

**RESPOND**

## **Working Papers**

### **Global Migration: Consequences and Responses**

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## **Border Management and Migration Controls in Austria**

Country Report

**Ivan Josipovic & Ursula Reeger**

Austrian Academy of Sciences

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Any enquiries regarding this publication should be sent to us at: [ursula.reeger@oeaw.ac.at](mailto:ursula.reeger@oeaw.ac.at)

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## List of abbreviations

<b>Abbreviation</b>	<b>German</b>	<b>English</b>
<b>AsylG</b>	Asylgesetz	Asylum Act
<b>BFA</b>	Bundesamt für Fremdenwesen und Asyl	Federal Office for Immigration and Asylum
<b>BFA-VG</b>	BFA-Verfahrensgesetz	BFA-Proceedings Act
<b>BMASK</b>	Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz	Federal Ministry for Labour, Social Affairs and Consumer Protection
<b>BMEIA</b>	Bundesministerium für Europa, Integration und Äußeres	Federal Ministry for Europe, Integration and Foreign Affairs
<b>BMI</b>	Bundesministerium für Inneres	Federal Ministry of the Interior
<b>BVwG</b>	Bundesverwaltungsgericht	Federal Administrative Court
<b>FPG</b>	Fremdenpolizeigesetz	Aliens Police Act
<b>GrekoG</b>	Grenzkontrollgesetz	Border Control Act
<b>NAG</b>	Niederlassungs- und Aufenthaltsgesetz	Settlement and Residence Act
<b>VfGH</b>	Verfassungsgerichtshof	Constitutional Court
<b>VwGH</b>	Verwaltungsgerichtshof	Administrative High Court

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## About the project

With the goal of enhancing the governance capacity and policy coherence of the EU, its member states and neighbours, RESPOND is a comprehensive study of migration governance in the wake of the 2015 Refugee Crisis which is one of the biggest challenges that the EU has faced since its establishment. The crisis foregrounded the vulnerability of European borders, the tenuous jurisdiction of the Schengen system and broad problems with multi-level governance of migration and integration. One of the most visible impacts of the refugee crisis has been the polarization of politics in EU Member States and intra-Member State policy (in)coherence in responding to the crisis. Bringing together 14 partners from various scientific disciplines, RESPOND aims to provide an in-depth understanding of the governance of recent mass migration at macro (national, supranational), meso (subnational, local) and micro (individual migrant) levels through cross-country comparative research and critically analyse governance practices with the aim of enhancing the migration governance capacity and policy coherence of the EU, its member states and third countries.

RESPOND studies migration governance through a narrative which is constructed along five thematic fields:

- (1) Border management and security,
- (2) Refugee protection,
- (3) Reception,
- (4) Integration, and
- (5) Conflicting Europeanization.

Each thematic field is reflecting a juncture in the migration journey of refugees and designed to provide a holistic view of policies, their impacts and responses given by affected actors within.

## Executive summary

Between 2011 and 2018, legal changes in the realm of border management and migration controls in Austria extended policing capacities and activities targeting irregular migration, with measures arriving in tight conjunction with restrictions at all stages of the asylum procedure. Regarding pre-entry measures, cooperation on cross-border policing with neighbouring countries such as Hungary and Italy was intensified. At the border and with regard to irregular entrance, capacities for the establishment of identity have been increased through technical infrastructure and an operational interlocking of technically separate databases. With regard to persons seeking asylum, new duties for cooperation on the establishment of identity were created and options for data gathering were expanded through the inspection of geo-data from digital devices.

In September 2015, systematic border controls were re-installed at two major checkpoints towards Slovenia and Hungary. Schengen exemption provisions have been continually extended with reference to deficiencies at the EU's external borders and "serious threats to public policy and internal security" in accordance to Art. 25 of the Schengen Borders Code (SBC). Against this background, the federal government also introduced a unilateral annual quota for the admission of persons to the asylum procedure in 2016. While a respective emergency decree has not been triggered as of early 2019, due to dropping numbers of asylum applications, the provision caused broad controversies as to whether it is constitutional or not. Under the same amendment act, time periods for conducting repulsions were increased from formerly 7 to 14 days. For persons admitted to the asylum procedure, new restrictions on movement or residence have been introduced. In particular, rejected asylum seekers can now be ordered to move to newly created return centres. The maximum detention period has been extended from formerly 6 to 18 months and new grounds for administrative apprehension, such as the refusal to cooperate on return, were introduced. Returns have been fostered through financial incentives, the expansion of the list of safe third countries and Joint Return Operations under FRONTEX.



# 1. Introduction

Since the EU enlargement of 2004, the legal framework on border management in Austria has experienced crucial transformations. Located in the geographical centre of the EU-Schengen Area and exclusively surrounded by other Schengen member states today, the Austrian territory presents a deeply integrated area of intra-EU mobility with thousands of persons crossing its borders on a daily basis. Accordingly, national territorial integrity has not only been de facto eroded through increasing transnational technological and socio-economic connectivity associated with processes of globalization (Sassen, 1996). Austria also abides by at least two legal pillars that normatively compromise its authority on controlling borders and enforcing territorial exclusion.

The first pillar is the Schengen Acquis that was adopted in 1995, leading to the abolishment of control posts towards Germany and Italy in 1998 and towards the Czech Republic, Slovakia, Hungary, and Slovenia in 2007. The second pillar is the Geneva Convention and the European Charter of Fundamental Rights, establishing the principle of non-refoulement (based on Art. 2-3 ECHR) and providing the right to respect for private and family life (Art. 8 ECHR). Following increasing immigration via the asylum system until 2015 and broad public politicization of borders, these two legislative arrangements were put under political pressure through changes reintroducing controls at some border crossings and restricting entry conditions for persons seeking to apply for asylum. These measures came into effect in conjunction with restrictions at different stages of the asylum procedure, a multiplication of grounds for detention and forms of containment, as well as a new emphasis on return policies.

This report aims to shed light on the country's border management and migration control policies as part of a larger investigation on European governance of mass migration. It will thereby cover the time period of 2011 to 2018, focusing in particular on the political responses to the increasing numbers of asylum applications and secondary movements within the Schengen Area in 2015. The study provides a descriptive analysis of the Austrian institutional setting and the legal framework in four key areas of border management: pre-entry controls, controls at border crossings, internal controls and return. We also aim to shed light on some important dynamics in these areas in terms of policy change and organizational restructuring. The report does not cover EU legislation as this is subject to the RESPOND working paper "Border Management and Migration Control in the European Union" (Karamanidou & Kasperek, 2018). However, findings are contextualized within developments on the EU-level and EU primary and secondary law. In this vein, RESPOND seeks to enable further in-depth research and comparative analysis between EU member states.

## 2. Methodology

The present report is based on research conducted under the framework of the EU Horizon 2020 project RESPOND (2017-2020)<sup>1</sup>. It is structured by guidelines that have been developed by Sabine Hess and Bernd Kasperek from the University of Göttingen and Umut Korkut and Lena Karamanidou from Glasgow Caledonian University. Based on a shared template, it allows for comparative analysis across all participating countries. The focus of this study is on national policies targeting entry and stay within the Austrian territory. Given RESPOND's focus on forced migration, it also considers migration control measures in conjunction with the asylum procedure. Legal and policy changes are supplemented with secondary data on the implementation as well as an evaluative discussion part providing insights from own interview data.

The sources of this report are legislative texts, national or European reports, official statements, newspaper articles, as well as press releases of governing bodies. The study also included parliamentary questions (interpellations) answered by the Ministry of the Interior between 2011 and 2018. Desk research was further supplemented by a written Q&A with the Austrian Ministry of the Interior (E11\_070219). Regarding implementation, the Annual Policy Reports of the Austrian National Contact Point of the European Migration Network (EMN), the European Council on Refugees and Exiles (ECRE) were of great importance. Furthermore, we draw on contrasting assessments of two stakeholders who were interviewed in 2018. The first is active in the analysis, evaluation and policy advice on border management for the federal government in Austria (E09\_071118). The second is an NGO advocate of refugee rights who is active in the monitoring of developments in the asylum procedure and migration controls in general (E07\_311018). We led semi-structured interviews based on a joint RESPOND questionnaire. The conversations were recorded and transcribed. Eventually, we conducted a content analysis, allowing us to summarize and contrast the most important arguments with regard to the topics discussed in this report.

## 3. Key developments since 2011

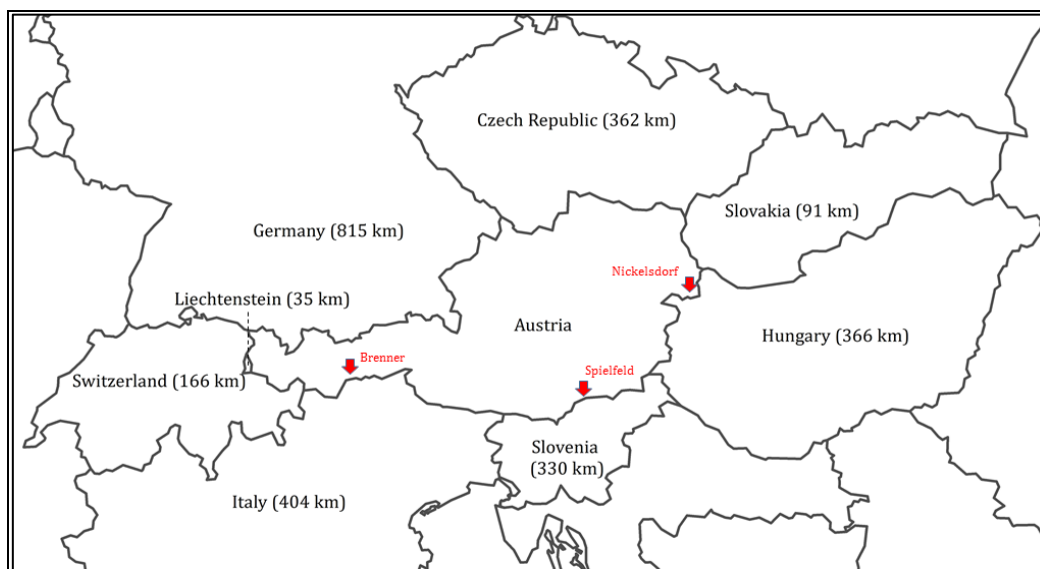
The two decades subsequent to the fall of the Iron Curtain in 1989 have been marked by considerable changes to the Austrian legal framework on borders. Following the country's accession to the EU in 1995 and the adoption of the Schengen Acquis, Austrian eastern borders experienced considerable reinforcement measures in advance of the removal of barriers towards Germany and Italy in 1998. The federal government expanded investments in border control personnel and technical equipment for more than a decade (Jandl, 2008). Following the complete accession of Eastern European countries to the Schengen Area by 2011 and a further abolishment of border control checkpoints, compensation measures were intensified. An administrative unit for "Operational Compensation Measures" (*Operative Ausgleichsmaßnahmen*) was installed, carrying out drag net controls based on risk analyses. Since 2011, Austria has been exclusively surrounded by states that are part of the Schengen Area, leading

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<sup>1</sup> For further information about RESPOND please visit <https://www.respondmigration.com/>.

to a general abolition of systematic border controls, with the exception of international airports. Before 2015, the right to temporary reintroduction of border checks for special reasons was rarely exercised. One example are large-scale sport events such as the European Football Championship in 2008, which was held in Austria and Switzerland.

**Figure 1: Austria and its neighbouring countries – length of border in km and selected major checkpoints**



Source: own design.

