



September 2009
AK Position Paper

Communication from the Commission to the
European Parliament and the Council - An
area of freedom, security and justice serving
the citizen COM/2009/0262 final
("Stockholm Programme")

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labor.

Werner Muhm
Director

Executive Summary

Using this Communication, the EU Commission introduces a draft for a programme that should form the basis for the policy in the field of justice and internal affairs for the next five years. The so-called "Stockholm Programme" will be decided by the European Council at the end of the year. This proposed new multi-annual programme in the field "Area of freedom, security and justice", in particular the deliberations on the further development of the migration policy, are of significantly great interest for the Chamber of Labour, as it will have a major impact on the activities of the EU in this sector. It is therefore also of particular importance, even at this early stage, hence long before the presentation of concrete legislative acts, to take a stand.

With regard to the spectrum of migration policy, the Commission once again emphasises the benefit of "circular migration" and takes the view that this model of temporary migration should be promoted. The approach of circular migration precisely targets the introduction of a Europe-wide seasonal migration model. We reject this as such models encourage wage and social dumping and because they typically and wrongly deny the necessity of integration measures.

The Chamber of Labour welcomes the fact that the Commission intends to further extend the mutual recognition

of administrative penalties. It must be guaranteed that administrative penalties concerning the noncompliance of standards, which are relevant for the rights of employees are relevant (in particular in the area of posting), can also be enforced throughout the entire Union.

The AK position in detail

The AK adverts that the number of the persons to be admitted remains a matter for the Member States and that in particular the control over family reunifications is very limited.

On migration policy

In its introduction, the Commission holds the view that “a lot has been achieved” during the past ten years and argues with respect to the migration policy that the foundations for a common migration policy and standards for a balanced and calculable migration had been created. One has to point out at this point that the number of the persons to be admitted remains a matter for the Member States and that in particular the control over family reunifications is very limited.

Under the title “Future Challenges”, the EK ties the expected consistently high migration pressure to the aging of the European population. So far the Commission has failed to provide an explanation for this reasoning.

The business environment is currently dramatically worsening. Even after an economic recovery, the labour market situation in Austria will remain tense, whereby this can also be put down to the increased supply on the labour market from the new EU States (after the end of the transitional periods, Austria is in the middle of the world’s largest open labour market) and to the traditional immigration states, here in particular in the form of family reunification. Therefore, no reason exists to recruit relatively low-skilled

workers or to support recruitment concepts for workers from third countries which have been planned at EU level. This also applies to “mobility partnerships” with third countries.

In this Communication, the Commission once more pleads for the option of a “circular migration” and holds the view that this model of temporary migration should be promoted. The approach of circular migration is aimed at the introduction of a Europe-wide seasonal migration model. The intention is to submit a proposal for a Directive on seasonal work” within the scope of implementing the “Strategic Plan on Legal Migration” by the EU Commission. The Commission wants to submit a relevant draft Directive in September 2009.

The Chamber of Labour comes out against the introduction of a Europe-wide seasonal migration model. Such proposals for legal acts concern short-term temporary work migration and assume that these people, once the work has been done, leave the EU again. This view has not been confirmed in Austria and Switzerland over the past 40 years. At the same time and in particular by relying on the seasonal regulation, the necessary investments into the integration policy were not made (labour market, housing, education).

Parallel to developing the “Stockholm Programme”, Austria intends to draw up a “National action plan for integration”. We think that these efforts should not be thwarted by introducing seasonal migration models at EU level.

We hold the general view that migration policy for labour market purposes, even if it - without a doubt - has a European dimension, is not solely within the scope of the EU’s competence, but that it - on the basis of the heterogeneity of the labour markets alone - should remain the responsibility of the Member States. One has to make sure, however, that the liberal migration policy of EU Member States is not at the expense of other EU States.

In this context it is also important to consider the subsidiary principle as it has to be closely examined whether regulations on labour market admission would not be better taken at national level.

Another important factor is that employees’ representations of interest have to be involved in all plans of the EU Commission at European level, which is currently not the case.

