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Public and Social Law

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Austrian Judges Association

Vereinigung österreichischer Richterinnen und Richter

## **Digital Revolution Impact on the Labor Market: Platform or Gig Economy and Artificial Intelligence**

*(Maria Nazari-Montazer)*

1.) *Provide a brief description of the presence of the „gig“ or „platform“ economy in your country. If possible, base your answer on official public data or academic reports, although we recognize that in some cases data may not be available.*

According to Eurofound<sup>1</sup>, the share of digital work in Austria is 5.4%, well below the EU average of 8.5%<sup>2</sup>.

The first (and last) significant survey investigating the characteristics of Austria's gig economy was carried out by the University of Hertfordshire and Ipsos MORI, in association with the Foundation for European Progressive Studies (FEPS), UNI-Europa and Arbeiterkammer Wien in 2016<sup>3</sup>:

*In an online survey of 2,003 Austrian adults aged 18-65, 36% (724) said they have tried to find work managed via so-called 'sharing economy' platforms such as Upwork, Uber or Handy during the past year. But only half of these, 18% (352), actually managed to find such work at least once a year.*

*Men are somewhat more likely than women to work in this way, with 39% of men who responded saying they had sought crowd work, compared with 34% of women. For*

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1 [www.eurofound.europa.eu](http://www.eurofound.europa.eu)

2 [https://www.etuc.org/sites/default/files/page/file/2023-05/ETUC\\_country\\_report\\_Austria-DE.pdf](https://www.etuc.org/sites/default/files/page/file/2023-05/ETUC_country_report_Austria-DE.pdf)

3 [fepeurope.eu/publication/423-character-of-austria-s-gig-economy-revealed-for-the-first-time/](https://fepeurope.eu/publication/423-character-of-austria-s-gig-economy-revealed-for-the-first-time/)

*some, this work is only occasional, but a significant minority, 5% (102) of respondents, claim to find paid work via online platforms at least once a week, with 9% (175) finding such work at least once a month.*

*It is often thought the gig economy is used either for altruistic reasons or as an occasional income top-up in addition to another main job. In fact, for a substantial minority of crowd workers, it is the only or main source of income with 2% saying it is their only source of income and 11% that it represents more than half. The majority, 59% say that it represents less than half their income. A substantial proportion (30%) did not know or did not wish to divulge this information.*

*The income of crowd workers is generally modest. Almost half (48%) of crowd workers in the survey who divulged their earnings earn less than €18,000 a year, with a further 43% earning between €18,000 and €36,000, while only 3% earn more than €60,000 a year.*

*People looking for work via online platforms are often looking for several different types of work. Fully one third (33%) of the 2,003 Austrian adults surveyed say they are looking for online work they can carry out from their homes on platforms such as Freelancer, Upwork or Clickworker. This is work that can be done from anywhere, so they are in a global labour market, perhaps competing with workers in India, Eastern Europe, the Americas or other parts of the world.*

*At the same time, 20% of the Austrian adults surveyed say they are looking for work they can do offline, such as cleaning, carpentry or gardening in other people's premises, for platforms such as Taskrabbit, Helpling or Myhammer.*

*Finally, 16% say they are looking for work as drivers, for companies like Uber or Blablacar. It is clear that many crowd workers do not restrict themselves to a single type of work but offer to provide several kinds of service.*

*When it comes to what crowd workers are actually doing, it is clear that some do a wide variety of work. The range is extremely broad, from high-skill professional work at one extreme to running errands at the other. The most common type of crowd work, done by some 74% of crowd workers, is office work, short tasks or 'click work' done online. However large numbers (62%) are doing creative or IT work, or professional work (49%). When it comes to work that is carried out offline (even though it is managed via online platforms) we again find high proportions of crowd workers active across several activities. Almost half (48%) do driving work and a similar proportion (44%) do personal service work. More than half (52%) do errands or office work on their clients' premises, and similar proportions do regular (53%) or occasional (51%) work in other people's homes. This reinforces the picture of people piecing together a livelihood from a range*