According to official statistics of the Austrian Ministry of Interior, 89,098 persons lodged an application for international protection in 2015. As an attempt to restore control over these movements, the federal government re-installed systematic internal border controls at the major checkpoints in Spielfeld (towards Slovenia) and Nickelsdorf (towards Hungary) in September 2015 (see Figure 1). In the face of a looming humanitarian crisis in Hungary by September 2015, the Austrian federal government (in accordance with the German federal government) decided to allow persons seeking asylum to enter federal territory (orf.at, 2015). Although the Interior Minister highlighted that the Dublin Regulation would not be suspended<sup>2</sup>, Austrian authorities de facto initiated organized onward journeys to the German border (Welt, 2015), leading to heavy criticism on the part of the Bavarian government. In Austria, the high numbers of new arrivals led to the temporary creation of emergency camps where persons were provided with basic means of aid. Those camps were erected both in border areas such as Spielfeld and in urban areas such as Vienna, where provisional facilities were created (Müller & Rosenberger, 2017, p. 125).

<sup>2</sup> A ruling of the European Court of Justice in 2017 stands in line with the argumentation that even such an exceptional situation does not invalidate the asylum regulations provided under Dublin III. Croatia accordingly was responsible for the asylum procedure of individuals from Syria and Afghanistan who had arrived via the Western Balkan Route and had lodged an application in Austria (Tagesschau.de, 2017).

As of early 2019, intra-Schengen-border controls at checkpoints towards Slovenia and Hungary are continually upheld based on Art. 25 SBC<sup>3</sup>. Initial plans to install systematic border controls at the Brenner Pass crossing point have not been realized as of early 2019. In 2017, military units were stationed in the Brenner Pass region, leading to a diplomatic dispute with Italy (orf.at, Vorbereitung sorgt für Verstimmung, 2017).

The latest prolongation of Schengen exemption provisions will last until May 2019. In his writing to the Commission, the Council and EU Parliament, the Interior Minister justified the measures, arguing that “the situation is not sufficiently stable” due to “the still too high number of arrests of illegally entered or illegally staying immigrants and asylum applications in Austria” (Herbert Kickl; cited in: derStandard, 2018). However, no statistics on apprehensions at the border have been presented as of early 2019 and asylum applications have been in steep decline between 2015 and 2018 (2015: 88,340; 2018: 13,400 according to statistics of the BMI). In October 2018, the leaders of the opposition in the National Council initiated an extraordinary session on this matter. They argued that yet another prolongation would represent a symbolic act and “a disproportionate infringement of the rights of citizens” (NEOS member, cited in: parlament.gv.at, 2018). Given the lack of any emergency, this would have detrimental effects on the economy, the usage of tax money and the intra-EU mobility of Austrian and other EU-citizens.

Likewise, the deployment of an assisting operation of 817 soldiers in border hinterlands of Burgenland, Styria, Carinthia, and Tyrol was heavily criticised. Figures from the year 2018 issued by the Defence Ministry show that this operation led to a mere 673 apprehensions. While the Defence Minister highlighted its deterring effects, oppositional parties such as NEOS or Liste Pilz spoke of symbolic politics and a waste of money, given the total costs of 49 million EUR per year (DiePresse, 2018).

The year 2015 also was an important year in the public and political discourse on border management as the call for “shutting down borders” grew steadily (see also Wodak, 2018). In early 2016, a wire-netting fence was erected at the Spielfeld-Sentilj border crossing towards Slovenia. The initial construction ran 200 meters east and 3.5 kilometres west of the main crossing point. According to the former Interior Minister, this was about “an orderly, controlled entry into our country, not about shutting down the border” (Johanna Mikl-Leitner, cited in: Politico, 2015). Additional barbed wire and containers are kept in readiness in preparation for periods of increased numbers of new arrivals. Initially planned as a technical system, the endeavour soon sparked a political controversy that started with the precise designation of the construction and continued into a debate on fortification constructions at Nickelsdorf and the Brenner Pass towards Italy. By 2018, the entire border management system was run continually at approximate annual costs of 1.7 million EUR.

In June 2018, the federal government openly displayed fortification measures with the training of the new border police unit PUMA under the label “Pro Borders”. It is composed of specialized federal police officers. The exercise involved a simulation with 200 background actors as migrants confronting 500 police officers and 220 soldiers. According to our respondent from the Ministry of the Interior, the new unit allows for “The possibility of rapidly deploying larger

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<sup>3</sup> Between May 2016 and November 2017, exemption provisions were prolonged based on Art.29 SBC stating “persistent serious deficiencies relating to external border control”.

specialized aliens and border police units adding value both for temporary border controls and for compensatory measures. New strategies have been developed in the course of the creation of this unit to be best prepared for different scenarios” (E11\_070219).

Most recent plans presented by the Ministry of the Interior entail the introduction of “preventive detention for dangerous asylum seekers” (Kleine-Zeitung, 2018). This would allow authorities to conduct a “danger prognosis” directly after the application for international protection. It has been argued that this could be based both on information provided by the refugee and on further research by the authorities in databases or on the Internet.

#### **Key legal amendments 2011-2018**

2011 – Aliens Law Amendment Act (No. 38/2011)

2013 – FNG-Adaptation Act (No. 68/2013)

2015 – Aliens Law Amendment Act (No. 70/2015)

2016 – Amendment Act (No. 24/2016)

2017 – Aliens Law Amendment Act (No. 145/2017)

2018 – Aliens Law Amendment Act (No. 56/2018)

## **4. Legal framework**

Despite the federal structure of the Austrian state, immigration and asylum laws are strongly centralized, conceding only minor competences to the provinces (*Länder*). The national legislative framework regulating different aspects of border management and migration control is based on Art. 10 (1) sentence 3 and 7 of the Federal Constitution Law (No. 1/1930). Immigration laws as a legal field of public and administrative law are usually referred to as *Fremdenrecht*. Closely related are the fields of citizenship law, security police law, border control law and the aliens’ employment law. Among those, there are at least five legal centrepieces relevant for the current subject.

The Aliens Police Act (FPG) (No. 100/2005) covers provisions on the competences of the aliens police concerning the entrance into federal territory, the grounds for rejection, the issuance of documents for foreigners, as well as residence terminating measures and return (Feik, 2016, p. 156). Beside provisions on the denial of entry (*Zurückweisung*), the FPG establishes an elaborate system of residence termination and exclusion from federal territory. There are three types of residence terminating procedures: return decisions (*Rückkehrentscheidungen*), exclusion orders (*Aufenthaltsverbote*), and expulsions (*Ausweisungen*), whereby the first type addresses third country nationals with unlawful residence status, and the latter two target persons who have violated the conditions of their previously lawful residence. Expulsions can be imposed upon third-country nationals who are lawfully residing within federal territory but where reasons for rejection become known subsequently, the Integration Agreement has not

been fulfilled, or the person has remained unemployed for a longer time. Expulsions also apply to EU citizens who pose a threat to public order or who have violated residence after the first three months of their stay. Exclusion orders may in general last for 18 months to 5 years and can be ordered upon diverse criminal offences but also upon destitution and legally binding punishments following an administrative offence. Those procedures can result in three types of residence terminating measures executing the exclusion from federal territory: forced return (*Abschiebung*), repulsion (*Zurückschiebung*), readmission to a neighbouring state (*Durchbeförderung*). Forced returns can only be conducted if a person has not returned ‘voluntarily’ and if the return decision, the exclusion order or the expulsion is enforceable. This means that in each case, authorities must balance considerations of public interest against the private and family interests of the individual in line with Art. 8 ECHR. Likewise, authorities may secure each of these procedures and measures through detention orders (*Schubhaft*).

The Border Control Act (GrekoG) (No. 435/1996) and the Schengen Borders Code stipulate the conditions for controlling border crossings. While the Settlement and Residence Act (NAG) (No. 100/2005) governs legal residence permits and provides for an active management of migration in conjunction with the Visa Code, the Asylum Act (AsylG) (No. 100/2005) holds important provisions for persons who lodge an application for international protection. The AsylG governs obligations deriving from the Geneva Convention and the European Charter of Fundamental Rights. Concerning border management, Art. 2 and 3 ECHR are of particular importance as they prohibit repulsion or return to a territory where a person might face threats to his/her life, degrading treatment or punishment. The principle of non-refoulement also relates to potential chain-refoulement. Likewise, Art. 8 ECHR protects the right to respect for private and family life that must be considered upon a rejected application for international protection. The AsylG more generally stipulates rules for asylum applicants and beneficiaries of international protection with respect to entry, identification, and qualification. Closely tied to this is the BFA-Proceeding Act (BFA-VG) (No. 87/2012) that covers the procedural dimension of immigration via the asylum system. Eventually, the Aliens’ Employment Act (AuslBG) (No. 218/1975) is relevant as it entails provisions on work place inspections for illegal employment.

## 5. Implementation and key actors

Regarding policy implementation in the realm of border management and migration control, at least four key issues emerged between 2011 and 2018, which we outline here and will discuss in more detail in following chapters:

- (1) Pre-entry measures: here, the so-called Western Balkan Route and the Brenner Pass towards Italy received political attention. The federal government tried to cooperate with Italy and Hungary as well as with states from the Western Balkans in order to prevent irregular migrants from arriving in Austria. Therefore, police cooperation and exchange of data on human smuggling were intensified.
- (2) At the border, the large numbers of asylum seekers arriving in 2015 sparked broad public debates on the permeability of national borders. In the following months and years, the federal government demanded repeated extensions of the Schengen exemption provisions, allowing police officers to systematically control border checkpoints towards Slove-

- nia (Spielfeld) and Hungary (Nickelsdorf). Likewise, the federal army was called into assistance, patrolling in southern border regions. While refusals of entry increased in 2016/2017 compared to previous years, the total numbers remain rather modest given the considerable investment of resources. Against this background, the lawmaker also introduced a national annual quota for asylum applications in 2016, which has not come into force but caused broad political controversy regarding its legal implementation. Furthermore, the disguise of identity was politically addressed by increasing administrative capacities.
- (3) Internal controls: Political debate and public policy particularly addressed the question of preventing certain groups of asylum seekers from absconding. The federal government repurposed former reception centres in remote areas into return centres for rejected asylum seekers. Given the rising number of aliens police acts securing returns and short capacities in police detention centres, a new detention centre was built and opened in 2014 in Styria, exclusively dedicated to immigration detention. While the number of detention orders had dropped between 2012 and 2015, it has since been increasing and now is again at the level of 2012. Likewise, short term apprehension orders (72 hours before forced return) have considerably increased since 2015. The total number of issued toleration cards, which prevent immigrants without residence permit from falling into complete irregularity, has remained at a low level: in 2013, 355 cards were issued, in January to November 2018 only 179.
- (4) Return: in political discourse and public policy, the major target group has been rejected asylum seekers. Statistics on completed returns (forced and voluntary) indicate that forced returns in particular have increased since 2014. However, leaving Dublin cases aside, latest figures provided by the Federal Ministry of the Interior show that most returnees are in fact European or EU citizens. The federal government introduced financial incentives for voluntary departure in 2016 and intensified cooperation with third countries for this purpose.

Concerning the key actors involved in border management and migration control in Austria, public authorities remain largely responsible for policy implementation, yet in recent years private companies and NGOs have particularly become involved in the realm of asylum.

At the highest institutional level, the Austrian Federal Ministry of the Interior (Bundesministerium für Inneres – BMI) holds the greater part of the competences related to border management and migration control. Between 2011 and 2017, members from the Austrian People's Party (ÖVP) had held the office of the Interior Minister. Following the 2017 national elections and the accession of the Austrian Freedom Party (FPÖ) to the federal government, the position was assigned to Herbert Kickl of the FPÖ. In response to the political crisis associated with increased asylum application numbers in 2015 and 2016, the BMI was internally restructured in 2018. A new Directorate V (Aliens Division) was created, tying together the subjects of "citizenship and residence", "borders and aliens police", as well as "asylum and return". Apart from the BMI, there are four other ministries that are relevant for migration control:

- The Federal Ministry for Europe, Integration and Foreign Affairs (BMEIA) which is responsible for issuing visas;
- The Federal Ministry of Labour, Social Affairs, Health, and Consumer Protection (BMASK) that has competences with regard to employment permits, which may in turn have an impact on the legal residence status of foreigners;

- The Federal Ministry of Defence (BMLV), which in recent years has assisted border controls by stationing patrols along the green border hinterlands;
- The Federal Ministry of Finance (BMF), to which the finance police is subordinated.