The EK also points out that it needed a “European concept for social integration”: it remains, however, largely unclear what the Commission imagines this to be, in particular as integration policy has been by and large the competence of the Member States. The “European Fund for the Integration of Third country nationals” is for reasons

of allocation alone not in a position to contribute a substantial amount. Language is a significant instrument for both integration and access to labour market and employment. Recommendable would be German and social courses right at the beginning of the migration. These must place a financial burden on migrants.

The separation into private and business travellers planned by the Commission for controlling and monitoring at the borders is in our view not comprehensible. Citizens could feel discriminated by the introduction of such practice.

It is important for the asylum policy that asylum seekers are not completely excluded from seeking work as the access to employment and education might help to come better to terms with the traumatic reasons for their escape. From the point of view of the Chamber of Labour this, however, should entail that asylum procedures will on average be faster processed than it has been the case in the past. Another important fact is that the opportunity of accessing the labour market does not mean that the right of residence regulations for new immigration can be bypassed.

With regard to promoting the voluntary return of unaccompanied minors it has been pointed out that this must not lead to the „deportation“ of unaccompanied minors to their countries of origin, as the wellbeing of the minor/s must take priority.

The AK points out that employees’ representations of interest have to be involved in all plans of the EU Commission at European level, which is currently not the case.

The AK welcomes the aimed accession of the EU to the ECHR in accordance with the Lisbon Agreement.

On the promotion of citizens' rights

The planned multi-annual programme contains important approaches for strengthening the basic rights dimension of the EU. Basically, we welcome the fact that Europe sees itself "as the guarantor of basic rights". We are, however, concerned about the latest legal developments regarding the relationship of basic trade union rights with the fundamental freedoms of the internal market. In its judgements "Viking" (Case C-438/05 dated 11.12.2007) and "Vaxholm" (Case C-341/05 dated 18.12.2007) the European Court of Justice undertook significant restrictions of the basic right on industrial action measures.

The resonance and massive rejection of these judgements must certainly to this day be ranked unusual in the reception of judgements of the European Court of Justice (from the wealth of critical expert contributions we would refer to the selection on <http://www.etui-rehs.org/en/Headline-issues/Viking-Laval-Rueffert-Luxembourg>).

In our opinion the judgements mentioned are also in significant tension to the jurisdiction of European Court of Justice for Human Rights to Art 11 of the European Convention on Human Rights [ECHR] in connection with trade union activities (compare European Court of Human Rights [EGMR], judgement 21.04.2009, Enerji Yapi-Yol Sen against Turkey, Bsw No 68.951/01) as well as other international guarantees for trade union liberties, in particular Art 6 Section 4 of the European Social Charter as well as Art 3 of the ILO

Agreement (No. 87) on the Freedom of Association and Protection of the Right to Organise Convention.

Against this background, we welcome the aimed accession of the EU to the ECHR in accordance with the Lisbon Agreement. In order to strengthen the basic rights, however, similar steps should be made towards joining other international basic rights guarantees, with the European Social Charter leading the way. This would not only serve to strengthen the basic rights and the social dimension of the EU overall; it would also provide for a remedy in case of possible contradictions between European Community Law and other guaranteed basic rights. And it would in particular help to reinstate the shattered trust of the trade unions into the European Community Law in its interpretation by the European Court of Justice.

On the unrestricted exercise of the right of free movement of workers

The Chamber of Labour has a very positive opinion on the Institute of Union Citizenship. However, the possibilities resulting from the free rights of movement should not result in a development where Member State competences to create social and education policy are undermined. This would be the case if citizens of the Union would be able to enjoy social benefits in their receiving Member State by the sheer use of their free rights of movement. Such fears have already become reality with regard to higher education policy concerning the access regula-

Furthermore, the AK criticises the jurisdiction line of the European Court of Justice on the use of social benefits in the receiving country.

tions to university education in Austria based on the jurisdiction of the European Court of Justice (see Rs C-147/03, Commission/Austria dated 7.7.2005).

