

**REPORT**  
**on the Free Movement of Workers**  
**in Austria in 2002-2003**

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## **Introduction**

Free movement of workers has not been a hot topic in the years 2002 and 2003, neither for the scientific community nor for politics. There haven't been major amendments to legislative Acts and the political discussion about EU-enlargement and transitional periods for the labour-related free movement for the new Union citizens mainly took place in 2001. After fixing that position, this point of EU-enlargement wasn't in debate anymore. One reason for that might be, that even employee-organisations (trade unions, Arbeiterkammer) favoured that solution. Only very few entrepreneurs mentioned, that closing the labour market for the new Union citizens will lead to economic disadvantages. But since nearly all Member States followed Austria and Germany, this argumentation didn't prevail. From the Austrian migration law point of view the relevant period was dominated by asylum discussions.

## Chapter I

### Entry, Residence, Departure

The Austrian Aliens Act 1997 (Fremdengesetz, Federal Law Gazette I 1997/75) has special provisions relating to entry, to residence and to withdrawal of residence rights for EEA citizens and for relatives of EEA citizens and of Austrian nationals:

Sect. 46: Visa exemption and right of residence of EEA citizens

- (1) EEA citizens shall be exempt from the visa requirement and shall have right of settlement.
- (2) EEA citizens who do not possess sufficient means to support themselves or do not hold fully comprehensive sickness insurance coverage shall be entitled to settle only if they can:
  1. Present to the authority a declaration of recruitment from their employer or a certificate of employment, or
  2. Furnish proof to the authority that they pursue a gainful occupation in a self-employed capacity, or
  3. Show to the satisfaction of the authority that they have a well-founded prospect of taking up employment within a period of six months following their entry, or
  4. Furnish proof to the authority that they are supported as relatives of an EEA citizen who has right of residence.

Sect. 47: Right of residence of favoured third-country nationals

- (1) EEA citizens' relatives who are nationals of a third country shall be subject to the visa requirement.
- (2) Provided that the EEA citizens are entitled to settle, favoured third-country nationals (§ 3 below) shall have right of settlement; a settlement permit shall be issued to them if their residence does not constitute a threat to law and order or public safety. Such aliens may submit applications within Austria for the granting of an initial settlement permit if they are personally entitled to visa-exempt entry. The period of validity of the settlement permit shall be five years, but six months in the case of an EEA citizen intending to take up employment (Sect. 46 § (2) lit 3), computed from the time of his entry.
- (3) Favoured third-country nationals shall be the following relatives of an EEA citizen:
  1. Spouses;
  2. Relatives in the descending line, up to the age of 21 years and provided that they are supported;
  3. Relatives, and relatives of the spouse, in the ascending line, provided that they are supported.
- (4) Favoured third-country nationals who have had their principal residence in the federal territory for an uninterrupted period of ten years may not be refused an additional settlement permit; in the case of spouses (§ 3 lit 1 above), the foregoing shall apply only if they have been married to an EEA citizen for more than one half of that period.
- (5) Official acts in connection with the granting of residence authorizations to favoured third-country nationals shall be exempt from stamp duty and administrative charges.

Sect. 48: Special provisions relating to withdrawal of right of residence and to non-procedural measures

- (1) The imposition of a residence ban on EEA citizens or favoured third-country nationals shall be admissible only if their conduct constitutes a threat to law and order or public safety. The imposition of a residence ban on EEA citizens or favoured third-country nationals who have had their principal residence in the federal territory for an uninterrupted period of ten years shall be inadmissible; in the case of spouses of EEA citizens, the foregoing shall apply only if they have been married to an EEA citizen for more than one half of that period.
- (2) The expulsion of an EEA citizen or a favoured third-country national shall be admissible only if he is unlawfully resident in the federal territory (Sect. 33 § 1).
- (3) In the event of the imposition of an expulsion order or a residence ban, EEA citizens and favoured third-country nationals shall be granted ex officio an enforcement deferment of one month, unless the alien's immediate exit is necessary in the interests of law and order or national security.

- (4) Rejection at the border of an EEA citizen shall be admissible only under Sect. 52 § 1 or § 2 lit 1, 3 (c) or 5, and only if certain facts justify the assumption that his residence in the federal territory would constitute a threat to law and order or public safety.
- (5) Sect. 54, 55 and 63 § 1 lit 2 shall not apply to EEA citizens.

Sect. 49: Relatives of Austrian nationals

(1) Austrian nationals' relatives, as referred to in Sect. 47 § 3, who are nationals of a third country shall have right of settlement; except as otherwise stated below, they shall be subject to the provisions applying to favoured third-country nationals in accordance with Sect. 46-48 above. Such aliens may submit applications within Austria for the granting of an initial settlement permit. The period of validity of the first two settlement permits issued to them shall be one year in each case.

(2) The settlement permit shall be issued to such third-country nationals, upon application, for unlimited period if the requirements for the granting of a residence authorization (Sect. 8 § 1) are satisfied and the aliens:

1. Have been married to an Austrian citizen for at least two years and live under the same roof in the federal territory;
2. Are children under full age of an Austrian citizen and live under the same roof in the federal territory.

In 2002 the Austrian Aliens Act was amended three times: *Federal Law Gazette I* 2002/69, 2002/126 and 2002/134. The new regulations allow immigration for working reasons only to key personell. Amendment I 2002/126 was inter alia to implement Directive 2001/40/EC; the relevant provision is Sect. 34a Aliens Act. In 2003 the Austrian Aliens Act was not amended even once. And there has been nearly no academic debate about the Austrian Aliens Act in 2002 or 2003. The focus of academic interest was on Asylum Law.

The following articles in Austrian law journals or books refer to the chapter's topic in general and only partly as regards Union citizens:

- Embacher, Wilfried & Lepschi, Andreas, *Fremdengesetz 1997* (2003) (commentary to the Austrian Aliens Act).
- Feik, Rudolf, *Fremdenrecht*, in: Bachmann, Susanne et al (eds), *Besonderes Verwaltungsrecht* (2002, 4th edition) 69-123 (Austrian and European Aliens Law and Asylum Law).
- Feik, Rudolf, *Verpflichtende Integrationskurse in der EU*, *Migralex* 2003, 53-58 (obligatory integration courses).
- Kaun, Maria, *Verpflichtende Deutschkurse für Ausländer*, *ASoK* 2003, 34-37 (obligatory language courses).
- Khakzadeh, Lamiss, *Die Schubhaft – Rechtsfragen des Vollzugs und des Rechtsschutzes*, *Migralex* 2003, 43-51 (legal aspects of deportation detention).
- Marth, Thomas, *Das neue Verfahren für unselbständige Schlüsselkräfte*, *Migralex* 2003, 19-27 (procedural questions of the admittance of key personell).
- Muzak, Gerhard, *Fremdenrecht* (6. Suppl., 2003) (revised commentary on the Austrian Aliens Act).
- Nowotny, Ingrid, *Reform des Fremdenrechts und des Ausländerbeschäftigungsrechts 2002*, *ASoK* 2003, 14-19 (amendments to the Aliens Act and the Aliens Employment Act).

- Pöschl, Magdalena, Die Integrationsvereinbarung nach dem österreichischen Fremden-gesetz – Lässt sich Integration erzwingen?, in: Sahlfeldt, Konrad et al (eds), *Integra-tion und Recht* (2003) 197-241 (Austria’s “integration agreement”).
- Schumacher, Sebastian, *Fremdenrecht* (2003) (guide to asylum law, employment, natu-ralization, immigration).
- Weh, Wilfried, 125 Jahre sind genug – Kakaniens Fremdenrecht ist nicht europareif, *Juridikum* 2002, 58 (Article 9 Directive 64/221/EEC, Articles 6 and 8 ECHR and the Austrian Aliens Act).
- Zeichen, Sigrid, Ausweisungsschutz für integrierte Fremde – Eine Untersuchung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte zu Art 8 EMRK, *ZÖR* 2002, 415-454 (analysis of the Strasbourg’s case law concerning Art 8 ECHR).