Under the administration of the BMI, there are nine Provincial Police Directorates (*Landespolizeidirektionen* – LPD), one in each of the nine Austrian provinces. Despite Austria's federal character and this administrative structure, there is only a single Federal Police. Bodies of the public security service for aliens police and repulsion, in short Aliens Police (*Fremdenpolizei*), are permitted to investigate the lawfulness of the entry and residence of non-citizens as stipulated under the Aliens Police Act (FPG section 5 Section 33-40). Within the executive system, the Aliens Police is the part of the authority that deals with the enforcement of immigration law. Within the framework of police directorates, the Aliens Police is a separate department, which is largely attached to the district administration. It closely cooperates with other authorities on various issues. This concerns, for example, the Federal Office for Immigration and Asylum (*Bundesamt für Fremdenwesen und Asyl* – BFA) in the case of refugees who wish to apply for asylum, or the Labour Market Service (*Arbeitsmarktservice* – AMS) in the licensing procedure for taking up legal employment in Austria. Likewise, they hold competences regarding the imprisonment of third country nationals in detention facilities.

Attached to the BMI, the Austrian Criminal Intelligence Service (*Bundeskriminalamt* – BK) is particularly responsible for gathering information about human smuggling and trafficking activities. It is linked to Europol's European Migration Smuggling Centre.

Concerning controls at the border, federal police officers are responsible for systematic checks at entrance points during periods of Schengen exemption provisions. Since 2017, the Federal Ministry of Defence has been providing soldier patrols for border hinterlands with a particular focus on the Brenner Pass towards Italy. They are not permitted to conduct border controls themselves but merely assist police officers in the detection of persons and suspicious vehicles. The finance police may control imported wares at border check points. It also carries out workplace inspections in search for illegally employed persons.

Regarding detention, federal police officers are largely responsible for operational tasks, yet the new immigration detention centre in Styria deploys staff from the private security company G4S.

In the realm of asylum, the Federal Office for Immigration and Asylum (BFA) is responsible for the processing of asylum applications, while the Federal Administrative Court (*Bundesverwaltungsgericht* – BVwG) can be addressed for appeal in the first instance. The BFA was created under the 2013 FNG-Adaption Act (No. 68/2013) as an attempt to render the processing of asylum applications more efficient. Therefore, the administration that had formerly been split between different units and different provincial agencies was centralized within one federal agency (Wiener & Benndorf, 2012).

While the accommodation of persons who are admitted to the asylum procedure is regulated by the Austrian provinces, the federal level is responsible for the two Initial Reception Centres (*Erstaufnahmestellen*) in Traiskirchen and Thalham, where persons are accommodated during the admissibility procedure (around 20 days). Here, the private company European Homecare was active until 2012 and was replaced by ORS Service, which is now responsible for care and maintenance tasks. ORS Service has also been engaged in the newly created return centres, which are federal facilities that had been used as distribution centres in



2015/2016 and were later repurposed for accommodating rejected asylum seekers. At the beginning of 2019, the BMI issued plans to install a federal agency that would replace non-profit NGOs and private firms and take over their activities concerning asylum seeker accommodation and legal consultation.

Regarding return assistance, legal consultation on return is currently conducted by the organisation *Verein Menschenrechte Österreich*. Austria offers three reintegration programmes:

- in cooperation with the International Organization for Migration (IOM): RESTART II,
- in cooperation with Caritas Austria: IRMA plus,
- under the European Reintegration Network (ERIN).

## 6. Pre-entry measures

Pro-active border management in terms of national pre-entry measures entails visa provisions channelling regular migration flows as well as cooperation with EU member states and third countries on policing irregular migration and smuggling. The former is mainly structured by an EU visa regime with minor national novelties in recent years. Concerning the latter, Austria has particularly fostered exchange and cooperation with Hungarian and Italian authorities, providing operational support and signing agreements on cross-border policing. Furthermore, in response to the developments of 2015, bi-lateral action plans were developed with Bosnia and Herzegovina, Serbia, Albania, Kosovo, Macedonia, and Montenegro.

### 6.1. Visas

Legal entrance into the federal territory of Austria generally requires a valid passport and a visa. The Foreign Police Act (FPG) (100/2005) stipulates groups that are exempted from visa obligations. These encompass EEA citizens, third country nationals with a settlement within the Schengen Area, citizens of third countries holding bilateral agreements with Austria, and beneficiaries of international protection (EMN, 2015, p. 29). Applications for any kind of residence permit generally need to be lodged outside of Austria at a responsible embassy or consulate, only renewals of certain titles granted previously can be conducted in Austria.

The EU Visa Code Regulation (2009/810/EC) and the Schengen Borders Code (2006/562/EC) govern the first two types of visa. Visa A grants holders airport transit and Visa C permits for short stays of up to three months. The third type, Visa D, is a national long-stay visa that allows for a stay of up to six months. It can be issued for the purpose of a stay beyond three months in exceptional humanitarian cases, for job-seeking, the acquisition of residence permits, or the purpose of family reunification under asylum law. Generally, applying for Visa D requires health insurance that covers at least 30,000 EUR, proof of financial resources, and proof of employment and residence in the country of origin (EMN, 2015, p. 29). Under the 2017 Aliens Law Amendment Act (No. 145/2017), special provisions were introduced, permitting for a stay of up to 12 months with Visa D. This primarily applies to cases where persons are attending

courses in Austria or have to bridge periods until a pending residence permit is granted. Seasonal workers have also been entitled to receive a Visa D for a period of nine months and can even extend it from within Austria in particular cases.

## 6.2. Externalisation: cooperation on cross-border policing of irregular migration

Apart from Austrian engagement in border policy making under the framework of EU Migration and Home Affairs<sup>4</sup> (detailed in the RESPOND working paper “Border Management and Migration Control in the European Union”), bi- or multilateral forms of collaboration dealing with irregular migration abroad also exist. These can be classified in terms of (1) permanent networks of cooperation, (2) project based initiatives or (3) ad-hoc target specific cooperation with EU-member states and third countries.

The *Salzburg Forum* is a long-standing joint cooperation effort, which was established in 2000 through an Austrian initiative. It is a platform for Central European cooperation<sup>5</sup>, focusing on the security dimension of immigration politics. Interior Ministers use this political arena for the exchange of regional expertise and resources, as well as for developing policy strategies for EU-JHA. The gathering takes place more than once a year, but at irregular intervals (*Salzburg-Forum*, 2018). In 2016, for example, the *Salzburg Forum* was held twice and representatives agreed on a stronger commitment to invest in resources for FRONTEX and EASO operations. Austria agreed to provide 20 police officers for border protection at the Serbian-Hungarian frontier<sup>6</sup>.

Regarding project based initiatives, the project *FIMATHU* (Facilitated Illegal Immigration Affecting Austria and Hungary) was established in 2011 following an increase of irregular border crossings. The Austrian and Hungarian Interior Ministers coordinated this project under Europol support, which helped to facilitate information exchange via shared databanks. After the apprehension of 7,500 irregular migrants and the detection of 891 cases of smuggling by 2013, the project was expanded to include other central and Eastern European countries (Europol, 2013).

By 2017, Austria ratified a treaty with Italy on police cooperation and renewed a 2006 treaty with Hungary. Beside enhanced competences for criminal persecution, these treaties further enable cross-border policing of irregular migrants. In the case of the treaty with Hungary, this for example means geographically unlimited intervention on the railways, in which Austrian authorities are allowed to continue official acts although having crossed the Hungarian border. Concerning Italy, the treaty authorizes officials to create joint police patrols, particularly focus-

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<sup>4</sup> In accordance with the Council Directive 2011/51/EC, carrier sanctions have been nationally transposed. Section 111 of the FPG stipulates obligations for carrier companies while Section 112 provides for sanctions upon the violation of the same.

<sup>5</sup> Member states of the Forum: Austria, Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia. Furthermore, there is a “Group of Friends” comprised by the Western Balkan states and Moldova.

<sup>6</sup> No information is provided on the planned duration of the Austrian police presence at this border.

ing on joint interventions on railway transportation routes. Furthermore, Austria committed itself to providing police officers at the Adriatic coast, in Sicily and at the airport in Rome (bmi.gv.at, Grenzüberschreitende Einsätze, 2017).

One route that received particular public and political attention was the “Western Balkan Route”. The public debate of 2015 and 2016 was largely conducted in terms of the “closure of the Balkans route”. In February 2016, the Austrian interior and exterior ministries hosted a conference named “Managing Migration Together” with the attendance of 18 ministers from the Balkan region. Representatives agreed to foster cooperation along routes of frequent irregular flows (EMN, 2017, p. 31). Austria committed itself to providing police officers for operational support. Six bilateral action plans were developed together with Bosnia and Herzegovina, Serbia, Albania, Kosovo, Macedonia, and Montenegro, each of them agreeing on Austrian support towards EU-accession in exchange for tighter cooperation on reducing refugee flows (BMEIA, 2016). For some countries like Macedonia, direct operational support in the form of an Austrian police presence in the country was provided.

As a measure against human smuggling and trafficking, the Joint Operational Office at the Austrian Criminal Intelligence Service was installed as a link to Europol’s European Migration Smuggling Centre (EMN, 2017, p. 27). Our respondent from the Ministry of Interior highlights the importance of this measure as it serves the following objectives (E11\_070219):

- “Close cooperation with Europol and international law enforcement authorities”
- “Rapid international exchange of information 7/24”
- “Intensified investigative activities along the Balkan and Central Mediterranean routes”
- “Preparation of daily updated situation pictures for the analysis of migration flows/tug activities”
- “Targeted implementation of priority checks by criminal police in the higher-level road network and on neuralgic rail routes.”

Likewise, in recent years, Austria became active in an Interpol project on migrant smuggling along the Balkan route and a German project on cases of smuggling involving rail freight containers (EMN, 2017, p. 27).

### **6.3. Smuggling and the criminalization of aid towards the crossing of borders**

Provisions on the facilitation of unauthorized entry, transit and residence as provided by the Council Directive 2002/90/EC and the Council Framework Decision 2002/946/JHA came into effect in Austrian law under the aliens law reform of 2005. Since then, the offence of smuggling has been regulated under Section 114 of the FPG. Smuggling is defined as the deliberate promotion of the illegal entry of a foreign national for the purpose of the unlawful enrichment of oneself or a third party. Offenders can be sentenced to up to two years of imprisonment.

Para.3 and 4, stipulating increased penalties if the offence is committed “commercially”, “in relation to a larger number of strangers”, or if pain is inflicted on smuggled persons, are sources of particular political controversy. According to para.4, “anyone who commits the offence according to para. 1 as a member of a criminal organisation or in a way that endangers

the life of the stranger to whom the offence relates shall be punished by the court with a prison sentence of one to ten years". This clearly exceeds the EU template of six or eight years (Wegscheider & Mitgutsch, 2005).

The provisions drew heavy criticism from NGOs, as it enjoys a very broad interpretation in practice (derStandard.at, 2014). People who support border crossings out of solidarity and without personal benefits can accordingly be reported as being smugglers. A 2014 trial on the smuggling activities of eight refugees engaged in a social movement reinforced the political debate on the blurred legal lines between the treatment of organized criminals and that of actions of solidarity. Seven of the eight defendants were sentenced to between 7 and 28 months in prison. Altruistic motifs for facilitation of unauthorized entry remain legally disregarded as of early 2019.

