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AK Position Paper

Comments on the draft Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers

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.

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 Labour.

Rudi Kaske
President

Werner Muhm
Director

Executive Summary

The proposed Directive is welcomed, but does not go far enough.

In addition to the requirement that time limits for the enforcement of rights shall be such that they cannot be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Union law, further measures are also required. These include in particular the right to be issued with clear, understandable pay slips and records of working hours, a reversal of the burden of proof in legal proceedings in the event of a failure to submit the records of working hours and the notice of employment by the employer, and the clarification of the right to reimbursement of costs for the necessary acquisition of information and advice in connection with the enforcement of these rights.

In order to contribute effectively to a de-facto equal treatment, the planned bodies to support the workers must be capable of taking appropriate action across the entire field of labour law. A limitation simply to cases of discrimination on the basis of nationality would not, under any circumstance, be adequate and does not satisfy the purpose of this Directive.

The activities of the bodies mentioned should not be limited to supporting individuals who reside in the respective Member State on the basis of exercising the right to freedom of movement,

but should also include workers posted abroad! They are normally even more severely affected by discrimination and the withholding of rights.

The AK position in detail

Principles

The stated intention of the Directive to facilitate the exercise of rights of workers who avail themselves of the freedom of movement, is welcomed. The problem described in the draft Directive, that the European and national law is not always observed by government agencies on one hand and employers on the other, is one that we can confirm on the basis of our own experience. This applies particularly to migrant workers as, in general, they are considerably less well-informed about their rights and are not normally familiar with the local conditions. In many cases, language barriers are an added factor.

This draft Directive contains proposed measures to remove obstacles to the exercise of rights and to prevent the discrimination of workers on the basis of their nationality. These proposals are welcomed, but remain vague in parts and will only have the capacity to contribute towards preventing the discrimination of migrant workers to a limited extent. Proposals are therefore made below which go far beyond the measures in the draft Directive.

Regarding Chapter II – Enforcement

We consider the ability to enforce rights via judicial and/or administrative channels and, where applicable, in an arbitration process to be a matter of course. The same also applies to the ability of associations or organisations, with the consent of the worker concerned or their family members, to engage in any administrative or judicial procedure

on their behalf or to be able to initiate such a procedure. These requirements should therefore serve as an opportunity, at the national implementation stage at the latest, to carry out a screening process as to whether these opportunities are actually available to migrant workers in all areas.

A significant measure, which is explicitly welcomed, is Art 3 paragraph 2 sentence 2, according to which the time limits shall be such that they cannot be regarded as capable of rendering virtually impossible or excessively difficult the exercise of rights conferred by Union law. However, this requirement should not be limited merely to rights conferred by Union law. Short time limits can represent a particular obstacle for migrant workers in general, due to their specific situation. The formulation "...excessively difficult..." should, for the purposes of the intention of this regulation, be replaced by "...significantly difficult ...". Sentence 1 leg cit, according to which the national rules on time limits are not prejudiced, is counterproductive to the purpose of the Directive or at least highly unclear. The first sentence of this regulation should therefore be deleted and sentence 2 adapted as follows:

"2. Time limits for the enforcement of these rights shall be such that they cannot be regarded as capable of rendering virtually impossible or significantly difficult the exercise of the rights."

To facilitate the exercise of these rights, the following additional measures should be stipulated:

The right to be issued with clear, understandable pay slips

Our experience of providing advice to ten thousand workers annually shows that pay slips and salary statements are incomprehensible to an average worker. Every company has its own form of statement, often making it difficult even for experts to understand whether the entitlements conferred have been calculated correctly.

Uniform guidelines for clear, understandable pay slips would both facilitate workers in the enforcement of their rights and reduce the burden on companies.

Compulsory issuance of records of working hours

Employers should be obliged to issue records of working hours to employees. This would make it easier to check whether overtime and allowances have been compensated correctly.

Reversal of the burden of proof in the event of a failure to submit the records of working hours or the notice of employment

It is not sufficient if records of working hours must only be made available to the authorities and the refusal to submit these records entails consequences of an administrative nature, yet the failure to submit records of working hours has no consequences of any kind in civil proceedings. If the employer refuses to submit the records of working hours in court proceedings, it must not result in the employee concerned continuing to carry the full burden of proof for all hours worked. This is not appropriate, as the employer, who does have an obligation to keep records of working

hours, thus has much greater access to the evidence than the employee. The failure to submit records of working hours by the employer should therefore result in a reversal of the burden of proof in court proceedings. The same applies to the notice of employment.