The following judgments should be noticed:

The Administrative Court (5.4.2002, 2002/18/0021) had to deal with the EU Hu-man Rights Charta. The complainant argued that it violates Article 3 and 20 of the Charta, if he is not allowed to apply for a residence permit from Austria; Article 9 of the Charta (right to marriage) includes a right to family life. The Court pointed on the fact, that the Charta is not legally binding and that the quoted provisions do not grant a right to family reunification. (Similar Administrative Court 26.6.2003, 2001/18/0191 as regards the residence right of a self-employed and Article 16 of the Charta.)

*a) Union citizens and residence ban*

The Administrative Court (14.2.2002, 2001/18/0091) had to decide about a residence ban for ten years, which was enacted because a German was sentenced for nationalso-cialistic agitation (240 day rates plus suspended prison for 10 months). According to constant case law it is possible to use Sect. 36 § 1 lit 1 and § 2 FrG<sup>1</sup> as a guidance for

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1 Sect. 36 FrG 1997:

(1) A residence ban may be imposed on an alien if on the basis of certain facts it can justifiably be assumed that his residence:

1. Constitutes a threat to law and order or public safety, or
2. Runs counter to other public interests as stated in Art 8 § 2 ECHR.

(2) Certain facts within the meaning of § 1 above shall be deemed to include, in particular, cases where an alien:

1. Has received, under a final judgement of an Austrian court, an unconditional sentence of impris-onment of more than three months, a partially suspended sentence of imprisonment, a suspended sentence of imprisonment of more than six months, or a sentence on more than one occasion for pu-nishable acts based on the same malicious propensity;
2. Has been sentenced on more than one occasion, by a final decision, of an administrative infrac-tion under Sect. 99 § 1 or 2 Road Traffic Regulations (FLG 1960/159), under Sect. 366 § 1 lit 1 Trade Regulations (FLG 1994/194) in connection with a restricted trade or occupation subject to li-censing, under Sect. 81 or 82 of the Security Policing Act (SPG, FLG 566/1991), or under Sect. 9 or 14 in conjunction with Sect. 19 Public Meetings Act (FLG 1953/233), or of a serious breach of the present federal law, of the Border Control Act (FLG 435/1996), the 1991 Domicile Registration Act (FLG 9/1992) or the Aliens Employment Act;

Has been sentenced in Austria, by a final decision, of wilfully committed fiscal offen (with the ex-ception of contraventions of financial rules) or of wilful breaches of foreign-exchange control regula-tions;

assessing the requirements of a residence ban. The Administrative Court stated that even if the complainant has integration by his work and personal ties, the sentenced offences require a residence ban.

In 1998 an Italian was sentenced to prison for 12 months (9 of them suspended) for smuggling a stolen car from Italy via Austria to Slovenia and for forging documents. A residence ban for 10 years was enacted. His wife, two children and his mother in law – all of them Italians – live in Austria. The Administrative Court (12. 3. 2002, 99/18/0245) argued that the family came to Austria two years ago and therefore integration in Austria is not very intensive. On the other hand, being part of the “*Autoschiebermafia*” (car smuggling mafia) is a very serious crime. Therefore a residence ban seems to be necessary to reach the goals of Article 8 § 2 ECHR (Sect. 37 and 48 Aliens Act) and is justified. Specific EC Law was not mentioned.

Another Italian was subject to a residence ban for 10 years. The authority argued, that he was sentenced in Germany for drug dealing and the illegal possessing a weapon to 4 ½ years imprisonment in 1984. In 1994 he was sentenced for smuggling watches (fine of about € 430,-). In 1997 he was sentenced for bodily harm to a (suspended) fine of 70 day rates. Additionally there have been six traffic offences in 1996. The Administrative Court (24. 5. 2002, 99/21/0146) referred to Article 3 Directive 64/221/EC and the ECJ’s judgments *Bouchereau*, *Calfa* and *Nazli*. It concluded that a 15 years old crime does not give reason to assume an actual danger to public order. The other offences are not that important; therefore there is no adequate danger as required by Sect. 48 Aliens Act. This makes the residence ban unlawful.

In 1998 a German was sentenced to 9 months imprisonment because of fraud (he was sentenced for fraud in Germany in 1988, 1990 and 1991, too). Although he had an Austrian girl friend, a local banishment for 10 years was enacted. The Administrative

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4. Has been sentenced in Austria, by a final decision, of a serious infringement of the statutory provisions governing prostitution, or has been convicted in Austria or abroad, by a final judgement, for procuring;

5. Has engaged or participated in alien smuggling for his own advantage;

6. Has made false statements to an Austrian authority or its agents concerning himself, his personal circumstances or the purpose or intended duration of his residence, with a view to being granted right of entry or right of residence in accordance with Sect. 31 § 1 and 3;

7. Fails to furnish proof that he possesses the means to support himself, unless his entry took place lawfully with a view to his taking up employment and he has pursued a permitted occupation in Austria for more than six months within the previous year;

8. Is discovered by a customs official or an agent of the regional or provincial offices of the employment market service to be engaged in an occupation which he is not permitted to pursue under the Aliens Employment Act; or

9. Has contracted marriage and invoked his marital status as grounds for the granting of a residence authorization or of a certificate of exemption, but has never led with his spouse a joint family life within the meaning of Art 8 ECHR and has received a pecuniary advantage for contracting such marriage;

10. was adopted but misleads the Court about the real relationship to the parents.

(3) An applicable judgement under § 2 above shall be deemed not to exist if the conviction has already been expunged. Any such judgement shall, however, be deemed to exist if it was rendered by a foreign court and satisfies the requirements set out in Sect. 73 Penal Code.

(4) Notification by a customs official or an office of the employment market service concerning the inadmissibility of the pursuit of an occupation under the Aliens Employment Act shall be deemed equivalent to the discovery thereof, in accordance with § 2 lit 8 above, if the alien was discovered by an agent of the public security service to be engaged in such occupation.

Court (18. 3. 2003, 98/18/0364) accepted that decision because the criminal behaviour predominates the “family” ties.

*b) Third Country National Family Members of Union Citizens*

As far as I see there has been only two decisions by the Administrative Court concerning the residence rights of a Third Country National Family Members of Union Citizens. The Administrative Court (13. 3. 2002, 2002/12/0034) was confronted with the refusal of a residence permit for a man from Yugoslavia, who is married with a German who lives in Germany. The Court stated that the Third Country National’s right to reside is linked to the EEA-/EU-Citizens right to reside (Sect. 47 Aliens Act). According to Sect. 46 Aliens Act the EEA-/EU-Citizen has – inter alia – to prove financial means or a health insurance. Without checking the fulfillment of the requirements for the EEA-/EU-Citizen, the authority is not allowed to reject the Third Country National Family Member’s application. The second case concerned a Turkish with an Austrian father (19. 11. 2003, 2001/21/0120). He was sentenced for an illegal stay in Austria, because he stayed after a limited visa exhausted. The Administrative Court referred to ECJ’s *MRAX*-decision and stated: if the claimant meets the requirements of Article 4 Directive 68/360/EC, he is entitled to stay even if he does not have a visa. The authority is wrong if she denies a right to stay without checking Article 4 leg. cit. And it is not in accordance with the *MRAX*-decision if a fine is enacted (especially because the claimant is entitled to apply for a residence permit in Austria).

*c) Third Country National Family Members of Austrians:*

There have been quite a lot of decisions by the Administrative Court concerning this group.

Third Country Nationals as spouse: cf. 24.1.2002, 99/21/0183; 5.9.2002, 98/21/0059; 28.1.2003, 2002/18/0297; 28.1.2003, 99/18/0388; 18.3.2003, 99/18/0051; 18.3.2003, 2002/18/0171.

A few times a fictitious marriage was part of the decision: cf. 17.2.2002, 2002/18/0163; 28.2.2002, 99/21/0255; 28.1.2003, 2003/18/0003; 27.2.2003, 2001/18/0124; 27.2.2003, 2002/18/0193; 27.2.2003, 2002/18/0248; 27.2.2003, 2002/18/0261; 27.2.2003, 2002/18/0275.

Third Country Nationals with Austrian parents: cf. 28. 1. 2003, 2002/18/0146; 27. 2. 2003, 2003/18/0039.

Third Country Nationals with an Austrian child: cf. 9. 5. 2003, 99/18/0344.

EC Law was not mentioned in those cases, but they refer to Sect. 48 Aliens Act.

