

# GMS Flash Alert

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## European Union - ECJ Rules on Fines for Non-Compliance for Posted Workers

The European Court of Justice (ECJ) ruled in joined cases for “Maksimovic and Others”<sup>1</sup> that fines imposed under Austrian legislation exceeding EUR 13 million<sup>2</sup> for failure to comply with the obligations for posted workers are disproportionate.

The ECJ ruled that Austria’s national legislation is in conflict with the freedom to provide services outlined in article 56 of the Treaty on Functioning of the European Union (TFEU). This means that the ruling has a broader impact beyond Austria.

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### WHY THIS MATTERS

The ECJ justifies the application of the financial administrative penalties and fines, but declares that such measures must be proportionate. Fines that vary in accordance to the number of workers are not disproportionate, but the Court finds that fines for non-compliance in regards to administrative permits and payroll documentation:

- cannot be less than a pre-defined amount;
- cannot be imposed cumulatively for each worker and without a maximum;
- cannot be supplemented with an additional amount for the litigation costs (in this case 20 percent of the imposed fines);
- cannot be converted to several years of prison sentence in the event of failure to pay the fine.

The ruling could very well lead to a revision of the fines applied/devised in EU countries. This case will not lead to diminished efforts to conduct labour inspections, though it could lead to a higher level of compliance for workers from abroad that companies in both home and host countries must fulfill.

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### Court Case in Detail

The case concerned a large Austrian paper/pulp company (“Company A”) which had contracted with an Austrian engineering company (“Company B”) to conduct repairs. Company B has four members on its company board.

Company B then contracted with a Croatian company ("Company D") in 2015 to complete the necessary repairs after another Croatian company ("Company C") failed to conclude the work.

The Austrian fiscal investigation service (*Finanzpolizei*) visited the construction site on three different occasions and concluded that the necessary payroll administration was not complete for any of the workers present. Consequently, *Finanzpolizei* issued substantial fines to each of the four board members in Company B and the highest fine to the company director for Company D.

### **Court Ruling: What Was Not at Issue**

The ECJ ruled out the application of the Directive for Posted Workers 96/71/EC as this Directive does not contain monitoring measures. Further, the Court ruled out the application of the Enforcement Directive 2014/67/EU that includes such measures given that this Directive was not transposed into Austria's national legislation at the time of the circumstances of this case.

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## KPMG NOTE

When it comes to fines for administrative non-compliance, as we see with this ruling, the sky is not the limit and, as such, fines which exceed EUR 13 million for this type of offence are very excessive (regardless of the fact that such fines could have – arguably – a deterrent effect and conceivably could "persuade" many companies to pay close attention to the compliance requirements in respect of their foreign workers).

It is important to note that in principle the ECJ does not find financial fines for administrative non-compliance as an obstruction to the freedom to provide services – quite the contrary!

The judges refer to the TFEU in their legal basis for this ruling, indicating that requirements for administrative compliance and the fines established for non-compliance that countries implement in their national legislation are not restricted to a certain type of worker, e.g. posted workers.

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## FOOTNOTES:

1 Case nos.: C-64/18, C-140/18, C-146/18 and C-148/18 can be found on the [website](#) of the Court of Justice of the European Union.

2 The fines could be converted to prison sentence between 1,600-1,736 days for each responsible agent.

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## Contact us

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