The jurisdiction line of the European Court of Justice on the use of social benefits in the receiving country also goes in a direction, which needs to be challenged (last Case Vatsouras, C-22/08 dated 4.6.2009): according to this a social benefit also falls within the scope of free movement of labour of Art 39 EU Treaty, if indeed a connection to the labour market, e.g. job seeking exists. It would be sensible to have an open discussion to which degree citizens of the Union have to be integrated in the receiving country in order to be able to claim social benefits. For the sake of legal certainty it would be advisable to introduce precise legislative definitions, for example concerning the currently extremely ambiguous concept of the "unreasonable" claim of social benefits, as determined in Art 14 Section 1 of the Directive 2004/38/EC ("Right of Union citizens and their family members to move and reside freely within the territory of the Member States"). In case this Directive is revised, the framework conditions for open access to university education, to which individual Member States feel obliged, should also be secured. In connection with the target of creating a European Higher Education Area it is necessary to introduce a regulation for the flows of students, which is not at the expense of prospective students resp. the Austrian taxpayer.

It would also be important to create

information channels, where people, who are interested in migrating to Austria, could get initial information about stay, employment and housing, about various recognition procedures, learning the local language and other social benefits. That way it would be possible to create a realistic scenario of the chances resp. risks of a migration decision. This could be guaranteed by a multilingual information website and by publications, which are available at the embassies.

On the subject "Living together in an area that respects diversity and protects the most vulnerable"

The AK emphasises the necessity to continue the fight against discrimination, racism, anti-Semitism, xenophobia and homophobia also at European level and to strengthen the rights of children and minorities. This does not only concern the elimination of discrimination, sensibilisation and prevention, but also the support of disadvantaged groups. This, for example, could mean access to education or employment.

There are hardly any national institutions that have sufficient resources available which would enable them to effectively devote time and energy to fight discrimination, racism, anti-Semitism, xenophobia and homophobia. The only body in Austria dealing with this aspect is the Ombud for Equal Treatment, who try with only a few members of staff to cover the most diverse fields such as consultations and information campaigns

for the sensibilisation of enterprises, schools, authorities and many more.

The financial means of NGOs are extremely limited. In particular for the fight against racism against minorities such as the Roma it is necessary to install a central coordination agency (not in form of the European Monitoring Centre on Racism and Xenophobia) with a support budget for projects to eliminate discrimination (resp. support of groups), which could also assume a networking function.

Discrimination in respect of young people is particularly evident with regard to education and employment. Schools must be assisted in their efforts with information campaigns and sensibilisation work. Role model functions have a great effect on young people.

The most effective protection against exploitation and violence is the financial independence of women (this includes their own residence permit, which is independent from their husband). Due to migration, different "cultural" traditions such as female genital mutilations, forced marriage, involuntary termination of school education etc. are also brought to the receiving country. Women and girls are most affected by these measures. What is required is both a sensibilisation of the parents and hard sanctions for physicians, who carry out genital mutilations.

The Union should devote equal time and effort to the exploitation of work-

ers. We take the view that in this context in particular workers, who in connection with providing cross-border services on behalf of their employers and who are only posted temporarily to another Member State, have to be regarded as particularly in need of protection.

On the further implementation of the principle of mutual recognition

A Europe of Rights and judicial cooperation requires that those who are typically less fortunate in the European society or who are discriminated against are protected by appropriate standards.

We therefore guarantee our utmost support to extending the principle of mutual recognition with regard to administrative procedures. Although some progress has been made on a legal level, practice, however, shows that cross-border issues still cause difficulties. This concerns in particular problems with the mutual recognition of decisions or fines.

It would therefore be advisable to carry out systematic examinations concerning the problems arising from cross-border prosecution and to take appropriate measures to minimise these problems. This applies in particular to the mutual enforcement of fines based on the framework decision of the Council on applying the Principle of Mutual Recognition to Financial Penalties (ABl 2005, L 76, 16). Here significant difficulties still persist in practice.

The AK underlines that the most effective protection against exploitation and violence is the financial independence of women.

The AK points out that cross-border legal assistance and the mutual recognition of administrative penalties have to work smoothly.