The Administrative Court (13.3.2002, 2002/12/0033) mentioned that the term “if their residence does not constitute a threat to law and order or public safety” (Sect. 47 § 2 Aliens Act) has to be interpreted in the light of the same term in Article 39 EC Treaty and Article 3 Directive 64/221/EEC. According to the ECJ judgments *Bouchereau*, *Calfa* and *Nazli* the individual circumstances are relevant.

According to the Administrative Court (26. 11. 2002, 2002/18/0243), a Turkish man with his family in Austria can be subject to an unlimited residence ban because of being sentenced for drug selling (1994: 20 gramm heroine – 9 months imprisonment,



1995: 85 gramm heroine – 15 months imprisonment). Six years after being deported, the man asked for lifting the ban. According to Sect. 44 Aliens Act, this requires a change of the relevant circumstances. In the meantime his wife and children became Austrian citizens. According to Sect. 48 Aliens Act, which implemented Article 3 Directive 64/221/EEC, it is not unlawful to keep the residence ban upright.

*d) Association Agreement Turkey – EC*

It has to be mentioned that there are more than a hundred decisions concerning Turkish citizens. But only a few relate to the Association Agreement and Decision 1/80.

As regards Article 6 § 1 and Article 7 Decision 1/80 the Administrative Court (28.2.2002, 99/09/0179) referred to ECJ *Tetik* and *Antonissen* as regards unemployment. The claimant's husband was unemployed for 22 months and therefore she lost her right to work. The Court stated: "A former membership to the regular labour force does not result in an unlimited membership." Since the Turkish was no more a Turkish worker in the sense of Article 6, it was not illegal to refuse a "Befreiungsschein" (labour permit). In a later decision the Administrative Court (24.2.2003, 2003/21/0004) repeated parts of that decision: Staying abroad for a few years (inter alia for military services) after being legally employed between 1989 and 1995 annuls the privileged position.

A Turkish repeatedly worked as a painter of power line pylons between April and October since 1990; the rest of the year he was unemployed because this job could not be done in winter. The Administrative Court (26.6.2002, 98/21/0299) confirmed that this man can't refer to Article 6 § 1 Decision 1/80. Weather-induced unemployment is not covered by Article 6 § 2 Decision 1/80. If there was an unemployment before 1995, this extinguishes rights to future benefits. Therefore only times after January 1995 (Austria's accession to the EU) are relevant. As the ECJ stated in its *Eker* case: since there was not a continuous working period for one year, the claimant cannot refer to Article 6 Decision 1/80. Even if the weather-induced unemployment would be accepted as involuntary unemployment in the sense of Article 6 § 2, this would not help: adding the working times in 1995 and 1996 does not result in more than one year (similar Administrative Court 20.3.2002, 99/09/0214).

A similar decision concerned a Turkish who lost his job in December 1993. According to the Administrative Court (22. 1. 2002, 99/09/0094), this unemployment extinguishes the relevant former working periods. Even if the man worked from 31st January 1994 until 10th June 1997, he doesn't meet the requirements of Article 6 § 1 3rd dash Decision 1/80 (four years of employment) (similar Administrative Court 20.3.2002, 99/09/0104; 20.3.2002, 99/09/0214 and 28.2.2002, 99/09/0100).

The Administrative Court (4.9.2003, 2001/01/0159) also stated that Article 6 Decision 1/80 requires a secure position; this is not given if the Turkish worker's residence is based on deportation deferrals.

Article 7 Decision 1/80 is applicable and grants individual rights; goal of that provision is to create good conditions for family reunification (cf. ECJ *Kadiman*) (Administrative Court 20.3.2002, 99/09/0108; 18.4.2002, 99/09/0157 and 18.4.2002, 99/09/0222). The legal position of the family member depends on the fact that the Turkish worker is actually part of the regular work force (cf. ECJ *Akman*); this "refer-

ence-person” cannot be replaced: a requirement of Article 7 Decision 1/80 is, that the family member got the permit to settle with that worker (Administrative Court 20.3.2002, 99/09/0108).

The Administrative Court (26.6.2003, 2003/18/0148; similar 26.6.2003, 2003/18/0139) said that the Association Agreement and Decision 1/80 do not grant family reunification but a labour-related position to family members, if they got the permit to settle with the Turkish worker; these provisions do not grant a right to come to her husband who lives and works in Austria for more than 11 years. A travel-visa is not a permit to settle with a Turkish worker (Administrative Court 24.4.2002, 2002/18/0038).

According to the Administrative Court (28.2.2002, 99/09/0128 with further references to its former case law) Article 7 Decision 1/80 requires a real flat-sharing for at least three years (unless exceptional reasons justify something different (cf. ECJ *Kadiman* and *Ergat*). Since the Turkish left his father after 2 ½ years and moved into his own flat (nearby), he cannot refer to Article 7 Decision 1/80. The same counts for a woman, who did not live with her husband for three years: This is not a “short break” as mentioned in the ECJ’s decisions *Kadiman* or *Eyüp*; therefore she is not entitled by Article 7 Decision 1/80 (Administrative Court 17.6.2003, 98/21/0167). On the other hand, the Administrative Court (18.4.2002, 99/09/0157) stated that an involuntary absence (the father sent the 17 years old claimant to Turkey for “pedagogical reasons” after he was committed for an offence) of nearly one year is irrelevant if father and son have a real flat-sharing before and after that absence: a “short break” is given if it lasts less than 6 months or if it is “adequate”; since there have been objective reasons for a break, the absence does not extinct the right granted by Article 7 Decision 1/80.

A Turkish man was sentenced to 15 months imprisonment (10 of them suspended) for slave trade (he ordered a Slovakian woman to prostitute and took the money). An unlimited local banishment was enacted. The claimant referred to ECJ’s decision *Nazli*. The Administrative Court (14.2.2002, 99/18/0199) quoted the legal materials (“slave trade is an exceptionally dangerous and shameless crime” which usually is connected to organized criminality) and stated that the authority’s decision (long lasting slave trade violates public order very intensively) was correct. The *Nazli* case itself was not mentioned by the Court.

A Turkish man was sentenced for negligent bodily harm in 1995 (fine of 80 day rates), for damager of property in 1996 (fine of 50 day rates), for intimidation in 1997 (fine of 150 day rates), for bodily harm in 1997 (90 day rates) and finally for intentional serious bodily harm and intimidation in 2000 (imprisonment for 21 months). An unlimited residence ban was enacted. The Administrative Court (24.1.2002, 2001/21/0102; similar 14.2.2002, 99/18/0128; 10.10.2002, 99/18/0421 and 10.10.2002, 99/18/0453) referred to Article 14 Decision 1/80 and stated that according to ECJ’s case law (*Nazli*, *Bouchereau*, *Calfa*) Article 14 Decision 1/80 has to be used like the similar provision for EU citizens, which affords a real and serious danger and more than just a criminal punishment. The personal behaviour is relevant. The Administrative Court confirmed, that the authority did not only refer to the criminal courts’ judgments but took the complainant’s behaviour into account. His neglecting the health of others, the fact of recidi-

vism within a short period and his stubbornness do not give any reason to doubt about an individual danger for the public. As regards the argumentation that the ECJ stated a deportation after being imprisoned for a similar period as a violation of EC Law (*Nazli*), the Administrative Court declared that the ECJ's judgment referred to a general preventive measure. "It is not true that enacting an unlimited residence ban to a Union citizen (and therefore to a Turkish privileged by the Association Law) is inadmissible at all. Something like that is not part of the referred ECJ's judgement *Calfa*."

Article 14 Decision 1/80 requires an actual and serious danger: if the offences are not very serious or happened a few years ago, a local banishment is unlawful (Administrative Court 26.6.2002, 99/21/0143).

The Constitutional Court referred to "Article 14 Decision 1/80 in conjunction with Article 3 Directive 64/221/EC" in its decision 13.3.2003, B 1821/02. A Turkish was subject to an unlimited local banishment although his family lives in Austria and two of his seven children are Austrians. This decision is based on a few crimes between 1993 and 1998: incorrect giving of evidence in front of a Court, bodily harm, sexual misuse of his minor daughter, constraint. The man asked for an annulment of the banishment already 1 ½ years after its enactment; the authorities rejected. The Constitutional Court confirmed the authorities' decision. As regards the argumentation that Association Law requires the annulment, the Court stated:

"The authority took the complainant's personal behaviour and the derived danger for public security and order into account; the authority checked a relevant circumstance, which makes – according to Article 14 Decision 1/80 in conjunction with Article 3 Directive 64/221/EC – the provisions of Part II Decision 1/80 inapplicable. Therefore the authority made no mistake which would be relevant for constitutional reasons."