*of different activities.*

Estimates from 2021 assume that up to 363,000 people in Austria work more than just temporarily, i.e. at least 10 hours per week or more than 25% of their income, on platforms.<sup>4</sup>

*2.) How does this development affect the traditional employee/employer relationship? What is the status of platform or gig workers in your country: employees, independent contractors or a third category? Is there any jurisprudential divergence regarding the status of these workers? Cite relevant examples*

The arrival of the gig economy has added another facet to Austrian working life. There are no regulations specifically tailored to platform work or crowd work. The new forms of collaboration are taken into account within the existing legal framework, which is being amended from time to time. In the area of transport law, for example, the Occasional Transport Act was reformed at the beginning of 2021 to take account of changing circumstances.

Austria has a long standing tradition of social partnership. Collective bargaining agreements therefore exist for almost all sectors of economy. With the emergence of the platform economy, a number of new collective agreements have been added<sup>5</sup>, such as a collective agreement for bicycle couriers, or a new collective agreement for drivers in passenger transport.

Austrian labour law and social law have a differentiated system in order to deal with as many case constellations as possible. The definition of who is actually an employee differs between the different legal regimes. The definition used in social security legislation is slightly different from that used in labour law, and within Austrian labour law there are differences between collective and individual labour law, also when it comes to the definition of who is an employee. In individual labour law, which determines which claims the employee can assert under the employment contract, the relevant status is that of the “genuine employee” (*echter Arbeitnehmer*).

“Genuine employees” in Austria are in general fully covered by social security insurance. Their minimum wages are subject to collective agreements, which usually provide for (additional) special payments. These employees are entitled to paid holidays of at least 5 weeks per year, and there are notice periods and deadlines for terminating employment. There are also numerous employee protection regulations.

The “genuine employee” is defined as a person who performs work in a personally dependent capacity. This also means that there is an obligation to perform work personally. The cooperation is characterised by a certain degree of external determination in the sense that the employee is subject to instructions, not only factual instructions relating to the content of

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<sup>4</sup> [https://www.etuc.org/sites/default/files/page/file/2023-05/ETUC\\_country\\_report\\_Austria-DE.pdf](https://www.etuc.org/sites/default/files/page/file/2023-05/ETUC_country_report_Austria-DE.pdf)

<sup>5</sup> <https://fair.work/en/ratings/austria/>

the work, but also personal instructions, for example regarding working hours or the place of work. As a rule, an employee only owes "endeavour" for a certain period of time, but not a specific result<sup>6</sup>.

According to the relevant case law, whether someone is to be categorised as a "genuine employee" is determined by the actual circumstances of the collaboration, regardless of any written agreements to the contrary.

The use of algorithmic management tools means that the degree of control in crowd working is regularly pronounced. For example, platform workers (who are referred to in Austrian legal literature as crowd workers) are often evaluated on the basis of reputation and rating systems (e.g. customer ratings), and the quality of their work is thus monitored. In addition, the crowd worker's work processes can be monitored by the platform and strict specifications can be made regarding the execution and time or location of the work performed.

A personal obligation to work may also arise from the access rules agreed with the platform. For example, the crowd worker may be obliged to perform the work in person due to a prohibition on passing on user data. Crowd workers may be bound to the platform by evaluation or promotion systems. Crowd workers are motivated to continue working on the platform in order to get more or better work. This can be seen as similar to promotion in a company. Depending on the individual circumstances, platform workers can thus be genuine employees, especially if they are subject to continuing control by the platform<sup>7</sup>.

Crowd workers are deemed (genuine) employees if they have to perform the work themselves within a specified time, if they are subject to ongoing monitoring and if the work process is specifically specified. An important aspect here is the possibility of being able to reject or terminate work orders without further sanctions. In the event that there is no corresponding obligation to perform (e.g. the possibility of rejecting future work orders at any time without sanctions, etc.), then the collaboration is not considered an employment contract but a freelance contract with an independent contractor.