Cross-border legal assistance and the mutual recognition of administrative penalties, however, have to work smoothly. Following the model of co-operation mechanisms in the sector of criminal law, it would be advisable to create analogue instruments for administrative procedures.

Apart from the simpler enforceability of fines in other Member States, one should also keep the enforceability of social security contributions, but also fees and taxes in other Member States in mind, as in particular the already financially seriously stricken social security authorities are currently failing to collect any contributions abroad.

By introducing the Internal Market Information System (IMI), the Commission has created a sophisticated system to promote the cross-border co-operation of administrative authorities. It is therefore incomprehensible that the capacities of the IMI are restricted to certain areas (e.g. to implementing the EU Services Directive). This is even more serious as the cooperation between the authorities hardly works in some areas, such as with regard to posting workers. The AK therefore requests that the IMI will also be involved in the protection of workers' rights (the Commission Recommendation 2008/C 85/01 of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services already exists).

A general abolition of the action for enforcement requires measures,

which ensure that workers and consumers are sufficiently protected and that they are not worse off than before. The reform, however, of the European system of judicial competence in civil and commercial matters (Brussels I VO) which the action for enforcement addresses, may not only be restricted to the abolition of legal institutions. Just recently some procedures decided by the European Court of Justice have made it clear that the current competence system has some loopholes, which could be used to the disadvantage of workers and their trade unions. These deficiencies have to be remedied in order to build the trust for further integration steps.

On the protection of the private sphere and personal data

Just like the Commission we attach great importance to the protection of personal data and the private sphere. In our opinion, the cooperation with the USA, which has been described as exemplary, is extremely questionable. We recall the recently discussed passing on of bank data to the USA, after the relevant server - following lengthy negotiations - was at last transferred to Europe. In the view of the AK any passing on of sensible consumer data is unimaginable.

On the reduction of terrorist threats

The EK uses this section to state that the EU "had to use all available means to fight terrorism". This statement is in tension for realising an "area of justice". In the area of fighting terror-

ism sovereign actions must also be restricted to appropriate means and respect both basic and human rights.

To implement monitoring measures by referring to the fight against terrorism and cybercrime might foil the commitment to basic rights.

On the creation of a common basis of minimum standards

In the field of criminal matters, it would be advisable to consider the creation of statutory offences to prevent exploitation-prone employment relationships, which typically exist in a cross-border context. One should in particular consider the creation of minimum standards to take action against the exploitation of posted workers on the basis of the Posting of Workers Directive (Directive 96/71/EC).

On supporting the economy

The AK welcomes the statement of the Commission that the financial crisis had clearly shown “that the financial markets had to be regulated and that abusive behaviour had to be prevented”. Apart from measures to regulate the financial markets it seems to be necessary to take decisive action against the abusive use of fundamental freedoms. There is a great need for action in particular in the area of international corporate law. The setting up of so-called “letterbox companies” for the sole purpose of applying lower regulation standards must effectively be prevented.

On the strengthening of the international presence of the EU in legal issues

The statement of the EU to support the abolition of the death penalty and of torture in other states and the outlawing of other forms of humiliating resp. inhumane treatment must be welcomed. In the opinion of the AK trade sanctions should also be considered - as the possibly strongest form of outlawing which is at the disposal of the EU.

The EU should also campaign for international minimum employment standards at their most important trading partners

Other

Another important focus should be placed on the consideration not to allow other abusive forms of behaviour from spreading from one Member State to another and to make employment bans or exclusions from public orders EU-wide (i.e. beyond the borders of the Member States) enforceable.

The Chamber of Labour welcomes that the Communication points out on several occasions that particular attention will be paid to the situation of minors. The Appendix too emphasises with regard to future key aspects of action that measures for the benefit of dependent persons and those in need of protection must be improved and that decisive action has to be taken to pre-

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vent the sexual exploitation of children and child pornography. In view of the fact that a large part of these assaults are taking place within the family or a familiar environment it is necessary to introduce measures for the relevant sensibilisation within the closer environment.

It also seems to be more sensible in the area of drugs policy to put emphasis on education and thereby on reducing the demand rather than to continue to intensify the hopeless fight against the availability of drugs.



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