In March 2003 the Administrative Court asked for an interpretation of Articles 8 and 9 Directive 64/221/EC and whether these stipulations are relevant for Turkish in the sense of Article 6 or 7 Decision 1/80 (*Dörr and Ünal*, C-136/03). Until now more than 150 Administrative Court cases have been suspended until the ECJ's decision.

The ECHR judgement *Yildiz v. Austria* (31. 10. 2002, 37285/97) was a result of an Administrative Court's decision (4.12.1996), when this Court had to decide whether Association Agreement stipulations overrule an enacted residence ban and stated that the claimant did not prove his times of employment and therefore Decision 1/80 was not relevant. The Strasbourg Court found that a local banishment based on seven violations of traffic rules (total fine: € 2035,-) is excessive and therefore a violation of Article 8 ECHR.

## Chapter II Equality of Treatment/Labour Law

### *Parliamentarian Acts*

Directive 1999/70/EC about time-limited working contracts was implemented by *Federal Law Gazette I 2002/52* by amending the *Arbeitsvertragsrechts-Anpassungsgesetz* (AVRAG, Act to adapt Labour Contract Law, *Federal Law Gazette 1993/ 459*). A new Sect. 2b deals with the ban of discrimination. *Jöst/Risak (ZAS 2002, 100)* are critical to the implementation measures as regards the pro-rata-temporis principle for workers and the provisions against subsequent employments. A new Sect. 3a by the same amendment provides for an obligation to information in the case of transferring a firm. The same amendment brought the implementation of Directive 2001/19/EC.

The *Krankenanstalten-Arbeitszeitengesetz* (Hospital working times Act, *Federal Law Gazette I 1997/8*) was amended (*Federal Law Gazette I 2002/169* and *I 2003/146*).

To implement Directives 76/207/EEC and 93/104/EC the Act about women's work at night was repealed (*Federal Law Gazette I 2002/122*).

The following judgements should be noticed.

The Supreme Court for Civil Affairs (13.11.2002, 9 ObA 232/02) stated that the taking over of a tabacconist's falls within the scope of Directive 77/187/EEC.

The Supreme Court for Civil Affairs (5.6.2002, 9 ObA 97/02) had to deal with the transfer of a regional airline and the (continuing) employment of pilots and referred to Article 4 Directive 77/187/EEC.

The Supreme Court for Civil Affairs (26.6.2003, 8 ObA 41/03) stated that it is a transfer in the sense of Directive 77/187/EEC, if a former municipality's kindergarten is run by a private association.

The following articles in Austrian law journals or books refer to the chapter's topic.

Anzenberger, Werner, Au-pair in Österreich, *ASoK 2002*, 299-305, deals with labour law and social law for au-pair.

Birk, Rolf, Neuere Entwicklungen des europäischen Arbeitsrechts, *DRdA 2002*, 455-461, analyzes the European Labour Law's development since 1997.

Egger, Johann, Die neuen Antidiskriminierungsrichtlinien der EU, *DRdA 2003*, 302-310, discusses the Directives 2000/43/EC and 2000/78 EC.

Eichinger, Julia, Unterschiedliches Bezugsalter für Zahlungen aus einem Sozialplan – Diskriminierung von Männern? *RdW 2002*, 288-290, discusses the Supreme Court for Civil Affairs' application for a preliminary ruling concerning different age-limits for "Übergangsgeld". This payment (75% of the monthly wage for max. five years) was part of a social plan after closing a unit of an international concern.

Feik, Rudolf, Zum passiven Wahlrecht türkischer Arbeitnehmer bei AK-Wahlen, *Wbl 2003*, 320-327, is an annotation to ECJ *Wählergruppe "Gemeinsam"* (C-171/01).

Gagawczuk, Walter, Leiharbeitsrichtlinie – wiederholter Anlauf gescheitert?, *DRdA 2003*, 597-599, is about the attempts to create a Directive protecting "lended" employees.

- Graf, Caroline, EU-Insolvenzverordnung und Arbeitsverhältnis, *ZAS* 2002, 173-179, deals with Regulation 1346/2000 and its impacts on employments. According to her, this Regulation brings a lot of problems for the Labour Law.
- Grießner, Georg, Allgemeiner Kündigungsschutz für befristete Arbeitsverhältnisse, *RdW* 2003, 147-153, analyzes Sect. 2b AVRAG, which implements Directive 1999/70/EEC.
- Hesse, Gerhard, Passives Wahlrecht zu den Vollversammlungen der Arbeiterkammern, *DRdA* 2003, 600-605, is a critical annotation to ECJ *Wählergruppe "Gemeinsam"* (C-171/01).
- Holzner, Wolfgang & Reissner, Gert-Peter, Zur arbeitsrechtlichen Gleichbehandlungspflicht in EU-Assoziationsabkommen, *DRdA* 2003, 476-480, discuss discrimination clauses in association agreements.
- Hopf, Herbert & Smutny, Petra, Diskriminierung auf Grund des Geschlechts bei der Begründung des Arbeitsverhältnisses – Schadenersatz trotz fehlender "Bestqualifikation"?, *DRdA* 2002, 99-110, investigates whether there is a claim on compensation for sex-related discrimination if the employer refuses female applicants and if the compensation is to be paid if the woman is not the best applicant.
- Jöst, Andreas, Die neuen EG-ArbeitszeitRL des Straßen- und Luftverkehrssektors, *ZVR* 2002, 317-323, discusses new developments for truck drivers and pilots as regards their working times (Directives 2000/15/EC, 2000/79/EC, 93/104/EEC, 2000/34/EC).
- Jöst, Andreas & Risak, Martin, Aktuelle Neuerungen im Arbeitsrecht, *ZAS* 2002, 97-104, describes the new developments in Austrian Labour Law.
- Liebig, Paul, Betriebsübergang und Insolvenz-Ausfallgeld, *Wbl* 2002, 12-16, discusses problems of insolvency in the light of transfer of businesses.
- Liebeg, Paul, Neue gemeinschaftsrechtliche Vorgaben für den Schutz der Arbeitnehmer bei Zahlungsunfähigkeit des Arbeitgebers?, *Wbl* 2003, 157-164, deals with EC's insolvency law and in particular with Directive 2002/74/EC, 80/987/EEC and Regulation 1346/2000.
- Löschnigg, Günther, Festlegung der Arbeitszeit und Arbeitskräfteüberlassung, *DRdA* 2003, 542-548, is an annotation to Supreme Court for Civil Affairs, 13.6.2002, 8 ObA 116/02, concerning working times and Directive 91/383/EEC.
- Löschnigg, Günther, Schwangerschaft und Beendigung im Probemonat im Lichte der RL 92/85/EWG und 76/207/EWG, *DRdA* 2002, 365-369, analyzes the problem of pregnancy during the trial month at the beginning of an employment in the light of the Directives 92/85/EEC and 76/207/EEC.
- Löschnigg, Günther & Melzer-Azodanloo, Nora, Bereitschaftsdienst in öffentlichen Apotheken, *DRdA* 2002, 211-219, discusses working times in public pharmacies.
- Mayr, Klaus, Anrechnung eines Mutter-/Vaterschaftskarenzurlaubes für die Höhe der Abfertigung – der EuGH ist nun am Wort, *DRdA* 2002, 75-78, analyzes whether times of a parental leave have to be counted for time-related benefits in the light of Article 141 EC Treaty and Directive 75/117/EEC.