## **6.4. Stakeholder discussion I**

The interviewed experts (E07\_031118, E09\_071118) both noted that the number and composition of persons arriving in Austria irregularly (be it with the aim of lodging an application for asylum or not) strongly depends on the border activities of transit states and EU-member states with external borders. They issued concerns and understanding for the inability of Greece, Italy or Spain to cope with the amount of new arrivals and pointed out that secondary movement towards Austria continues until today.

Yet, concerning the Western Balkan Route, the EU-Turkey Deal was highlighted as a critically important factor for reducing immigration flows towards Austria. Beside this, our expert on border management (E09\_071118) argued that whereas Austrian engagement in countries from the Western Balkans such as Macedonia might have led to increased border policing, it comes at the cost of the severe use of violence. This would be enabled by a lesser degree of compliance with human rights and rule of law in non-EU states in the Balkans. Instead, the expert advocated the increase of resources and more efficient cooperation under the prevailing FRONTEX mandate. The management of information on the situation in countries of origin can accordingly be considered as an especial key component of active regulation efforts.

## **7. At the border controls**

Section 10 of the GrekoG (No. 435/1996) provides that entry into federal territory is only permitted at border crossing points. As mentioned in the previous chapter, border control posts have generally been abolished in Austria, however since 2015, Schengen exemption provisions (Art. 26-27 SBC) are exercised at Spielfeld and Nickelsdorf. As of February 2019, according to the Ministry of Interior, controls at Spielfeld were conducted by 8 officials during daytime and 6 during the night on samples derived from risk analyses. Section 15 of the FPG (No.100/2005) stipulates the criteria for the lawful entry of third country nationals, whereby travelling documents and visas (where necessary) represent the two central documents for identification.

While the establishment of the identity of immigrants is generally tied to the issuance of visas as a pre-entry measure, this is different in the context of asylum. Here, identification requirements become immanent upon a person's entry into the country. Beside the Eurodac Regulation, the VIS Regulation and the SIS II Regulation, the AsylG and the BFA-VG hold important national provisions. Art. 36 Section 2 of the BFA-VG (No. 87/2012) together with Art. 34 Section 2 of the FPG (No. 100/2005) provide a definition of identity establishment as "recording a person's names, date of birth, nationality and address of residence" (Lukits, 2017, p. 13). The procedure includes the taking of fingerprints and queries in the Eurodac database, the Visa Information System but also the national fingerprint database which contains data from detected irregular migrants or criminal suspects. Furthermore, identity documents must be presented and can be seized by authorities who detect potential forgery (Lukits, 2017, p. 18-19).

Between 2011 and 2018, Austrian lawmakers tightened entry provisions through at least three types of policy reforms: (1) harder punishment upon detection of irregular entry and extended periods of repulsion, (2) increased capacities of establishing a person's identity, as well as (3) the introduction of an annual quota for asylum applications (the latter of which has not come into force as of 2019).

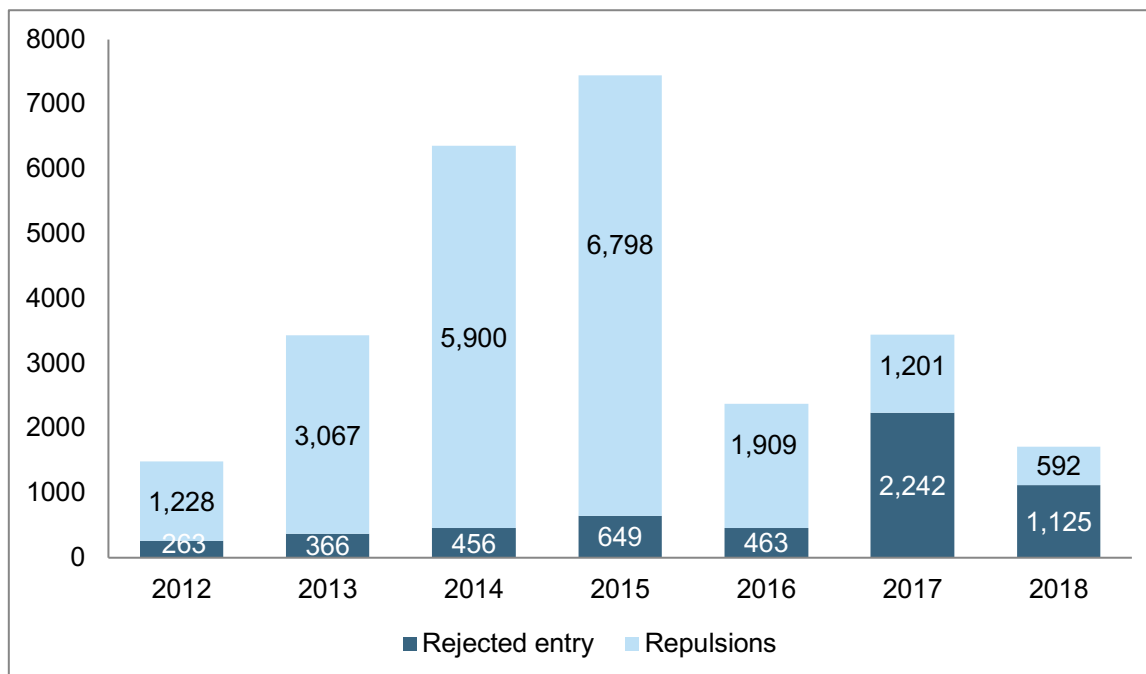
## 7.1. Rejected entry and repulsion

Unauthorized entry as such is not considered as a criminal offence in Austria, but rather one of an administrative kind, leading to fines of between 100 and 1,000 EUR or detention for up to two weeks. Persons found to already be staying illegally within the territory may be fined with 500 to 2,500 EUR. In this context, penalties for repeat offenders have been increased to up to 7,500 EUR as stipulated under the Aliens Law Amendment Act 2011 (No. 38/2011).

The rejection of entry into federal territory is generally possible, but it is subject to important constraints, particularly in the case of asylum applications. If border controls are conducted, rejection of entry (*Zurückweisung*) (Section 40 FPG) is possible. This generally refers to the hindrance of entering federal territory and may apply where authorities have doubts about a person's identity, in case of irregular immigration via the green border or upon a given entry ban or exclusion order. Apart from forced return, (*Abschiebung*; see last chapter), Austrian law provides for two other types of residence terminating measures, namely repulsion (*Zurückschiebung*) (Section 45 FPG), and readmission through another state (*Durchbeförderung*) (Section 45b FPG). Repulsions cover cases in which persons have already entered the country unlawfully. They are consequently ordered to return to the neighbouring EU member state which they entered through. The 2016 Amendment Act (No. 24/2016) increased the time period during which authorities may carry out such repulsions from initially 7 days to 14 days. Authorities may conduct readmission to countries where agreements allow for it. If this is not possible, the BFA initiates a residence terminating procedure based on Section 52 FPG (No.100/2005), also allowing for detention. All residence terminating measures are strictly confined by the principle of non-refoulement in accordance with Art. 3 ECHR. It prohibits repulsion or return to a territory where a person might be subjected to torture, degrading treatment or punishment. The principle of non-refoulement also relates to potential chain-refoulement, namely the expulsion to an allegedly safe third country which then expels the person to an unsafe country.

Standard statistics provided by the Ministry of the Interior show that repulsions considerably increased between 2012 and 2015. This was followed by a sharp drop in repulsions in the subsequent year, with increased instances of rejected entry (Figure 2)<sup>7</sup>.

**Figure 2: Total number of rejected entries and repulsions, 2012-2018<sup>8</sup>**



Source: own compilation based on BMI annual statistics, retrieved from: <https://www.bmi.gv.at/302/Statistik/start.aspx>, 23.1.2019.

An answer to a parliamentary interpellation (BMI-10034/AB, 2016) provides numbers on persons who were denied entry from German authorities and had to return to Austria in 2016. Accordingly, between January 1<sup>st</sup> and November 1<sup>st</sup> 2016, 12,301 persons were denied entry at German borders and returned to Austria, 1,955 of whom subsequently lodged an application for asylum in Austria. In the remaining cases, according to the document, the Ministry of the Interior primarily conducts repulsions to the country through which the person had entered Austria; otherwise, a residence terminating procedure is initiated.

Concerning the re-admission of third country nationals in the event of illegal entry or residence, Austria builds on European and national readmission agreements. The European Union has concluded agreements with Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia,

<sup>7</sup> For 2016, the Ministry of the Interior provides two different sets of statistics for rejected entries. The standard annual statistics present 403 refusals of entry and 1,724 repulsions between January and November 2016. For the same period of time, the Ministry provides different figures in reply to a parliamentary interpellation (BMI-10034/AB, 2016). According to this, 3,723 persons were refused entry at the Austrian borders, including the Vienna International Airport. A majority, namely 3,225 persons, had to return to Slovenia. The reason for this might be a difference in definitions or calculation methods.

<sup>8</sup> Official statistics provided by the BMI do not list which country persons had to return to following the respective measures.

Hong Kong, Cape Verde, Macao, Macedonia, Moldova, Montenegro, Pakistan, the Russian Federation, Serbia, Sri Lanka, Turkey, and the Ukraine.

Austria has concluded bilateral readmission agreements with a total of 22 states. Three of these readmission agreements exist with the third countries Kosovo, Nigeria and Tunisia. The remaining agreements concern the EU member states Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, the Czech Republic and the associated states Liechtenstein and Switzerland.

In 2016, the Ministry of the Interior presented numbers on Austrian readmissions of third country nationals from neighbouring countries, showing that 983 persons were readmitted from Italy, 149 from Germany, 47 from the Czech Republic, 15 from Switzerland, 15 from Slovenia, and 10 from Hungary (BMI-9933/AB, 2016).

## **7.2. Establishment of identity**

Identification procedures associated with border controls have become increasingly detailed in recent years with a particular focus on data gathering and enhanced processing through multiple databases. The 2013 FNG-Adaptation Act (No. 68/2013) allowed for the use of electronic devices for the collection of images and audio material at border control posts. It also stipulates the authorities' right to take fingerprints of persons where there is well-founded doubt on their identity and to feed data into the Eurodac and the Visa Information System. Since 2014, an Integrated Administration of Aliens permits the BFA to conduct queries beyond the asylum procedure database into technically separate databases such as the Central Aliens Register or the Schengen Information System (Lukits, 2017, p. 40). The 2016 (No. 24/2016) Act amending the GrekoG and the BFA-VG also permits for queries in the Central Aliens Register using photos of persons to be identified.

Technological equipment at airport border crossings was further expanded with the installation of eGates, which are automatic border control devices matching travelling documents with biometrical data at airport gates. In 2014, the EU Fast Pass Project was incorporated under a test operation framework in Vienna (EMN, 2015, pp. 21-22).

Regarding persons seeking to apply for asylum, the 2015 Aliens Law Amendment Act (No. 70/2015) introduced a critical novelty. Persons who refuse to have their fingerprints taken accordingly risk being withdrawn from a suspensory effect of their complaint to a rejected asylum application. This provision transposed the recast Asylum Procedure Directive (2013/32/EU). The 2018 Aliens Law Amendment Act (No. 56/2018) furthermore enables authorities to inspect geo-data from asylum seekers' digital devices in case of doubts with regard to their identity, their country of origin or their travelling route.

