified through ZKO3 forms remained below the 2019 average since the beginning of 2020. The average monthly number of notified ZKO3 postings declined by 14 percent from 2019 to 2020. In 2021, the numbers recovered, but remained slightly (1.8 percent) below the 2019 level.

The sudden, significant drop in the number of notified postings in February, March, and April 2020 can clearly be attributed to the COVID-19 pandemic and the associated policy response by the Austrian government. However, as far as longer-term developments are concerned, it is important to separate the COVID-effect from other trends. If we look at the number of postings notified in the two years before the pandemic (Figure 1), we notice a decrease in the growth rate of postings notified through ZKO3 and ZKO4 between 2018 and 2019, whereas the number of postings notified through ZKO3T forms has continued to increase strongly. During the pandemic (Figure 2), we notice an acceleration of the unequal growth of the postings notified in the transport sector. Meanwhile,

Figure 2

Monthly Notified Postings to Austria Jan 2019 – Dec 2021



postings notified for all other sectors seem to have recuperated from the initial impact of the pandemic in early 2020 but remain below the 2019 average. Hence, we argue that the overall trend of postings notified since 2019 appears to be driven not only by the pandemic. The high number of postings notified even in the unprecedented context of a global pandemic, shutdowns, and travel restrictions suggests posted workers are an important element of the Austrian economy. Nevertheless, the number of postings to Austria in the non-transport sector seems to be plateauing, which signifies a change in the trend of strong growth for most of the last decade.

CONCLUSIONS

Posting to Austria is a significant form of temporary labor supply for the Austrian economy, which is confirmed by the high number of postings notified even in the unprecedented context of a global pandemic, shutdowns, and travel restrictions. Posting trends to Austria have been growing since 2011, despite the removal of wage differentials between sending countries and Austria when the equal pay principle was introduced in the national posting regulations. This can be explained by the fact that most postings to Austria come from lower-income EU countries, which means that despite the equal wages in theory, overall cost differentials between sending countries and Austria remain due to the employers' lower social security contributions. This might be one of the contributing drivers to maintain a high number of postings in the future as well. In addition, some posting undertakings seem to violate rules like equal pay to preserve and/or increase their competitive advantage, even in countries with strong enforcement mechanisms like Austria.

The global pandemic resulted in a sharp decrease in the number of postings for the initial period between January – April 2020, but we observe a recuperation in numbers from May 2020. Despite the increase, the number of postings to Austria in the non-transport sector seems to be plateauing. This signifies a

change in the trend of strong growth for most of the last decade, which could be driven by the fact that the demand in the Austrian labor market has reached maturity.

Other factors might influence the posting trends to Austria differently. The most significant ones are the recent changes in the Austrian legislation on posting. The Anti-Wage and Social Dumping Law was amended in September 2021. The amendment was triggered by two different EU-level regulatory interventions that Austria needed to reflect in its national legislation. The first one was the adoption of Directive (EU) 2018/957 on the Posting of Workers, whose main change was the introduction of the equal pay principle at the EU level. As the equal pay principle was already embedded in the Austrian legislation long before EU legislation required it, we can assume the transposition of the new Directive might not have a significant impact on the number of postings.

The second relates to the revision of the cumulative principle of the punitive measures stipulated in the Anti-Wage and Social Dumping Law, because of the European Court of Justice (ECJ)'s deliberation on the joined cases of "Maksimovic and others versus Bezirkshauptmannschaft Murtal and Finanzpolizei." The Croatian subcontractor Maksimovic and an Austrian engineering company as third-party employer were fined EUR 13 million for not complying with administrative obligations and payroll documentation for their 217 posted workers during inspections by Austrian authorities. The ECJ ruled that the practice of cumulative fines was in violation of European law on the proportionality of punitive measures and recommended Austrian legislators to align their regulations to Community law. This recommendation was reflected in the 2021 Anti-Wage and Social Dumping Law by abolishing the practice of cumulative fines and putting a cap on the amount a posting company can be charged with when in violation of the law (Danaj and Kahlert 2021). The abolishment of the cumulative fines has been criticized by some of the national stakeholders (such as the Social Democratic Party and

the Chamber of Labour), who have argued that the removal of this preventative measure has weakened the anti-wage and social dumping efforts in Austria (Geyer et al. 2022). The changes in the legislation are too recent to have an observable effect on posting trends. However, it must be assumed that if anything, lower fines will further increase the already significant number of violations against the equal pay principle.

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