- Mayr, Klaus, Diskriminierung(en) aufgrund des Geschlechts, *DRdA* 2002, 66-72, is about sex-related discrimination and includes a few remarks to Article 141 EC Treaty.
- Mayr, Klaus, Diskriminierungen aufgrund des Alters im österreichischen Arbeitsrecht, *ASoK* 2003, 289-298, looks for age-related discriminations.
- Mosler, Rudolf, Beschäftigung nach Bedarf – arbeitsrechtliche Grenzen der flexiblen Teilzeitarbeit, *DRdA* 2002, 461-470, discusses Article 141 EC Treaty and Directives 75/117/EEC and 97/81/EEC.
- Naderhirn, Johanna, Die geplante Neuregelung des Gleichbehandlungsgesetzes, *RdW* 2003, 710-717, deals with a proposal for an Act to implement Directives 2000/43/EC and 2000/78/EC.
- Reissner, Gert-Peter, Anmerkung zu OGH 11.6.2001, 8 Obs 273/00, *DRdA* 2002, 315-320, is an annotation to a Supreme Court for Civil Affairs' decision about Directive 2001/23/EC and the case of an insolvent company taken over by their employees.
- Reissner, Gert-Peter, Die begünstigte Kündigung des Arbeitnehmers bei Betriebsübergang, *ZAS* 2002, 104-115, deals with the Austrian implementation of Article 4 § 2 Directive 2001/23/EC (privileged notice of employment by the employee).
- Reissner, Gert-Peter, Neue Betriebsübergangs-Entscheidungen des EuGH zur Reinigungsbranche und zum Betriebspensionsbegriff, *DRdA* 2002, 436-440, is an annotation to ECJ *Temco Service Industries* (C-51/00) and *Beckmann* (C-164/00).
- Röpke, Oliver, Europäische (Aktien-)Gesellschaft (SE) und Arbeitnehmerbeteiligung, *DRdA* 2002, 177-181, is about the participation of employees within the Societas Europaea according to Regulation 2157/2001.
- Runggaldier, Ulrich, Rechtliche Stellung einer Grenzgängerin, *DRdA* 2003, 69-74, looks at the labour law stipulations for a frontier-worker.
- Runggaldier, Ulrich & Kreil, Linda, Richtlinienwidrigkeit des Senioritätsprinzips?, *RdW* 2003, 394-396, discuss progressive income according to seniority in the light of Directive 2000/78/EC.
- Schärf, Wolf-Georg, Arbeiterkammerwahlenanfechtung – AK quo vadis – VfGH legt EuGH Fragen zum Ausländerwahlrecht vor, *RdW* 2002, 33-36, is about the Austrian Constitutional Court's application for a preliminary ruling in the case *Wählergruppe "Gemeinsam"* (C-171/01).
- Schindler, René, Zur Umsetzung der EU-Richtlinien in Österreich, *DRdA* 2003, 402-409 and 523-536, discusses structural problems of implementing Directives in general and looks for the following Directives in detail: 2000/43/EC, 2002/15/EC, 2002/74/EC, 2001/86/EC, 2002/14/EC, 2000/43/EC, 2000/78/EC, 2002/73/EC.
- Schrammel, Walter & Winkler, Gottfried, *Arbeits- und Sozialrecht der Europäischen Gemeinschaft* (2002) (EC's labour law and social security law).
- Smutny, Petra & Hopf, Herbert, Mobbing – auf dem Weg zum Rechtsbegriff?, *DRdA* 2003, 110-123, includes a small excursus to Directives 2000/43/EC, 2000/78/EC and 2002/73/EC.
- Stalder, Patricia, Spannungsfelder und Perspektiven der Umsetzung der europäischen Antidiskriminierungsrichtlinien, *JRP* 2002, 227-236, discusses problems of implementing Directives 2000/43/EC and 2000/78/EC.

- Standeker, Elke, Haben teilzeitbeschäftigte Arbeitnehmer einen gemeinschaftsrechtlichen Anspruch auf gleiches Entgelt wie vergleichbare Vollzeitbeschäftigte?, *ASoK* 2003, 80-83, states that Article 136 EC Treaty does not give the power for remuneration-provisions for part-time employees.
- Standeker, Elke, EuGH: Arbeitsbereitschaft und Bereitschaftsdienst gelten in vollem Umfang als Arbeitszeit, *ASoK* 2003, 318-322, is an annotation to ECJ *Jaeger* (C-151/02).
- Standeker, Elke, Keine Kompetenz der EU für Entgeltfragen befristet beschäftigter Arbeitnehmer, *ASoK* 2003, 398-401, states that Article 137 EC Treaty does not give the power for remuneration-provisions for time-limited employees.
- Stärker, Lukas, Ausgliederungen im Landes- und Gemeindebereich, *Ecolex* 2003, 926-929, is about outsourcing in provinces and municipalities in the light of Directive 2001/23/EC.
- Stärker, Lukas, Zu den Ruhepausenregelungen des KA-AZG, *RdM* 2003, 52-54, deals with working times in hospitals (Directive 93/104/EEC).
- Stärker, Lukas, Ruhezeitenregelungen im Arbeitsrecht, *ASoK* 2003, 148-158, is about rest-provisions in labour law and includes remarks to Directive 93/104/EEC.
- Sturm, Elisabeth, Die Änderung der Gleichbehandlungsrichtlinie, *DRdA* 2003, 83-88, discusses the Directives 2002/73/EC, 2000/43/EC and 2000/78 EC.
- Sturm, Elisabeth, Positive Diskriminierung in der Arbeitswelt, *DRdA* 2003, 481-491, analyzes Article 141 § 4 EC Treaty.
- Windisch-Graetz, Michaela, Europarechtliche Fragen zum geplanten Betrieblichen Mitarbeitervorsorgegesetz, *ZAS* 2002, 73-75, includes a few remarks on Directive 79/7/EC and Article 141 EC Treaty.
- Wolfsgruber, Claudia, Anmerkung zu OGH 11.12.2001, 10 ObS 334/01, *DRdA* 2003, 171-174, is an annotation to a Supreme Court for Civil Affairs' decision stating that different age-limits for pensions are not violating EC Law.
- Woschitz, Bettina, Steht das Gemeinschaftsrecht der Wehrpflicht nur für Männer entgegen?, *RdW* 2003, 649-652, is an annotation to ECJ *Dory* (C-186/01).

### Chapter III Employment in the Public Sector

In the relevant period no particular problems have been encountered and therefore have to be reported.

As regards access to an employment in the public service, the following has to be noticed. According to Sect. 4 Civil Servants Act (*Federal Law Gazette* 1979/333) the applicant has to be Austrian citizen in the case of an employment in the sense of Sect. 42a leg. cit.; in other cases he/she has to be Austrian or “a citizen of a state”, who have – due to an international treaty within the scope of European integration – to get an equal legal position in access to an employment than Austrians have. That means that civil service is restricted to Austrian citizens and those who have an equal position according to EC Law. But some functions are reserved to Austrians: if the function requires a specific solidarity with Austria, which could be expected only by Austrian citizens, this activity has to be assigned to civil servants with Austrian citizenship; this accounts to the direct or indirect participation in providing sovereign exercises and the realisation of common affairs of the State (Sect. 42a leg. cit.). The same system is used for contractual employed civil servants (Sect. 3 and Sect. 6c Contractual Employed Civil Servants Act, *Federal Law Gazette* 1948/86). The Austrian parliament looked at the ECJ’s case law and used its guiding principles for his definition for “reserved services”. But there is no special provision saying that all jobs at the army, at the executive powers or at the courts are reserved to Austrian citizens. And there hasn’t been an officially noticed or reported problem with foreign applicants within the last few years. But the parliament enacted the need of knowledge of the German language (Sect. 4 § 1a Civil Servants Act and Sect. 3 § 1a Contractual Employed Civil Servants Act). (See Annex I for the relevant provisions [in German].)

As regards the recognition of diplomas for access to employment in the public sector, Sect. 4a Civil Servants Act is the relevant provision. A foreign diploma granting access to the foreign civil public sector has to be qualified as equal by the head of the unit (§ 4 leg. cit.). A diploma in the sense of that provision is a diploma or recognition in the sense of Art. 1 lit. a Directive 89/48/EC, Art. 1 lit. a-c Directive 92/51/EC or Art. 9 EC-Switzerland-Free movement Agreement. There is no similar provision for contractual employed civil servants. But Sect. 3 § 2 Contractual Employed Civil Servants Act states, that in special situations there is no need for the Austrian citizenship, if there are no Austrian applicants for the job. (See Annex II for the relevant provision [in German].)

Competitions like in ECJ case C-285/01, *Burbaud*, are – as far as I know – not part of the Austrian system.

