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Facilitation or Liability Trap for Foreign Employers? – The Revised Austrian Law against Wage and Social Dumping



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On 1 January 2017, the revised Austrian Law against Wage and Social Dumping ("*Lohn- und Sozialdumping Bekämpfungsgesetz*" or "Revised LSD-BG") came into force. The Revised LSD-BG applies to matters arising after 31 December 2016.

Regulations against wage and social dumping are, however, not new to Austrian law. Originally embedded in the Austrian Law Amending the Labour Contract Law (*Arbeitsvertragsrechts-Anpassungsgesetz* or "AVRAG") since 2011, the initial Austrian Law against Wage and Social Dumping ("*Lohn- und Sozialdumping Bekämpfungsgesetz*" or "LSD-GB") was well known for its complex structure and wording. Applicable not only to Austrian but also to foreign employers, the LSD-BG - especially its enormous penalties - has often been a stumbling block not to be underestimated, in particular with regard to cross-border posting of employees to Austria.

Strict regulations for cross-border posting of employees

With regard to cross-border posting of employees, only certain cases explicitly listed in the Revised LSD-BG are excluded from its scope, including (i) participation in seminars, lectures or meetings without providing any further services; (ii) visiting fairs or fair-like events, congresses or meetings; (iii) participation or organisation of cultural events or international competitions; (iv) employees working in transit transport business; and (v) activities in connection with international education-, training- or research programmes carried out by official academic institutions, provided that all of these services are **short term** and **not extensive in scope**.

New exemptions for multinational companies and managers

One of the Revised LSD-BG's most important innovations from a practical perspective is the implementation of an **intra group exemption** for internationally operating companies. Such companies may send **specialist staff** to Austrian subsidiaries for a maximum of **two months per year** (each). The exemption is, however, limited to the purpose of research and development, holding of trainings, planning of project work, or exchange of experience, providing consulting services, controlling, or cooperation in group departments having a central coordination function for more than one country.

Further, by 1 January 2017 managers (or other employees) earning a gross monthly salary of 125 % the 30-times maximum daily contribution basis pursuant to the Austrian General Social Insurance Act (which is EUR 6,225 for 2017), are exempted from the Revised LSD-BG's provisions.

Though, as only employees with an above-average income and skills set will be favored, whether these exemptions will actually lead to tangible improvement in practice, needs to be seen.

Employer's obligation to pay minimum salary and special payments – Introduction of offsetting payments

As its predecessor, the Revised LSD-BG grants all employees a minimum salary standard. Thus, (Austrian and foreign) employers must pay their employees in

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Austria at least the **minimum salary and special payments** set out in the applicable Austrian collective bargaining agreement or other statutory regulations.

In case of a violation authorities may impose **finances between EUR 1,000** (first violation) **to EUR 50,000** (repeated violation) to the (foreign or Austrian) employer for every (!) affected employee.

In this context, it is important to mention that **the (foreign) employer's company will not (!) be held liable for the penalty fees, but its managing directors will**. For example, if a foreign company posting or hiring out employees to Austria, has two managing directors, and does not pay the minimum salary to for instance five employees, the fines will be imposed on both managing directors five times each. So, the authorities will impose penalty fees on each managing director for every employee.

Authorities may refrain from imposing penalties for wage-dumping in case of proven payment of the outstanding remuneration (voluntary or within given deadlines), minimal deviation from salary payment obligations (jurisdiction is very strict in this respect, under certain circumstances even 1 % less than is required to be paid may not constitute such minimal deviation), or slight negligence.

The Revised LSD-BG explicitly allows employers to **offset payments** exceeding the minimum salary against a salary paid below the minimum in the same salary period in order to avoid wage dumping. Thus, subsequent overpayments cannot retroactively vindicate wage dumping which occurred in relation to prior salary periods.

The legislator, however, still fails to set out concrete provisions on how foreign employers may determine the correct minimum salary to be paid (eg how to identify the applicable collective bargaining agreement). This lack of information is therefore most likely to remain one of the main obstacles in connection with cross-border secondments being taken by foreign employers.

Besides, the Revised LSD-BG again provides for paid vacation leave and requires the statutory working time and resting periods to be observed by (foreign and Austrian) employers.