The labour courts can also be called upon by persons similar to employees (*arbeitnehmerähnliche Person* = *employee-like person*<sup>8</sup>). A worker who is economically dependent on one specific client or employer is considered an employee-like person. This means that persons, also independent contractors, who are predominantly economically dependent on a single client can sue for their claims in the labour courts.

Due to the high non-wage labour costs associated with a genuine employment relationship, various legal structures have been put into place over the years to circumvent the status of

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6 *Rebhahn* in Zeller Kommentar<sup>2</sup>§ 1151 ABGB Rz 8ff

7 Gig Economy in Frage & Antwort Thema - Arbeitsrecht<sup>9</sup>, Mag. Lukas Wieser, LL.M. (IELPO)/Mag. Isabella Göschl, LL.B. (WU)<sup>9</sup>, ARD6791/5/2022<sup>9</sup>, Heft 6791 v. 24.3.2022

8 § 51 Abs 3 Z 2 ASGG (Arbeits- und Sozialgerichtsgesetz)

"genuine employee." In order to combat "false (bogus) self-employment," the legislature has created various regulations that also subject other forms of cooperation, such as work as a freelancer (*"freier Dienstnehmer"*) to at least some degree of social insurance.

The distinction between a freelancer and a truly self-employed person also depends on the individual circumstances. The distinction is made, among other things, on the basis of whether a specific work (a specific, concrete, finished work result) is primarily owed and also on the basis of whether there is an economic dependence on a specific client.

The Austrian collective labour law provides for the possibility of employee representation. There are employer and employee organisations for each sector, which negotiate the collective agreements applicable to the entire sector. There are also extensive rights for employee representation within the company, which can also be enforced through the courts. In recent years, for example, a works council has been established at a large food delivery platform. The concept of "employee" within the collective labour law is similar in that it concerns persons who do not work in an organisation that they have created themselves and operate at their own expense and risk, but who work for others, in an externally determined way. However, the focus is primarily on *de facto* integration into an organisational unit and less on the existence of an employment contract.<sup>9</sup>

*3.) What is the impact of artificial intelligence on the labour market of your country? If possible, base your answer on official public data or academic reports. Outline the positive and negative impacts.*

Since artificial intelligence has become freely available, it has also been used in Austria - both privately and in the work process. As far as can be ascertained, so far there is no research publicly available on the specific effects of artificial intelligence on the Austrian labour market. There are also no data available on the concrete extent of AI use in the Austrian labour market.

It is generally assumed that artificial intelligence is likely to replace certain tasks, thereby affecting a number of industries and leading to job displacement. It is also assumed that in certain areas AI will lead to increased productivity.

The Boston Consulting Group has recently published a press release on its latest global survey on the use of generative artificial intelligence (GenAI) in the work process.<sup>10</sup> 13.102 employees from different industries answered the questions posed, 4.744 of them from European countries (Spain, France, Italy, Germany, Netherlands and Belgium). It can be assumed that the situation in Austria is not very different from other European countries.

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<sup>9</sup> Windisch-Graetz in ZellKomm<sup>2</sup> § 36 AngG Rz 1-3

<sup>10</sup> <https://www.bcg.com/publications/2024/ai-at-work-friend-foe>

According to the study the Global South had a higher proportion of regular users of GenAI at work among its leaders, managers and frontline employees than the Global North did. Overall, both workers' confidence in GenAI (42%) and fear of job loss (42%) have increased since 2023. Workers who regularly use AI agree to a large extent that it has saved them time, increased their speed, improved the quality of their work and freed up time for more strategic work. Most users (58%) are saving at least five hours a week with the tool.

79% believe that AI and GenAI will profoundly transform their jobs. 42% think that their job might not exist in the next decade, because of the increased use of AI and GenAI.