As regards professional experience and seniority, there is a short annotation to a Supreme Court for Civil Affairs’ decision: Mayr, Klaus, Anmerkung zu OGH 24.10.2001, 9 ObA 175/01, *DRdA* 2002, 394-397. The Court stated that Sect. 82 § 9 Contractual Employed Civil Servants Act about counting earlier times of service only half leads to an indirect discrimination and is – due to Article 141 EC Treaty – not applicable. (See Annex III for the judgement [in German].)



In the relevant period only one article in an Austrian Law journal deals with legal problems of employment in the public sector: Schwarz, Bernhard, Rechtsprobleme der Ausgliederung unter besonderer Berücksichtigung des öffentlichen Bereichs, *DRdA* 2002, 351-364, deals with outsourcing and Directive 2001/23/EC.

Beiser, Reinhold, Beinhaltet die Freizügigkeit nach Art 39 EGV eine Maximalgehaltsgarantie?, *RdW* 2003, 330-331, is a critical annotation to GA Léger's argumentation in ECJ's case *Köbler* (C-224/01) concerning a benefit for university professors. The ECJ's judgment (30.9.2003) was part of academic discussion as regards the state liability for a national Court's EC Law infringement but not as regards the benefit itself.

And there have been three publications dealing with civil servants from the Austrian legal system's point of view: Baumgartner, Gerhard, Zur verfassungsrechtlichen Verankerung des Berufsbeamtentums, *ZfV* 2003, 270-286, hardly touches Article 39 EC Treaty. Zellenberg, Ulrich, Bundesverfassung und Berufsbeamtentum, *ZÖR* 2003, 227-248, does not refer to EC Law. The same counts for Weichselbaum, Barbara, *Berufsbeamtentum und Verfassung* (2003).

Directive 1995/30/EC was implemented by amendment *Federal Law Gazette* I 2003/77 to the Land- und forstwirtschaftliche Landeslehrer Dienstrechtsgesetz (Agricultural Teacher's employment Act, *Federal Law Gazette* 1985/296).

## **Chapter IV**

### **Family Members**

Since there are no specific problems for this group, they are part of the relevant chapter.

Only one decision should be mentioned here: The Constitutional Court (8.10.2003, G 119/03) had to decide whether the Austrian quota system for family members is in accordance with the constitution. The Court criticized the authority's practice and pointed to a constitutional solution in the case of exhausted quotas: If Article 8 ECHR requires the issuing of a residence permit for a family member, the authority should grant a "humanitarian permit". The Constitutional Court did not follow the ECHR's decision *Sén*, where inflexibility of a system caused a violation of Article 8 ECHR. In an obiter dictum the Court asked the Parliament to establish a better system. In the meantime the authorities are asked to meet human rights standards by interpreting an insufficient Act. That means that the Austrian quota system seems to be justified and "cemented" by the Constitutional Court.

## Chapter V

### Austria and ECJ Judgments

The academic analysis of ECJ judgments is noted within the concrete chapter of the report (e.g. social security). The same applies for final decisions in preliminary proceedings. Part of this chapter is to notice submissions to the ECJ.

The *Hlozek* case (C-19/02) is about “Überbrückungsgeld” as a benefit of a social plan after closing an unit of an international concern; the ECJ has to decide about that benefit in the light of Article 141 EC Treaty and Directives 75/117/EC, 86/378/EC and 76/207/EC.

In the *Skalka* case (C-160/02) the Supreme Court for Civil Affairs asked whether “Ausgleichszulage” (a supplementary benefit for a minimum pension) granted under pension insurance schemes is a non-contributory benefit or a pension benefit which has to be exported according to Article 10 Regulation 1408/71.

In the *Effing* case (C-302/02) the Supreme Court for Civil Affairs asked whether it is discriminatory that a German national’s child residing in Austria is not entitled to “Unterhaltsvorschuss” (advance maintenance payment), because its father is serving his sentence imposed by an Austrian Court in a German prison (and not in an Austrian one, which would be subject to that entitlement).

Subject of the *Haackert* case (C-303/02) is the question whether Article 7 Directive 79/7/EC applies to different age-limits like a premature pension because of unemployment.

In the *Wippel* case (C-313/02) the Supreme Court for Civil Affairs asked about the EC-limits for flexible part-time employment.

In the *Öztürk* case (C-372/02) the Supreme Court for Civil Affairs asked the ECJ to decide whether periods of unemployment required for particular entitlements under national law have to be taken into account even when they have been completed in another Member State. Since the claimant (who had been employed in Austria and afterwards in Germany, where he lastly has been granted unemployment benefits for more than 17 months) is a Turkish national, this case is not only referring to Article 45 Regulation 1408/71, but maybe also to Article 9 EEC-Turkey-Association Agreement and Decision 3/80.

The *Baldinger* case (C-386/02) has been submitted by a Court of first instance. The ECJ will have to rule whether it is discriminatory that restitution payments for prisoners of World War II are subject to nationality, even when the claimant has been an Austrian national until 1967 and became a Swedish national after having moved to Sweden for employment reasons.

In March 2003 the Administrative Court asked for an interpretation of Articles 8 and 9 Directive 64/221/EC (*Dörr and Ünal*, C-136/03). Until now more than 150 Administrative Court cases have been suspended until the ECJ’s decision.

The *Herbstrith* case (C-229/03) is about a compensation for discrimination (Directives 76/207/EEC and 97/80/EC).

The Supreme Court for Civil Affairs has submitted a care allowance case (*Hosse*, C-286/03). The ECJ will have to rule whether the Landes-Pflegegeld (provincial care

allowance) has to be exported (like the federal care allowance), even if it had to be qualified as a social advantage under Article 7 Regulation 1612/68 because of the claimant's Union citizenship.

The *Sozialhilfverband Rohrbach* case (C-297/03) is about Directive 77/187/EEC.

In case *Dogan* (C-383/03) the ECJ has to state whether a Turkish citizen loses his position granted by Article 6 Decision 1/80 if he is imprisoned for three years.

The *Roodbeen* case (C-541/03) is about Articles 8 and 9 Directive 64/221/EEC.

Subject of the *Dodl* case (C-543/03) is the question whether "Kinderbetreuungsgeld" (child care benefit) is a benefit in the sense of Article 73 Regulation 1408/71 and has to be granted even if the employment is suspended ("Karenz").

## **Chapter VI**

### **General Developments**

Free movement of workers is – like in the past – not a “hot topic” in Austria’s scientific community. Academic research on that issue is still rather rare in the field of foreigner law but there is constant interest in labour and social security law. Nevertheless the authorities and the courts have to deal with “free-movement problems”. Therefore a lot of decisions (especially in the area of foreigner law) have to be noticed.

Only very little new legislation concerning free movement of workers is to be reported. Although there have been a few changes in Austrian foreigner law, they did not refer to the situation of Union citizens, EEA nationals and their favoured family members. The same counts for labour law and social law: we have some discussion about the implementation of Directives, some case law, but no great debate about the effects or requirements of free movement of workers. And in some areas discussion does not happen at all (e.g. free movement of students, employment in the public sector, etc).

## **Chapter VII**

### **EU Enlargement**

A political discussion about the effects of an EU Enlargement – especially as regards the “flood of eastern workers” – mainly took place in 2001. In 2002 and 2003 the public’s interest was not very great. Legal measures to make the Austrian legal system compatible with the needs of the enlargement will be taken in 2004. As regards free movement of workers, Austria and Germany have always been interested in long lasting temporary regulations (although a few studies showed that there is no mass influx to be awaited). Later nearly all EU Member States also took the possibility of limitations for the free movement of (eastern) workers.

There is only one article about free movement of workers and EU Enlargement: Leitner, Robert, Arbeitnehmerfreizügigkeit in einer erweiterten Europäischen Union, *ASoK* 2003, 395-398.