### 7.3. Annual quota for asylum applications

In spite of the principle of non-refoulement, the 2016 Amendment Act (No. 24/2016) introduced a unilateral quota for the annual admission of persons to the asylum procedure.<sup>9</sup> Under the title of “exceptional provisions for the maintenance of public order and the protection of inner security during the enforcement of border controls” (section 5), the law allows the federal government (together with the main committee of the National Chamber) to pass a decree suspending further processing of asylum applications outside of temporary border control posts and registering points of the provincial LPDs. Following an examination of the enforceability of a repulsion or denial of entry without violation of the non-refoulement principle, persons could then be easily returned to the neighbouring country (bmi.gv.at, 2016, pp. 82-83). Threats to public order and internal security have thereby been justified with reference to “the number of foreigners applying for international protection” (Section 36, 2016 Amendment Act, No. 24/2016) and the functioning of state systems. Accordingly, annual upper limits of new asylum applications for the following four years were introduced: 37,500 in 2016, 35,000 in 2017, 30,000 in 2018 and 25,000 in 2019. Until early 2019, the upper limit has never been reached and thus, no decree has been passed as of today. Legal scholars and NGOs, however, have issued grave concerns about the constitutional conformity of this law.

Agenda Asyl, a national network of refugee protection NGOs, referred to it as an “erosion of EU law and fundamental human rights” (Agenda Asyl, 2017, p. 2) and argued that such a policy must not be replicated by other EU member states. An evaluation report by two experts on international and European law, Bernd-Christian Funk and Walter Obwexer (2016), concluded that the quota presents a legal novelty. They argue that EU law does provide for the option of passing emergency decrees for the purpose of sustaining public order (Art. 78 TFEU) and that such threats indeed may exist during periods of temporary border controls, which in turn have to be permitted by the Commission in accordance with the Schengen Border Code. According to these legal scholars, this would also place constraints on the general duty of at least having to consider an application for asylum, which has to take place with an unreserved adherence to the fundamental rights of private and family life and non-refoulement. In this vein, immediate repulsions to neighbouring countries would be possible unless ECJ decisions suggest the possibility of chain-refoulement due to deficiencies in a member state’s asylum system. Another legal scholar, Peter Hilpold (2017), takes a more critical stance, arguing that Art. 78 TFEU cannot stand in opposition to the Geneva Convention and the Common European Asylum System, which is based on the Convention and its core legal principles. Likewise, an interpretation according to which the Commission’s approval of Schengen exemption provisions also implies an acknowledgement of distorted public order, would present an invalid conflation of the Schengen and the Dublin regimes. According to Hilpold (2017, p. 79), a unilateral quota contradicts basic principles of human rights law and is not sufficiently supported by international and European law. Although the European Commission issued concerns about the early plans, arguing that “such a policy would clearly be incompatible with Austria’s

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<sup>9</sup> In public and political discourse, this provision has often been discussed under the term “upper limit” (*Obergrenze*) or “emergency decree” (*Notverordnung*).



obligations under European and international law” (Dimitris Avramopoulos; cited in: Salzburger-Nachrichten, 2016), no lawsuit has been initiated upon the introduction of the amendment act.

## 7.4. Stakeholder discussion II

While the interviewed experts had different reasons for their concerns about and critique of the reintroduction of systematic border controls and fortification measures along borders of federal territory, they share the conclusion that this dimension of border management has had only modest effects on the stocks and flows of irregular migrants and persons seeking to apply for asylum. Accordingly, the public politicization of borders is considered to be rather of a symbolic nature, mainly operating in terms of signals of deterrence.

The expert on asylum law and refugee protection criticized the lack of independent and systematic border monitoring (especially given the Schengen exemption provisions). However, based on own inquiries, the expert assumes the quantitative scope of apprehensions to be rather modest. In this regard, the effectiveness of increased border controlling may be called into question. Yet, considering existing jurisdiction on pushbacks and the critical human rights situation in Hungary, this expert underlined the lack of information on the different ways in which persons are treated, depending on their country of origin and whether or not they wanted to apply for asylum. Concerning the annual quota for asylum applications, the primary rationale was argued to be the increased use of the tools of repulsion and pushback.

The expert on border management showed understanding for reinforcement measures at border check points and surrounding areas in the light of high numbers of arrivals during 2015. However, the expert considers the prolongation of Schengen exemption provisions to be unnecessary and at best a tool towards exerting pressure on neighbouring countries. The inevitable permeability of borders leads both experts to highlight that effective control measures are de facto of an international or supranational kind, whereby our expert on border management advocated fostering an integrated European approach that anticipates migratory movements before they set in.

Our respondent from the Ministry of the Interior (E11\_070219) argues that migration controls at the border generally

depend on whether or not the reintroduction of internal border controls has been ordered in accordance with Art. 25 ff SBC. In the case of border controls, persons may be refused entry in the course of the border control or in the event of an apprehension within the border area. In the case of apprehension outside the border control area in the other federal territory, it must be checked whether a repulsion to the neighbouring country from which the person illegally entered the country by land is possible. [...] If an asylum application is filed, the person must in any case be presented to the Federal Office of Immigration and Asylum (BFA) and the person is granted temporary authorisation to reside within federal territory.

According to the Ministry of the Interior, compliance with these provisions is ensured through *“the monitoring of police activity at the border [which] is carried out by the relevant organisational units (LPD, BFA). [...] Any legal complaints arising shall be recorded and dealt with in accordance with national laws and regulations.”* (E11\_070219)

**Key EU legislation**

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)

Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017 amending Regulation (EU) 2016/399 regarding the reinforcement of checks against relevant databases at external borders

Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011

Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II)

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac'

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence

**8. Internal controls and detention**

The Austrian Ministry of the Interior provides annual statistics on intercepted persons, namely “all persons that entered or reside illegally, that have been smuggled or are smugglers themselves” (Bundeskriminalamt, 2018, p. 5). Here, figures strongly coincide with asylum applications, as a large share of asylum seekers enters illegally due to lacking legal pathways beyond relocation, resettlement or family reunification. Accordingly, 21,232 persons were detected in 2011; the climax was reached in 2015 with 94,262 persons and declined by 2017 to 27,753 (ibid., p. 6). Although reliable, these statistics do not reveal much about the population that is entering in actuality or residing without any kind of permit, given that many illegally entered persons are at least admitted to the asylum procedure.

However, the asylum system presents a major ex post facto source of irregularity. Over the last decade, the number of asylum seekers with a final negative decision constantly remained far above that of returns, both voluntary and forced (Rosenberger, Atac, Schütze, 2018, p. 3) (see Table 1).

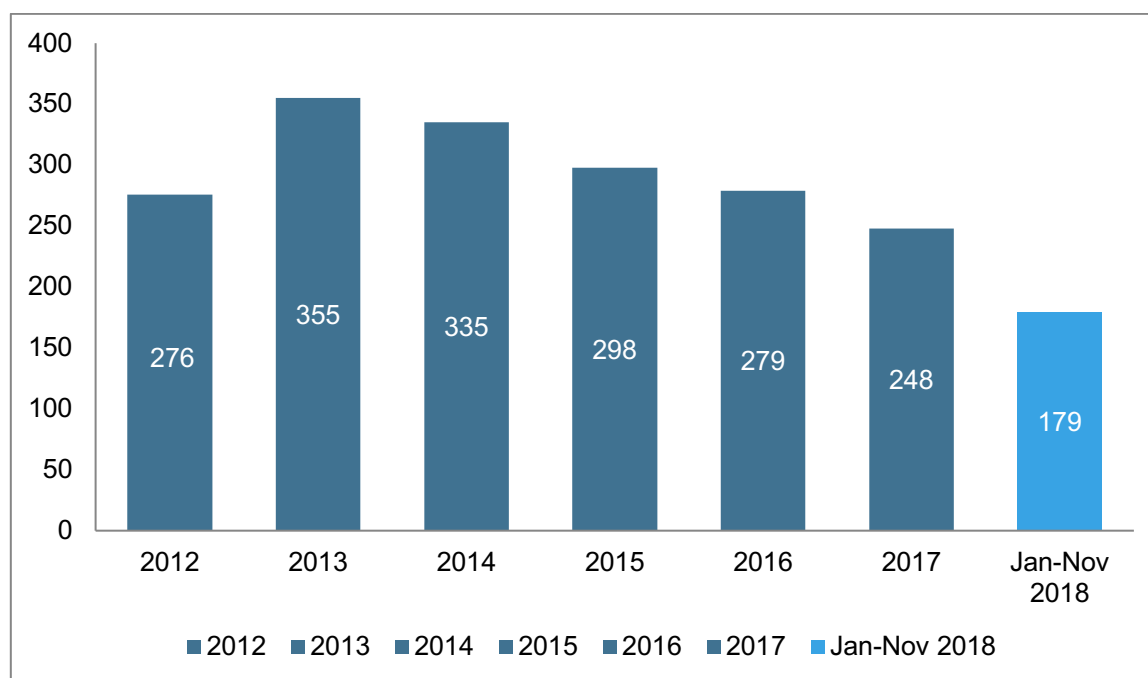
**Table 1: Juxtaposition of the total number of final negative decisions on international protection and other (non-asylum related) residence terminating decisions with completed returns**

	2015	2016	2017	Jan-Jun 2018
Final negative decisions on international protection	24,017	26,698	28,818	16,544
Non-asylum residence-terminating decisions	6,668	6,035	7,096	3,391
Completed returns (voluntary and forced)	8,365	10,677	11,974	na

Source: own compilation based on bfa.gv.at (2018) and BMI-1001/AB (2018).

Furthermore, a very minor share of persons who cannot be returned to their country of origin is granted toleration (*Duldung*)<sup>10</sup>. Federal authorities do not provide permanent statistics, yet the answer to a parliamentary interpellation of 2016 (BMI-7947/AB, 2016) reveals that the number of issued toleration cards is only very small (see Figure 3).

**Figure 3: Total number of issued toleration cards**



Source: own compilation based on BMI-7947/AB (2016) and BMI-2483/AB (2019).

In this regard, much of the reforms in the realm of internal controls targeted persons in the asylum procedure or upon rejection of the application. Control over residence and movement

<sup>10</sup> Persons with a return decision who cannot be returned on grounds of legal, technical or policy-related obstacles can be granted toleration status for one year, which grants basic social rights.

has been expanded from persons in the admissibility procedure to delinquent asylum seekers and rejected asylum seekers. Detention provisions were further tightened with increasing maximum duration, a multiplication of grounds for and forms of detention.

## 8.1. Restrictions on movement and residence of asylum seekers

The Aliens Law Amendment Act 2017 (No. 145/2017) expanded the group of persons that can be legally ordered to remain within Basic Welfare Support Accommodation. Initially confined to persons in the admissibility procedure, it now includes asylum seekers, where reasons of “public interests, public order or a fast proceeding of an application” (Section 15b AsylG) prevail. This mainly applies to delinquent asylum seekers or persons who have fallen under criminal suspicion. Violations to comply can be fined with 5,000 to 15,000 EUR or detention. Persons who have not even been admitted to the asylum procedure and who are violating their duty to return can lose a part of their social security benefits.

This Amendment Act also introduced the possibility of ordering rejected asylum seekers to move to a return centre (Section 57 FPG). Those are existing asylum accommodations of the federal government, which have been repurposed. They no longer accommodate people at the beginning of the asylum procedure, but those with a negative asylum decision who are obliged to return. Counselling and social benefits for these people are only available in the return facilities. Return centres are not detention centres. People can move freely, however, they are located in remote areas and there are territorial restrictions to remain in the political district. Four facilities have thereby been dedicated to the accommodation of this group: one in Fieberbrunn (Tyrol), one in Schwechat (Vienna Airport), one in Krumfeld (Carinthia), and one in Steinhaus (Styria).

According to the Interior Ministry’s answer to a parliamentary interpellation, restrictions on the place of residence in accordance with Section 57 FPG have been ordered 1,226 times by January 6, 2019 (BMI-2483/AB, 2019). The reply also reveals that in 2018, 112 persons were accommodated in the return centre in Fieberbrunn, of which 13 were forcibly returned to another country, and 15 departed voluntarily (largely persons from Bosnia and Herzegovina).