The Austrian Employment Service (*Arbeitsmarktservice – AMS*), which is the public legal entity in Austria that deals with the unemployed, grants unemployment benefits and places people in new jobs, has been using digital applications and artificial intelligence for quite a while now. The AMS has experimented with a system (*AMAS*) that calculates the placement opportunities of certain people on the labour market based on various personal data. Age, gender, education and work experience were included in the calculation. The AMS wanted to use the algorithm to prioritise people according to their employability in order to reduce unemployment more quickly overall. The Austrian Data Protection Agency (*Datenschutzbehörde*) has stopped the program in August 2020, as it considered it to be illegal profiling. The project is currently still the subject of legal proceedings. Following an appeal by the AMS, the Federal Administrative Court (BVwG) cancelled the data protection authority's prohibition notice. This decision by the BVwG has now been overturned by the Supreme Administrative Court (VwGH) and referred back to the Federal Administrative Court.

Since January 2024, a specifically developed AI (*Berufsinfomat*) has been providing information on job-related content for AMS customers.

*4.) Do you have any laws regulating and/or relevant judicial decisions about artificial intelligence on the labour market? What are the challenges for employers, such as privacy, transparency, secrecy, plagiarism, and the claim that artificial intelligence will be replacing workers? What are the concerns for employees?*

There are no specific national laws dealing with artificial intelligence with regard to the labour market.

The Austrian Federal Government has formulated an AI Strategy (*Artificial Intelligence Mission Austria 2030*)<sup>11</sup>. With regard to the labour market the strategy recognises the AI associated pressure to redesign, reorganise and requalify within the labour market, which will potentially have a major impact. The Federal Government plans on continuing the dialogue between companies and employees within the framework of the Austrian social partnership, with the aim of a human-centred design of future AI-supported workplaces. According to the strategy, the Federal Government plans on examining the establishment of a socio-economic

<sup>11</sup> <https://www.bmk.gv.at/themen/innovation/publikationen/ikt/ai/strategie-bundesregierung.html>

observatory for artificial intelligence, whose tasks would include the regular monitoring and methodical description of AI-induced changes in the world of work and labour markets, the development of positive future scenarios for an AI-supported economy and society and the submission of proposals for policy makers. The strategy includes the support of already existing European and International AI observatories, such as the OECD AI Policy Observatory and the EU AI Watch.

As a member of the European Union Austria is also subject to the provisions of the EU AI Act<sup>12</sup>, which entered into force on 1 August 2024<sup>13</sup>. The framework defines four levels of risk for AI systems. Each risk level is associated with specific compliance, risk management, governance and information obligations. The principle is: “the higher the risk, the stricter the regulation”. The four levels are “unacceptable risk”, “high risk”, “limited risk” and “minimal risk”. Certain AI practices that are deemed to pose an unacceptable risk are prohibited under Art. 5 of the AI Regulation.

High risk AI systems, according to the AI Act, are for example AI systems used in critical infrastructures, in educational training, in employment, management of workers, in essential private and public services and many more. These are subject to strict obligations before they can be put on the market. Some critics believe that the member states of the European Union may be at a disadvantage compared to other regions of the world due to the strict regulations, as this also means that the potential benefits of artificial intelligence cannot be fully utilised.

In the Austrian public database of Supreme Court decisions there is only one ruling regarding artificial intelligence<sup>14</sup>. The case concerned a claim against a company offering debt collection and basic legal advice on contract drafting online, via its own AI system, and whether the company had breached certain rules designed to ensure that legal advice is given only by registered lawyers.

In future, the parties to the employment contract will probably also have to agree on the extent to which artificial intelligence may be used in the work process. Under certain conditions, the employee is obliged to inform the employer if he wishes to use artificial intelligence (on his own initiative) for the performance of his work. Employers must be mindful of data protection obligations when using artificial intelligence in personnel decision-making.<sup>15</sup>

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<sup>12</sup> Regulation (EU) 2024/1689

<sup>13</sup> <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai>

<sup>14</sup> [RIS - 4Ob77/23m - Entscheidungstext - Justiz \(bka.gv.at\)](#) – on [www.ris.bka.gv.at](http://www.ris.bka.gv.at)

<sup>15</sup> *Andreas Gerhartl*, Der Einsatz künstlicher Intelligenz im Arbeitsrecht, AsoK 2023, 390