## Chapter VIII Statistics

In 2002 results of the 2001-census have been published; as regards EU citizens and foreign workers, the following figures might be interesting:

### *Foreign citizens in Austria*

In total:	730.200 (2001)
	517.700 (1991)
	= + 41 %
Union citizens:	110.000 (2001) = 15 %
	79.500 (1991) = 15 %
	= + 39 %
Third Country Nationals:	620.200 (2001) = 85 %
	438.200 (1991) = 85 %
	= + 42 %

### *Union citizens in Austria*

2001:	110.000	= 15 % of the population without Austrian citizenship
	74.400	German citizens (= 68 % of the Union citizens in Austria)
	10.700	Italian citizens (= 10 %)
	5.700	British citizens (= 5 %)
	19.200	EU11-citizens (= 17 %)
		(all the other EU-nationalities are represented by less than 5.000 persons)

### *Third Country Nationals in Austria*

In total:	620.200 (2001)
	438.200 (1991)
	= + 42 %
Turkish citizens:	130.100 (2001) (= 18 %)
	118.600 (1991) (= 23 %)
	= + 10%
Ex-Yugoslavia citizens:	328.400 (2001) (= 45 %)
	197.900 (1991) (= 38 %)
	= + 66%

### *730.200 foreign citizens in Austria (% of the foreign population in Austria)*

Serbia/Montenegro	21,3 %	Slovakia	1,0 %
Turkey	17,8 %	Czech Republic	1,0 %
Bosnia/Herzegowina	13,2 %	USA	0,9 %
Germany	10,2 %	Iran	0,9 %
Croatia	7,9 %	Slovenia	0,9 %
Poland	3,1 %	Switzerland	0,9 %
Rumania	2,5 %	United Kingdom	0,8 %
Hungary	1,8 %	India	0,7 %
Mazedonia	1,7 %	Egypt	0,7 %
Italy	1,5 %	others (less than 5.000 in A)	11,3 %

### *Foreigners in the Austrian Bundesländer (% of the population)*

Vienna	16,4 %
Vorarlberg	13,5 %
Salzburg	12,1 %
Tyrol	9,6 %

Upper Austria	7,4 %
Lower Austria	6,2 %
Carinthia	5,8 %
Burgenland	4,6 %
Styria	4,6 %
average:	9,1 %

The Austrian quota system is – inter alia – based on scientific research. You'll find detailed information (in German) about Third Country Nationals in Austria (share in labour force, nationality, residence permits) under: [http://www.bmi.gv.at/downloadarea/asyl\\_fremdenwesen/Expertise\\_WIFO\\_NLV2004.pdf](http://www.bmi.gv.at/downloadarea/asyl_fremdenwesen/Expertise_WIFO_NLV2004.pdf).

This is the webpage of the Federal Ministry for Interior Affairs. The mentioned link leads to a publication of the Wirtschaftsforschungsinstitut, an independent economic research center.



## Chapter IX Social Security

Social security in Austria mainly consists of schemes based on compulsory insurance as a legal consequence of being employed in Austria as long as the income did not exceed the limit of € 301,54 (2002) or € 309,38 (2003) per month.

There are subschemes: the most important are for workers and employees (*Allgemeines Sozialversicherungsgesetz* – General Social Insurance Act, *Federal Law Gazette* 1955/189), civil servants (*Beamten-Kranken- und Unfallversicherungsgesetz* – Civil Servants' Health and Insurance Act, *Federal Law Gazette* 1967/200) and self-employed in industry and business (*Gewerbliches Sozialversicherungsgesetz* – Commercial Social Insurance Act, *Federal Law Gazette* 1978/560). Additionally there are specific regulations for special payments, like the *Bundespflegegeldgesetz* (Federal Care Allowance Act, *Federal Law Gazette* 1993/110) or the *Arbeitslosenversicherungsgesetz* (Unemployment Insurance Act, *Federal Law Gazette* 1977/609).

### *Parliamentary Acts*

In 2002 the *Kinderbetreuungsgeldgesetz* (Child-care benefit Act, *Federal Law Gazette* I 2001/103) was enforced. It replaced the former *Karenzgeldgesetz* (Parental Leave benefit Act, *Federal Law Gazette* I 1997/47). Residence usually suffices to claim the benefits, even though there are some explicit legal distinctions between nationals and non-nationals. Similar to the *Familienbeihilfe* (family allowance) (*Familienlastenausgleichsgesetz* – Act on Equalisation of Burdens of Families, *Federal Law Gazette* 1967/376), which is granted to EU nationals provided the claimants' family member resides in a Member State, it is to be expected that the same practice will be used for the child-care benefit. Sect. 28 Child-care benefit Act also provides for a health insurance. But it seems that it only provides for those recipients of benefits who are not covered by health insurance in their state of residence (because of their employment or status as a member of a family). This "subsidiarity" may be considered quite plausible from the Austrian point of view but the situation obviously does not meet the demands of Regulation 1408/71, at least if the authorities competent for sickness benefits in the other Member States consider their provisions to be applicable only subsidiary as well. It is supposed that at least 500 recipients of child-care benefits (most of them residing or working in Germany) are concerned in this matter. The *Kinderbetreuungsgeldgesetz* (Child-care benefit Act) was amended twice in 2003: *Federal Law Gazette* I 2003/58 and I 2003/122.

Another important Austrian Act has to be mentioned: the Parliament passed the *Betriebliches Mitarbeitervorsorgegesetz* (Company Provisions for Employees Act, *Federal Law Gazette* I 2002/100) which provides for obligatory monthly employer contributions (1.53% of the employee's gross income) for each employed person to a private fund (so called *Mitarbeitervorsorgekasse*), which are run by private insurance companies or banks under the supervision of public authorities. The employed person is entitled either to a certain amount when leaving the company (equivalent to the pe-

riod of his/her employment) or to leave all contributions with the fund and claim the total amount only at retirement as a “second pillar” for pensions. In 2003 this Act was amended twice: *Federal Law Gazette* I 2003/80 and I 2003/135.

The following judgments should be noticed.

The Administrative Court (19.2.2003, 2002/08/0053) ruled that periods of self-employment pursued in another Member State do not prolongate the reference period for completing the qualifying periods as provided for unemployment benefits under the *Arbeitslosenversicherungsgesetz*. The Court stated that under Sect. 15 *Arbeitslosenversicherungsgesetz* only periods of self-employment pursued in Austria give rise to prolongation of the reference period laid down in Sect. 14 leg. cit; this could be considered as discriminatory or as a violation of the principle of assimilation of facts.

The Supreme Court for Civil Affairs (10.7.2003, 6 Ob 118/03) had to deal again with advance maintenance payments. The partly means-tested “*Unterhaltsvorschuss*” (advance maintenance payments) have been qualified as a family benefit by the ECJ’s judgment *Offermans* (C-85/99). The Supreme Court followed: thus, for instance children of Swedish nationality living with their (Swedish) mother and her (Austrian) partner, are entitled to that benefit. The Supreme Court (30.6.2003, 7 Ob 295/02; 12.6.2003, 2 Ob 130/03; 26.3.2003, 3 Ob 50/03) has come to a very strict (teleologic) interpretation of the provisions for the entitlement to “*Unterhaltsvorschuss*” in terms of EC Law: this benefit cannot be claimed by dependent children for instance when the person who is obligated to provide for their maintenance is unemployed but does not claim for unemployment benefits, or when this person is imprisoned in another Member State, since both cases are not referring to the workers’ freedom of movement. But a minor German, whose Austrian mother is insignificantly employed (“*geringfügige Beschäftigung*”), is entitled to “*Unterhaltsvorschuss*” (Supreme Court for Civil Affairs, 28.5.2002, 4 Ob 117/02).

The Supreme Court (8.4.2003, 10 ObS 1/03) stated that recipients of pension benefits granted under another EU-/EEA-State’s legislation who reside in Austria basically are entitled to *Landes-Pflegegeld* (provincial care allowance). This is the consequence of the provincial legislation’s subsidiarity to the Federal Care Allowance Act and the Supreme Court’s judgement (22.10.2002, 10 ObS 286/02) that the mentioned recipients are not entitled to federal care allowance.

The Supreme Court for Civil Affairs (18.2.2003, 10 ObS 3/03) has ruled that Regulation 1408/71 does not apply to benefits under the *Kriegsgefangenenentschädigungsgesetz* (Restitution Payments for Prisoners of war Act, *Federal Law Gazette* I 2000/142) which originally could be claimed only by persons residing in Austria. This restriction has been cancelled meanwhile (*Federal Law Gazette* I 2002/ 40).