Notification obligations for foreign employers

Generally, a foreign employer has to **notify Austrian authorities about every single posting or hiring out** (*Arbeitskräfteüberlassung*) **of employees to Austria** by submitting an online form to the Austrian Central Coordination Agency Investigating Illegal Employment (*Zentrale Koordinationsstelle für die Kontrolle der illegalen Beschäftigung, ZKO*), containing detailed information about the employer, the employee and the Austrian company the employee is posted or hired out to.

The **deadline for the notification** has been extended by the Revised LSD-BG: It is now sufficient to submit the notification immediately before the employees' work in Austria starts; initially this had to be taken care of one week before the start of work at the latest.

It is advisable for a foreign employer to observe the notification obligations as the **level of the penalty was doubled** by the Revised LSD-BG: In case of a violation, authorities may now impose **finances** of **between EUR 5,000** (first violation) **to EUR 20,000** (repeated violation) to the foreign employer for every (!) affected employee.

Simplified notification procedures for foreign employers

At least, the Revised LSD-BG provides for **simplifications** for foreign employers, in case the posting or hiring out of employees (i) will take place on a regular basis, or (ii) the same services will be provided to a number of clients in Austria:

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In the first case, the employer may notify the ZKO about posting or hiring out of employees for a period of three months ("**umbrella notification**" or *Rahmenmeldung*). The notification has to contain the client's name, all work locations and information on all employees who will provide the services in Austria. Thus, the employer does not need to individually inform the ZKO if employees already registered by an umbrella notification come to Austria within the three months period. After the three months expire, the umbrella notification may be renewed.

In the latter case, all Austrian clients may be named in one notification in case the same services are to be provided to them in a close local and temporal relation (**collective notification** or *Sammelmeldung*).

It is, however, unclear if these two simplified notification procedures may be combined.

Documentation obligations for foreign employers

In the case of posting or hiring out of employees, the employer must generally keep salary and social security documentation on-site (also in electronic form, e.g. USB Stick) in Austria, and has to provide them to the authorities if requested. With regard to hiring out of employees, the Austrian employer/client (*inländischer Beschäftiger*) is obliged to keep the salary documentation available.

The Revised LSD-BG introduces the scope to keep the documentation available at locations other than on-site, provided that these locations are set out in the notification document. These locations include certain contact persons, Austrian branches or daughter companies, or authorised representatives such as lawyers or tax advisors.

The salary documents must include the employment agreement, salary statements, pay slips or other proof that salary has been paid, working hour documentation and documents regarding the correct classification in the applicable CBA's salary range. **All salary documents have to be provided in German, except the employment agreement** which – by 2017 - may also be written in English.

The social security documents need to include documentation proving the employees' registration with the social security authorities, notification documents and official permits with regard to the employees' lawful employment in the employer's country of domicile.

In the event of a violation of the obligation to keep **social security documentation** available, authorities may impose **finances between EUR 1,000** (first violation) **to EUR 20,000** (repeated violation) to the foreign employer for every (!) affected employee.

In case of a violation of the obligation to keep **salary documentation** available, authorities may impose **finances between EUR 1,000** (first violation) **to EUR 50,000** (repeated violation) to the foreign (in case of hiring out of employees: Austrian) employer for every (!) affected employee.

Cooperation obligation

The Austrian employer is obliged to cooperate with the authorities in case of an audit. This includes granting access to the premises and documents, supplying of information, not complicating or impeding the audit, etc. In case of a violation authorities may impose fines between EUR 1,000 (first violation) to EUR 20,000 (repeated violation) to the employer.



Summary

By transposing the LSD-BG into a separate law, the Austrian legislator has finally tried to revise the existing provisions by giving the LSD-BG a clear and understandable structure and implementing several facilitations for (foreign) employers, such as innovations for multinational companies and employees with a high salary and simplified notification procedures.

However, the LSD-BG's 2017 version still includes a wide range of regulations as well as enormous penalties, which may constitute traps and pitfalls not to be underestimated in the future. It is therefore advisable to increase the risk awareness of foreign employers (especially their managing boards with regard to liability) before posting or hiring out employees to Austria, and – when in doubt – consult a specialist in order to avoid tremendous liabilities and penalty fees.