## 8.2. Detention

The central grounds for detention pending return (*Schubhaft*) are stipulated under Section 76 of the FPG (No. 100/2005). Detention pending return may be ordered to secure proceedings for the issuance of a measure terminating the stay or to secure a forced return. Furthermore it can be applied in accordance with the Dublin III Regulation.

However, detention can only be ordered if there are no lenient alternatives and it exclusively relates to persons above the age of 14.<sup>11</sup> Such lenient means can include an order to remain

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<sup>11</sup> Minors between 7 and 14 can explicitly not be held in detention. Following the Aliens Law Amendment Act 2015 (No. 70/2015), lenient alternatives ought to be provided for all minors, that is, persons up to the age of 18.

in asylum accommodation facilities or other facilities determined by the BFA, a periodical duty to report at LPD posts as well as financial deposits.

For the decisions on whether detention is proportionate, the consideration of “risks of abscondence” is particularly important. In 2016, the High Administrative Court ruled that detention pending return in Dublin cases may no longer be imposed, because the Austrian Aliens Police Act (FPG) did not specify what was to be understood by risks of abscondence in accordance with Art. 2 of the Dublin III Regulation (604/2013). Consequently, the Minister of the Interior issued a decree allowing detention pending return to be imposed again on Dublin cases with immediate effect. Later the law was amended. Section 76 Art. 3 of the FPG now lists all criteria for assessing risks of abscondence and generally states that if certain facts justify the assumption that a person will evade the proceedings, or the return, or that the person will make the return considerably more difficult, a risk might be given. The following considerations constitute four important aspects out of a total of 9 assessment criteria:

- (1) whether the foreigner is involved in the procedure for the adoption of a measure terminating the stay, or is circumventing or obstructing the return or deportation;
- (2) whether the foreigner has re-entered federal territory in violation of an upright entry ban, an upright residence ban, or during an upright order to remove him or her from federal territory;
- (6a) whether, on the basis of the result of the interrogation, the search or the identification treatment, it can be assumed that another Member State is responsible under the Dublin Regulation, in particular if the foreign national has already lodged several applications for international protection in the Member States, or the foreign national has supplied false information;
- (9) the degree of social anchoring in Austria, in particular the existence of family relationships, the pursuit of legal employment or the existence of sufficient means of subsistence as well as the existence of a secure place of residence.

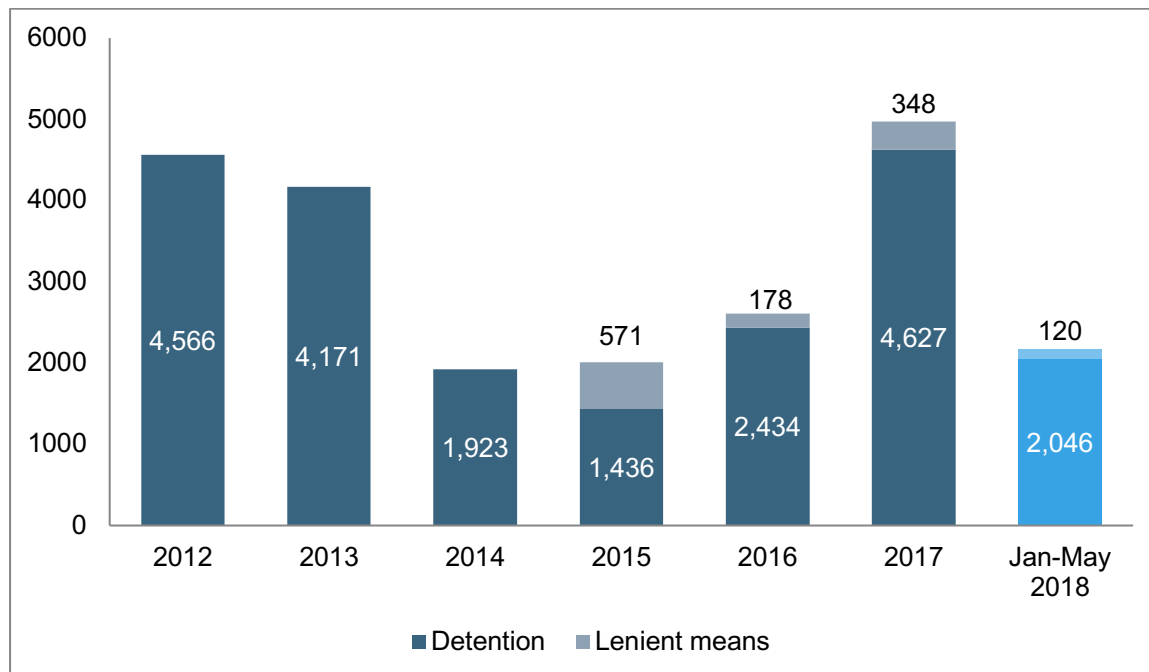
The duration of detention is not subject to individual administrative decisions but directly derives from Section 80 of the FPG (No. 100/2005). Generally, persons between 14 and 17 years may be held in detention for a maximum of three months; adults – that is, persons aged 18 and older – for a maximum of six months (this also applies to those who are still awaiting a final decision on the legitimacy of their residence termination as stipulated under Section 51 of the FPG).

Under the 2017 Amendment Act (No. 145/2017), possibilities for a maximum duration of detention at the EU-limit of 18 months (2008/115/EC) were created. Constellations leading to this may for example include cases in which the establishment of identity is not possible, particularly with regard to the obtainment of travelling documents, but also cases in which a person resists coercive policing acts during a forced return or in which he/she had already attempted to obstruct a return.

Persons held in detention have a right to legal remedy in accordance with Section 52 of the BFA-VG (No. 87/2012). This means that they are to be provided with a legal counsellor free of cost and may appeal to the BVwG, which has to decide within one week whether detention is to be sustained or terminated. Free legal counselling as well as time limitations for minors

were introduced with the transposition of the EU-Return Directive (2008/115/EC) under the Aliens Law Amendment Act (No. 38/2011).

**Figure 4: Total number of detention orders and lenient means upon a decision towards termination of residence according to Section 76 FPG**



Source: own compilation based on BMI-1001/AB (2018) and Heilemann & Lukits (2017, p. 45).

Since 2014, the number of annual detention orders has been rising continually (Figure 4). Apart from detention pending return, Art. 34 of the BFA-VG stipulates the possibility of apprehension orders (*Anhaltung mittels Festnahmeauftrag*), according to which persons may be detained for up to 72 hours. This form of detention does not require any reference to risks of abscondence and is usually applied if a person does not comply with obligations to return within the given time limit. According to the Interior Ministry's answer to an interpellation (BMI-1001/AB, 2018), figures are only available as from the beginning of 2016 (Table 2).

**Table 2: Total number of apprehension orders for the purpose of securing return based on Section 34 BFA-VG**

	2015	2016	2017	Jan-May 2018
Apprehension orders for the purpose of securing return	na	2,208	4,842	2,409

Source: BMI-1001/AB (2018).

Persons can furthermore be detained for the purpose of repulsion. The 2016 Amendment Act (No. 24/2016) introduced extensions of time limits for this matter from five days initially to 14 days currently. As with detention for return, lenient means must be taken into consideration and appeal to the BVwG is possible.

In Austria, detention is carried out in police facilities dedicated to administrative procedures (*Polizeianhaltezentren-PAZ*). In total, there are five facilities for the long-term purpose of immigration detention (see Table 3). In 2014, a new Immigration Detention Centre (specifically dedicated to detention pending return) was opened in Vordernberg, Styria. This facility is run by the private security firm G4S whose staff assists police officers for daily operations.

**Table 3: Names and capacity of the four largest long-term detention centres**

Detention Centre	Capacity
Vienna Roßauer Lände	379
Vienna Hernalser Gürtel	292
Vordernberg Immigration Detention Centre	193
Zinnergasse (for families and children)	50
<b>Total</b>	<b>914</b>

Source: compilation by ECRE (2018), based on figures by the Court of Auditors (2016).

### 8.3. Policing within federal territory and workplace inspections

In 2011, the Federal Ministry of the Interior presented a set of measures towards detecting persons residing irregularly within Austrian territory (bmi.gv.at, 2011). These measures comprised the following:

- intensified controls at hot spots, namely in border areas, on main traffic routes, on construction sites, in the tourist industry and in larger cities,
- tightened administrative requirements upon signs of a possible abscondence through the deposit of documents or cash money, regular reports to police stations,
- increased capacities for the detection of aliens through immediate calls for arrest and location queries through social media,
- increased use of the Central Register of Residents (*Zentrales Melderegister – ZMR*), in which all persons registered in Austria are listed with their main (or secondary) place of residence. It contains data on identity, such as name, gender, date of birth, and nationality. Given the fact that landlords or schools often request files on their place of residence, irregular migrants sometimes have no other option but to register at their local administration. Data of persons who abscond during the asylum procedure or during a residence terminating procedure is now fed into the ZMR and compared with the registered persons.

Concerning workplace inspections, the reply to a parliamentary interpellation of 2018 (BMI-367/AB) shows that the total number of criminal procedures initiated upon inspections of the finance police has remained relatively stable between 2013 and 2017.

**Table 4: Total number of initiated criminal procedures upon detection of illegal employed against selected groups**

Status	2013	2014	2015	2016	2017
No status	5,246	8,612	6,153	6,141	3,250
Asylum-seeker	637	612	452	674	569
Benef. of Asylum	59	56	68	61	61
Third Country Nationals	3,264	3,618	3,283	4,269	3,084
EU Citizens	2,507	4,206	6,013	7,439	6,326
Other	6,322	5,344	4,893	5,653	3,295
<b>Total</b>	<b>18,035</b>	<b>22,448</b>	<b>20,812</b>	<b>24,237</b>	<b>16,585</b>

Source: own compilation based on (BMI-367/AB, 2018)

## 8.4. Stakeholder discussion III

Regarding restrictions on movement and residence of different groups of asylum seekers, the interviewed experts had diverging opinions. Our expert on border management (E09\_071118) pointed out that such measures are necessitated by sluggish bureaucratic systems. Slow procedures and data protection provisions preventing rapid profile exchanges would accordingly allow for asylum shopping, not only between EU-member states but also within Austria. Thus, he shows understanding for certain degrees of spatial confinement as a means of rendering the asylum procedures more efficient and preventing persons from moving between provinces in search for better opportunities.

By contrast, our expert on asylum law and refugee protection (E07\_0311018) heavily criticized legally enforced restrictions of residence to federal accommodation facilities, particularly in the case of rejected asylum seekers, as being a deprivation of liberty. Although not placed under detention, such persons would de facto be forced to stay within the vicinity of federal accommodation facilities in remote locations, which are often detached from public infrastructure. Given this recent development, it is furthermore not clear how authorities deal with children and families. Concerning detention, the expert underlined how, based on her experience, the Austrian authorities generally preferred short term apprehension orders prior to returns instead of legally more complicated detentions. In this regard, the expert was less concerned about an increased maximum duration (since the previous 6 months had also rarely been exhausted), but pointed instead to restricted conditions for minors from the age of 14, who can now be held in detention for three instead of two months.



## 9. Return

In Austria, the return (*Abschiebung*) of third country nationals is regulated by the FPG (100/2005). Section 52 FPG stipulates that authorities may enact return decisions (*Rückkehrentscheidung*) on third country nationals who unlawfully reside within the federal territory. This may apply to asylum seekers with a final negative decision, but also to persons whose legal status has expired or has been withdrawn (Trauner & Slominski, 2014, p. 155). A return decision may be issued in conjunction with an entry ban.

The Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning third country nationals residing illegally was transposed with the introduction of the 2011 Aliens Law Amendment Act. However, whereas the initial provision stipulated a compulsory conjunction of return decisions with entry bans, the Administrative High Court ruled in 2012 that this stood in conflict with EU law (2008/115/EC). Following the 2013 FNG-Adaption Act (No.68/2013), Section 53 of the FPG now stipulates a mere possibility of including entry bans of up to five years upon consideration of individual circumstances. This legal amendment also transposed provisions (2008/115/EC) that allow ordering return decisions even after a person's departure.

A return decision does not imply the execution of a forced return. Instead, persons are preferably granted a general time limit of 14 days to leave the country as provided under the category of voluntary return<sup>12</sup>. Voluntary return may include cases of departure under a readmission framework (often involving certain costs), or of persons leaving the country independent of any state measures, merely informing respective authorities.

Return in terms of a forced return is stipulated under Section 46 FPG (No. 100/2005), which lists four constellations leading to a supervised enactment of return, namely cases in which the preservation of public order and safety appears to be necessary, in which the addressee of a return decision has not departed in time, in which authorities are apprehensive of a possible violation of the duty to return, or in which a person entered federal territory in spite of an entry ban or an exclusion order. Furthermore, a return must be executable. Obstacles can be of legal, technical or political kind. This may encompass a lack of travel documents, established family life in Austria, health problems, technical defects in the transfer, or the absence of a readmission agreement.

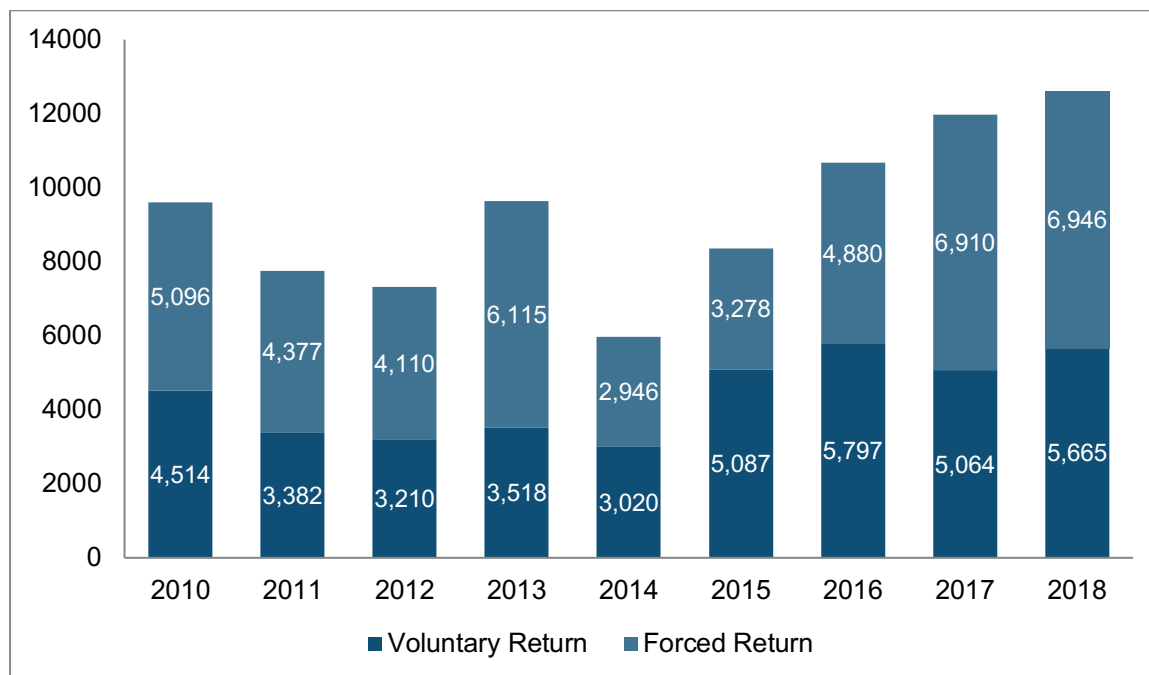
Since 2014, the total number of completed returns has been rising steadily. During an emergency driven 2016 "Asylum Summit" with representatives from the federal state, the federal provinces, and the municipalities, it was agreed that increased efforts towards return were to be made. The Ministry of the Interior set the goal of enforcing 50,000 returns by 2019 (Kurier.at, Flüchtlinge: 50.000 Abschiebungen bis 2019, 2016). In 2017, 11,974 returns were completed and most recent figures for 2018 show another increase with a total of 12,611 returns (see Figure 5). However, the figures of actually completed returns have constantly remained far below the number of residence terminating decisions and final negative asylum decisions over the years. Based on a ten year average, this so-called deportation gap (Gibney,

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<sup>12</sup> Here, the term "voluntary return" is used in reflection of legal terminology. However, certain forms of voluntary return do not necessarily entail that a person leaves a country due to personal conclusions, but may rather include indirect forms of control or coercion.

2008) has been estimated at around 3,900 persons per year by other Austrian migration scholars (Rosenberger, Atac, & Schütze, 2018). Given the small numbers of issued toleration cards (as mentioned in the previous chapter), this means that every year, several thousand persons go underground.

**Figure 5: Total number of completed forced returns (including Dublin cases) and voluntary returns, 2010-2018**



Source: own compilation based on statistics of bfa.gv.at (2018).<sup>13</sup>

Furthermore, recent data presented by the Ministry of Interior (BMI-2483/AB, 2019) shows that among all forced returns (Dublin cases not included) a large share are in fact European or EU citizens (see Table 5).

<sup>13</sup> Federal statistics provided by the BFA do not state which groups are covered under voluntary return. Accordingly, the figures might contain persons who left the country although they were not ordered to leave, such as asylum seekers or beneficiaries of international protection.

**Table 5: Forced returns (Dublin cases not included) listed by citizenship of returnees**

<b>Citizenship</b>	<b>2016</b>	<b>2017</b>	<b>Jan-Nov 2018</b>
Slovakia	341	418	532
Serbia	164	301	478
Hungary	357	322	410
Romania	362	340	348
Nigeria	76	219	280
Poland	115	139	242
Georgia	36	80	216
Afghanistan	2	117	166
Bulgaria	83	87	96
Kosovo	130	91	69
<b>Top 10</b>	<b>1,666</b>	<b>2,114</b>	<b>2,837</b>
<b>Other</b>	<b>623</b>	<b>1,048</b>	<b>1,417</b>
<b>Total</b>	<b>2,289</b>	<b>3,162</b>	<b>4,254</b>

Source: (BMI-2483/AB, 2019).

Since 2011, the return of third country nationals, in particular rejected asylum seekers, has been fostered through at least three types of measures: increased political and operational capacities, return incentives and the introduction of return centres.

## 9.1. Political and operational capacities enabling return

Political and operational capacities were enhanced through the expansion of the list of safe countries of origin. The Regulation on Countries of Origin (No.177/2009) was amended once in 2016 and twice in 2018 expanding the list of safe third countries. Currently the list encompasses 17 countries: Bosnia and Herzegovina, Kosovo, Mongolia, Macedonia, Montenegro, Serbia, Albania, Ghana, Morocco, Algeria, Tunisia, Georgia, Armenia, Ukraine, Benin, Senegal, and Sri Lanka. These countries are considered to be safe, based on the assumption that there will be no political persecution or inhuman or degrading punishment or treatment. Here, the suspensory effect of complaints against a rejected asylum application can be withdrawn. Also, as applicants from these countries largely do not pass the admissibility procedure, they are affected by the 2017 Amendment Act (No. 145/2017), which stipulates that violating a duty to return leads to a partial loss of social security benefits.

A group that has received particular political and public attention are persons from Afghanistan, due to high numbers of asylum applications since 2015 and a comparatively high rejection rate. In 2017 and 2018, two facilitating factors added to increased return efforts regarding Afghan citizens. Firstly, the 2016 joint declaration by the EU and Afghanistan allowed for cooperation among responsible authorities. Returns were largely conducted under FRONTEX Joint Return Operations<sup>14</sup>, whereby the former Minister of the Interior highlighted Austria's leading role in European return initiatives, arguing that the country has the highest return rate per head of population (Wolfgang Sobotka; cited in: Kurier.at, 2017). The second facilitating

<sup>14</sup> The Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air was transposed under the 2005 Amendment Act (No. 157/2005).

factor was an expert commission's report on behalf of the Federal Administrative Court which concluded that "no grounds were found which would prevent the return of single males to Afghanistan or would represent a serious difficulty or entail a risk for such returnees" (Mahringer, 2017, p. 54; cited in: Heilemann & Lukits, p. 18). This was met with heavy public criticism of refugee NGOs.<sup>15</sup> A prominent campaign against returns to Afghanistan was initiated under the slogan "Sicher Sein" (meaning "being safe" as well as "being sure" in German). It is continually supported by almost all major NGOs active in the field of refugee protection. They called upon international reports and underlined that in 2017 alone there were more than 10,000 civilian victims in Afghanistan due to acts of war and terrorism (Diakonie, 2018).

Austria also used EU-frameworks for return and readmission. The country joined the project of European Integrated Return Management (EURINT), exchanging knowledge and best practices among member states (EMN, 2014, p. 27). By 2016, it also became member of the European Reintegration Network (ERIN) providing assistance for a total of 265 returned migrants in their countries of origin during the first year of the initiative. Beside these networks, bilateral action was further fostered. Based on the EU-readmission agreement, an implementing protocol was signed between Austria and Bosnia-Herzegovina in 2012. In line with the Stockholm Programme, readmission agreements were prepared for Pakistan in 2013. Yet, as Pakistan authorities did not welcome signing the implementing protocol, Austria continued a "well-functioning cooperation on readmission matters with the Pakistani Embassy in Vienna and the Ministry of the Interior of Pakistan located in Islamabad" (EMN, 2014, p. 19).

## 9.2. Voluntary return measures

Concerning incentives for return, the 2015 Amendment Act (No.70/2015) legally codified professional consultation on return and allowed the BFA and the BVwG to inquire whether a rejected asylum seeker has engaged in compulsory consultation. In 2016, the federal government initiated a campaign that included advertisements on voluntary return and one-time financial support of EUR 1,000 per returnee. Besides such economic incentives, the Aliens Law Amendment Act 2017 (No. 145/2017) also introduced considerable indirect coercive measures. This included provisions that allow for orders directed at asylum seekers to take up residence in return centres upon a final negative asylum decision (as elaborated in the previous chapter). The legal amendment also enabled authorities to order rejected asylum seekers to apply for traveling documents at respective embassies and to contribute to the identification procedure. In line with the EU Commission's recommendations on making returns more effective (European Commission, 2017), this provision came in conjuncture with administrative penalties. Non-cooperation can accordingly lead to detention for up to four weeks in accordance with Section 5 of the Administration Enforcement Act (No. 53/1991). Likewise, fines of 5,000 to 15,000 EUR or six weeks of detention were introduced for persons failing to return within given time limits.

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<sup>15</sup> In 2018, the Regional Court for Civil Matters in Vienna revoked Karl Mahringer's status as a court-certified expert as it had doubts as to whether he was "in the position to ascertain the basics required for the provision of expert opinions in the aforementioned field of expertise and to draw appropriate, verifiable expert conclusions" (derStandard.at, 2018).

### 9.3. Implementation of the Dublin Regulation

Under national law, the Dublin III Regulation is referenced under Art. 5 AsylG and Art. 2 BFA-VG, stating that authorities issue an inadmissibility decision if Austria is not responsible for conducting an asylum procedure.

Concerning the implementation of the Dublin III Regulation, the most relevant grounds applied are (ECRE, 2018):

- a EURODAC hit,
- a visa from another EU member state in the passport,
- the statement of person that he/she entered the country via another EU member state,
- circumstantial evidence indicating entrance via another EU member state (for example in the course of an apprehension in the border area or the inspection of geo-data from digital devices).