Finally a Strasbourg decision should be mentioned: the Court (*L.B. versus Austria*, 8.4.2002, 39802/98) stated that it is no discrimination (Article 14 ECHR) if supplementary times for pension benefits are only counted if they are times spent at an Austrian school or university.

The following articles in Austrian law journals or books refer to the chapter’s topic.

- Anzenberger, Werner, Au-pair in Österreich, *ASoK* 2002, 299-305 (labour law and social law for au-pair).
- Bendlinger, Stefan, Der grenzüberschreitende Einsatz von Arbeitnehmern im österreichischen und internationalen Steuer- und Sozialversicherungsrecht, *FJ* 2002, 250-254 (posting of workers under Austrian and international tax law and social security law).
- Cerny, Josef, Die Sozialvorschriften des EG-Vertrages, *DRdA* 2003, 5-12 (EC Treaty's rules on social aspects).
- Eichenhofer, Eberhard, Verbot der indirekten Diskriminierung wegen Staatsangehörigkeit – Rechtsfigur zur Lückenschließung im Europäischen Sozialrecht?, *DRdA* 2002, 79-85 (ECJ judgments about indirect discrimination and the need for EC legislation).
- Friedrich, Michael, Kindererziehungszeiten in einem anderen Mitgliedstaat und die VO (EWG) 1408/71, *ASoK* 2002, 117-122 (annotation to ECJ *Kauer*, C-28/00).
- Friedrich, Michael, Berücksichtigung von in Drittstaaten erworbenen Versicherungszeiten auf Grund bilateraler Abkommen zur sozialen Sicherheit, *ASoK* 2002, 193-197 (considering of insurance periods in third countries by bilateral social security agreements).
- Karl, Beatrix, Die Auswirkungen des freien Waren- und Dienstleistungsverkehrs auf die Kostenerstattung, *DRdA* 2002, 15-29 (limited reimbursement of medical costs violates EC Law).
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- Winkler, Johannes, Ungleiches Pensionsalter von Männern und Frauen – EU-konform?, *RdW* 2002, 224-225 (different old-age-pension age-limits for men and women).

### *Miscellaneous*

A few ECJ decisions concerned Austria in particular.

In the *Kauer* case (C-28/00) the ECJ ruled that child-raising periods have to be recognised as Ersatzzeiten (subsidiary periods of insurance) even though they have been completed in other Member States and before Regulation 1408/71 was applicable in Austria.

In the *Duchon* case (C-290/00) the ECJ confirmed explicitly that an accident at work which has occurred in another Member State before regulation 1408/71 was applicable in Austria, has to be taken into account when an invalidity benefit is claimed under national pension schemes.

In the *Humer* case (C-255/99) the Court has ruled that it is possible to export "Unterhaltsvorschuss" (advance maintenance payment) according to Articles 73 and 74 Regulation 1408/71.

In the *Kaske* case (C-277/99) the ECJ ruled that that more favourable exceptions in bilateral agreements apply to any case (see already case *Roefeldt*) and that the fact, that such an exception is subject to a certain qualifying period, which can be completed only in Austria, is discriminatory.

There are a few bilateral agreements on social security. In addition to the agreements with EU or EEA Member States there are bilateral agreements with Third States. In 2002 the agreement with Israel was amended (*Federal Law Gazette* III 2002/20) and a new agreement with Yugoslavia was concluded (*Federal Law Gazette* III 2002/100). In 2003 a new agreement with Slovakia was concluded (*Federal Law Gazette* III 2003/60).

Finally it can be said for the years 2002 and 2003 that no major problems in social security law have been identified.

From the Austrian point of view no major problems have been encountered so far with regard to the relationship between Regulation 1408/71 and Regulation 1612/68. The only problem that has to be mentioned in this respect is the *Hosse* case (C-286/03) which has been submitted to the ECJ. It is about the export of Landes-Pflegegeld (provincial care allowance), because it perhaps cannot be qualified as a non-contributory benefit in terms of Regulation 1408/71 and/or it has to be considered as a social advantage under Article 7 Regulation 1612/68 and therefore has to be granted to a frontier-worker residing in another Member State because of his Union citizenship.

And a quite small problem seems to be the following: since Bundes-Pflegegeld (federal care allowance) is granted to victims of war (Kriegsopferversorgungsgesetz, Victims of War Supplying Act, *Federal Law Gazette* 1957/158), the ECJ's *Jauch* ruling has raised a question: recipients of benefits for victims of war are basically covered by the Austrian health insurance system but on the other hand Regulation 1408/71 does not apply to this small (and continuously decreasing) number of persons who may claim Bundes-Pflegegeld as annex to their benefits under the Kriegsopferversorgungsgesetz as long as they are residing in another Member State.

## Chapter X

### Establishment, Provision of Services, Students

From the Austrian point of view no major problems have been encountered so far. The only exception might be the Commission's procedure against Austria (C-147/03) concerning Sect. 36 Universitätsstudienengesetz (Federal Law Gazette 1997/48). This is about admission to an Austrian university and the recognition of a foreign school certificate. As far as I see, the only publication about that topic was written by Christian Ruhs. He is a member of the Austrian representation in Brussels and states that Sect. 36 leg. cit. is in accordance with EC Law. Cf. Ruhs, Christian, Zur EG-Konformität der akademischen Anerkennung der Reifeprüfung gemäß § 36 Universitäts-Studienengesetz, *Zfhr* 2003, 8-17.

The ECJ's judgment *Ninni-Orasche* (6. 11. 2003, C-413/01) was – as far I can see – not object of academic or (public) political discussion. This procedure was about an Italian woman, who worked in Austria for 2 ½ months and then applied for a financial support for a university study (“Studienförderung”). The ECJ ordered the Administrative Court to check the requirements of the “status migrant worker” and stated that a time-limited working contract does not automatically lead to a “voluntary unemployment”.

Felix, Ferdinand, EuGH: Heilpraktikerverbot in Österreich gemeinschaftsrechtskonform!, *ASoK* 2003, 45-52, is an annotation to ECJ *Deutsche Paracelsus Schulen/Gräbner* (C-294/00).

Quite important seems to be the Administrative Court's decision about a residence permit for Eastern Europeans (26.5.2003, 2002/12/0021). A man from Bulgaria, living in Austria since 1996, applied for a residence permit for “self-employment” (transport of goods). His application was refused because the annual quota for that kind of permit was exhausted. The Administrative Court revoked that decision because of it's being a violation of the Europe Agreement with Bulgaria. Art. 45 of that Agreement stipulates an annexed right to reside within the EU for self-employed Bulgarians. A quota system would be a barrier for trade and therefore the exhaustion of the quota cannot be an argument to deny the residence permit for the self-employed.

Directive 2001/19/EC was implemented in Hebammengesetz (Midwife's Act, *Federal Law Gazette* 1994/310) (*Federal Law Gazette* I 2002/92).

In 2003 Directives 89/48/EEC and 2001/19/EC have been implemented by amendments to EWR-Psychotherapeugesetz (EEA-Psychotherapy Act, *Federal Law Gazette* I 1999/114) (*Federal Law Gazette* I 2003/68) and to EWR-Psychologengesetz (EEA-Psychologists Act, *Federal Law Gazette* I 1999/113) (*Federal Law Gazette* I 2003/67).

## **Chapter XI**

### **Miscellaneous**

In 2003 the first Austrian Migration and Integration Report was published: Fassmann, Heinz & Stacher, Irene (eds), *Österreichischer Migrations- und Integrationsbericht* (2003; ISBN 3-85435-408-8). It includes articles about: demography (movements, labour market, income, housing, education), live circumstances of migrants, legal questions, naturalization, asylum, migration and public order, xenophobia, migrant's networks.

Bapuly, Bedanna & Kohlegger, Gerhard, *Die Implementierung des EG-Rechts in Österreich – Die Gerichtsbarkeit* (2003), analyzes the application of EC Law by the Supreme Court, the Constitutional Court and the Administrative Court. About 150 pages are about the Administrative Court's case law concerning the Association Agreement EC-Turkey. For quite a number of decisions, Bapuly and Kohlegger argue that a submission to the ECJ would have been preferable or even necessary (e.g. Administrative Court 29.11.2000, 99/09/0103; 19.12.2000, 98/09/0220).