The refugee-rights NGO ECRE (2018), reports that whereas, prior to 2015, the BFA rarely consulted authorities of other member states unless there was clear evidence, this has changed in recent years. “Requests were systematically addressed to Slovenia, which systematically responded that the relevant persons were not known. Requests were also sent to Croatia based on the assumption that applicants crossing through the Western Balkan route entered the EU for the first time through Croatia” (ECRE, 2018).

Transfers are usually enforced and carried out without informing the asylum applicant beforehand. Unless lenient means are applied, persons are brought to a detention centre, usually for less than 48 hours (see Table 5). ECRE (2018) also critically notes that in cases where asylum applicants require special care, foreign authorities are informed only one week in advance.

As a reference, according to ECRE (2018), Austria issued a total of 10,490 requests in 2017. Thus, only about 36 per cent of all requests were successful in that year.

Regarding incoming requests and conducted Dublin returns, the German Ministry of the Interior reports that in 2017, Germany sent 2,132 requests to Austria, of which 1,029 were approved and only 323 persons were eventually returned (Drucksache-19/694, 2018).

Regarding future policy plans at the European level, the Ministry of the Interior issued the following statement as a response (BMI-1971/AB, 2018) to a parliamentary interpellation:

From a national point of view, we welcome approaches that could lead to a more efficient Dublin system, such as the stable competence of a Member State once responsible, and measures to combat secondary migration. Models for an obligatory distribution of asylum seekers within the European Union, as well as by other EU Member States, are rejected. The guidelines of the European Council of 28 June 2018 call for consensual solutions and a sustainable change towards a crisis-proof system. The Dublin Regulation should be seen in the context of the overall approach.

**Table 6: Total number of completed Dublin returns, listed by destination country<sup>16</sup>**

<b>Member State</b>	<b>2016</b>	<b>2017</b>	<b>Jan-Nov 2018</b>
Italy	820	1,610	1,046
Germany	389	925	605
France	154	181	75
Croatia	455	79	51
Czech Republic	37	74	51
Poland	206	203	47
Sweden	44	73	40
Switzerland	63	73	39
Spain	53	58	25
Bulgaria	140	99	12
<b>Top 10</b>	<b>2,361</b>	<b>3,375</b>	<b>1,991</b>
<b>Other</b>	<b>238</b>	<b>386</b>	<b>177</b>
<b>Total</b>	<b>2,599</b>	<b>3,761</b>	<b>2,168</b>

Source: (BMI-2483/AB, 2019)

## 9.4. Stakeholder discussion IV

Both interviewed experts criticized the Dublin system for its practical deficiencies and its normative premises. The burden on southern member states, combined with a difficult macroeconomic situation, does not make it likely for them to take asylum seekers back. Our expert on border management (E09\_071118) pointed out both the lack of resources for gathering and processing data in countries like Greece, and slow bureaucratic processes of data exchange. Our expert on asylum law (E07\_0311018) on the other hand pointed out how – from an asylum seeker’s point of view – the Dublin system prompts considerable questions of justice as long as recognition rates vary greatly among member states. Given the fact that the chances of obtaining asylum status seem to depend on a person’s nationality and on the host country’s ties to the country of origin (and on its sensitivity to problems in that country) as well as on different traditions in decision-making practices, asylum seekers should be allowed to lodge their application where they wanted to.

Regarding returns to countries of origin, Afghanistan was a recurring topic. Both experts highlighted that readmission agreements, such as the one between the EU and Afghanistan, have considerable impact on the return rates of respective citizens. In this case, there was consensus that Afghanistan could hardly be considered a safe country, leading to the conclusion that the consideration of political and administrative barriers to return prevailed over concerns for individual situations. This was also underlined by our border expert with reference to Afghan citizens who have spent their entire life in Iran and are nonetheless sent to Afghanistan where they have no ties or perspectives. While the expert supports reforms that remove suspending effects of return decisions, he views the establishment of identity, and cooperation with authorities in host countries as the two biggest hurdles for returns. Our expert on asylum law and

<sup>16</sup> Since the 2011 judgement of the European Court of Human Rights (*M.S.S. v Belgium and Greece*), Austria suspended further Dublin transfers to Greece.

refugee protection on the other hand pointed out that the federal government's heavy politicization of return in conjunction with certain migrant groups has an impact on street level bureaucrats that make asylum decisions. The public communication of returning rejected asylum seekers as a major goal of federal politics would lead to corresponding expectations on the side of those who make individual decisions.

### **Key EU legislation**

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally residing third country nationals

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 - on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/ 2004 and Council Decision 2005/267/EC

Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third country nationals who are subjects of individual removal orders

Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third country nationals, and repealing the Council Recommendation of 30 November 1994

Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air

## 10. Conclusion

Located in the centre of the Schengen Area and completely surrounded by other Schengen countries since the EU's Eastern Enlargement in 2007, Austria's federal territorial borders to some extent lost importance as sights of migration control over the last decades. This changed in 2015, when in that year alone, thousands of refugees crossed the Austrian territory to move on to other EU destinations, most notably Germany, and almost 90,000 crossed the Austrian border and directly applied for asylum. This led to a series of legal changes both regarding territorial borders and the setting up of internal boundaries for asylum seekers and other third country nationals aiming at regaining control over a situation seemingly getting out of hand. Beyond that, the events of the year 2015 had an outstanding impact on the political landscape. Migration and asylum were highly salient topics during the national elections in late 2017, which resulted in a new Austrian government that particularly pushes the topics "order and security".

Regarding the legality of the entrance to Austria, the following groups of persons can be discerned: (1) EEA citizens enjoy freedom of movement, their entry is legal by definition. (2) Third country nationals (with a few exceptions) need a visa for a legal entry, the first-time application has to be lodged outside Austria. (3) Persons seeking asylum, unless admitted through relocation, resettlement, or family reunification, are considered to enter the country illegally and are merely tolerated unless admitted to the asylum procedure.

In recent years, Austria has heavily restricted immigration from third countries via the asylum system, which everyday politics has increasingly been framing as "illegal migration" instead of fleeing, e.g., from war. While intra-EU mobility and different forms of immigration from third countries have been politically targeted to a lesser extent, some control measures certainly have had restrictive side effects on them, too. The most important trends in the regulation of entry and residence encompass the following:

- 1) Concerning entrance to federal territory at some major checkpoints, Schengen exemptions have been introduced in 2015 and prolonged until today, even though the numbers of asylum seekers has been declining rapidly since 2016. Furthermore, soldiers of the Austrian Armed Forces are still active in patrolling southern border areas. At the peak of the so-called refugee crisis, a unilateral quota for annual asylum applications was created, but has not come into force as of today.
- 2) International cooperation with other EU countries and third countries, most notably with states on the Balkans, has been expanded in order to prevent more refugees from coming via the Balkan Route, furthermore targeting irregular migration in general and smuggling in particular. Hungary and Italy are partners when it comes to policing borders.
- 3) Regarding the establishment of identity, new administrative capacities have been created and restrictions within the asylum procedure were introduced. This includes the enhanced inter-operation of various databases, the possibility of inspecting geo-data from asylum seekers' digital devices, or new sanctions for non-cooperation on identification proceedings.
- 4) The return of persons residing unlawfully within federal territory has been fostered with a particular political focus on rejected asylum seekers. Although recent figures of returns show that the implementation largely affects non-asylum-seekers, the federal government



has been pushing for reforms in the asylum system as a means of increasing the number of returns. Therefore, new provisions for the confinement of rejected asylum seekers in return centres were created and conditions of detention were tightened. Readmission agreements and new obligations for cooperation increased administrative capacities to effectively conduct returns.

## **Policy recommendations**

For future policy reforms, we recommend taking into consideration the following aspects:

1. Engagement in reforms of the Common European Asylum System (CEAS): In the long term, new EU policy should aim to achieve an ordered legal entry or admission of asylum seekers to federal territory and aim to prevent secondary movement of rejected asylum seekers. The production of irregularity in the current Austrian and European asylum system must be politically addressed in order to increase governability and minimize the scope of problems arising with regard to administrative procedures, secondary movement and return. In this regard, the Dublin system has also proved to be no longer sustainable.
2. Return to Schengen: Repeated prolongation of controls at border checkpoints should not be used as a durable compensatory mechanism for failures in the asylum system or as a means of tightening the control of irregular migration. This has proved to be expensive and shows only modest effects with regard to repulsions and rejections of entry. During the period of internal controls, independent monitoring of border control procedure should be installed.
3. Regarding irregular migration and smuggling, data exchange and cooperation with neighbouring countries must continue, yet with consideration of human rights obligations of third countries like Serbia, Macedonia, or Bosnia-Herzegovina but also EU Member States like Croatia and Hungary.
4. Increasing legal certainty for persons who cannot be returned could also increase governability of this group and minimize abscondence and secondary movement within the Schengen area – toleration cards are only issued in small numbers. Cooperation with third country governments and authorities must match a close monitoring of the human rights situation in the returnee's country of origin

## Appendix: Overview of the legal framework on borders and migration control

Legislation title (original and English) and number	Date	Type of law	Object	Link/ PDF
<b>Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz – NAG)</b> Federal Act concerning Settlement and Residence in Austria (NAG)	StF: BGBl Nr. 100/2005	Law	Permission and withdrawal of legal residence and settlement permits	<a href="#">RIS</a>
<b>Bundesgesetz über die Gewährung von Asyl (AsylG)</b> Federal Act concerning the Granting of Asylum	StF: No. 100/2005	Law	Asylum applicants and beneficiaries of international protection: criteria on entry, identification, qualification, asylum procedure and return	<a href="#">RIS</a>
<b>Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln (FPG)</b> Federal Act on the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits	Stf: No. 100/2005	Law	Aliens' entrance to federal territory, grounds for rejection, residence terminating measures, return, toleration and the issuance of documents for foreigners	<a href="#">RIS</a>
<b>Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden (BFA-Verfahrensgesetz – BFA-VG)</b> Federal Act on the general rules for procedures at the federal office for immigration and asylum for the granting of international protection, the issuing of residence permits due to extenuating circumstances, deportation, tolerated stay and issuing of stay terminating measures, furthermore the issuing of documents for aliens. BFA Proceedings Act (BFA-VG)	StF: No. 87/2012	Law	Procedures for application for international protection, return, toleration and residence terminating measures	<a href="#">RIS</a>

<p><b>Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über gemeinsame Maßnahmen zur vorübergehenden Grundversorgung für hilfs- und schutzbedürftige Fremde (Asylwerber, Asylberechtigte, Vertriebene und andere aus rechtlichen oder faktischen Gründen nicht abschiebbare Menschen) in Österreich</b></p> <p>Agreement of 15 July 2004 between the federal state and the provinces under Article 15a of the Federal Constitution concerning joint action for the temporary Basic Welfare Support of aliens in need of help and protection in Austria</p>	StF: No. 80/2004	Agreement based on constitutional law	Division of competences of Basic Welfare Support during substantive procedure and distribution of asylum applicants across provinces	<u>RIS</u>
<p><b>Bundesgesetz, mit dem die Grundversorgung von Asylwerbern im Zulassungsverfahren und bestimmten anderen Fremden geregelt wird (GVG-B)</b></p> <p>Federal Act to regulate the Basic Welfare Support of asylum applicants in the admission procedure and of certain other foreigners (GVG-B)</p>	StF: No. 405/1991	Law	Basic Welfare Support during admissibility procedure	<u>RIS</u>
<p><b>Bundesgesetz über die Durchführung von Personenkontrollen aus Anlass des Grenzübertritts (GrekoG)</b></p> <p>Federal Act concerning the implementation of identity checks at the instance of border crossings (GrekoG)</p>	StF: BGBl 435/1996	Law	Border facilities and border controls	<u>RIS</u>

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