Reimbursement of costs for the necessary acquisition of information and advice in connection with the enforcement of these rights

As a result of language problems and the geographical distance of the place of residence of migrant workers, advice in advance of the enforcement of rights involves substantial costs in many cases. At least in cases where a subsequent payment of compensation is later judicially obtained, it should be clarified that the employee is also entitled to the reimbursement of these costs (in particular interpreting, advice and travel costs).

Regarding Chapter III – Promotion of Equal Treatment – Structures, Bodies – Dialogue

The activities of the bodies mentioned should not be limited to providing support in the area of antidiscrimination legislation only. Pay that is below the minimum amount stipulated in collective agreements or that is legally prescribed cannot necessarily be linked to discrimination on the basis of nationality – above all, it will be difficult to provide evidence of this. Of decisive importance is the fact that migrant workers who do not know their rights and/or are only able to exercise them with difficulty are, as a rule, affected far more seriously and more frequently by such practices. **Thus, in order to contribute effectively to a de-facto equal treatment, the bodies to be established must there-**

fore be capable of taking appropriate action across the entire field of labour law. A limitation to cases of discrimination on the basis of nationality would not, under any circumstance, be adequate and does not satisfy the purpose of this Directive.

The activities of the bodies mentioned should not be limited to supporting individuals who reside in the respective Member State on the basis of exercising the right to freedom of movement, but should **also include workers posted abroad!** They are normally even more severely affected by discrimination and the withholding of rights (see in this regard also the Comments of the Austrian Federal Chamber of 8.5.2012 on the proposal for a Directive for the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services).

It is also important that the relevant national bodies should be well-known to the workers and their family members. It is therefore essential that appropriate measures are put in place by the Member States and the Union. A transnational network of these bodies should also be set up for the purpose of exchanging experiences. A uniform name for these bodies would also be appropriate.

With regard to Austria, it should be noted that EU citizens who work and are liable for social security contributions are members of the relevant Chamber of Labour (AK) in accordance with the Austrian Chamber of Labour Act. In Austria, statutory legal representation thus exists for migrant workers. These individuals may thus also obtain information at the relevant AK within the scope of a personal consultation and it is also possible to enforce rights by means of legal protection by the AK. In particular, the

areas of employment and working conditions, access to social and tax advantages and access to employment are among the core competencies of the Chambers of Labour. Furthermore, expertise and advice services also extend to the areas of access to vocational training, access to education for the children of workers and access to housing.

The key aspects of working conditions – in particular the minimum wage specified for a particular job – are governed by collective agreements. This legal source is particularly important in Austria – in comparison with other Member States – as they are “sectoral collective agreements”, i.e. industry-wide, mainly national, regulatory frameworks. The trade unions of the Austrian Trade Union Federation (ÖGB), which conclude the collective agreements on behalf of the employees, offer comprehensive advice and representation in this regard, in some cases also in a form that is specially tailored to the needs of migrant workers.

It would be natural and sensible that the existing institutions mentioned – Chambers of Labour and trade unions – be designated as facilities for the implementation of the services required by the EU in accordance with this proposed Directive. The establishment of additional, dedicated contact bodies or the like for migrant workers should be avoided. Dedicated facilities of this kind would lead to duplication, disputes over respective areas of authority and inefficiencies.

Art 6, according to which the dialogue with social partners should be encouraged, is welcomed, especially as they have a legitimate interest in contributing to the fight against discrimination and the prevention of wage and social dumping.

Regarding Chapter IV – Access to Information

Unfortunately, Article 7 remains extremely vague as regards its practical implementation. It must be clearly stated that simply publishing the implementing legislation in the Federal Law Gazette does not, in any sense, satisfy the requirements. Rather, Member States are required to ensure that the corresponding information is disseminated in a way that is as long-term, effectively communicated and far-reaching as possible. This information must be tailored to the specific target group of migrant workers in terms of its content, form and dissemination methods. Attention must also be paid to young workers and those engaged in training in order to guarantee that they have an appropriate level of knowledge at the start of their careers.

An “appropriate form” of information, which is “clear, easily accessible [and] comprehensive”, in any case also probably requires the option of personal (legal) advice.

Regarding Chapter V – Final provisions

Art. 8, and in particular the requirement in paragraph 3 that the implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection of workers, is explicitly welcomed.

Should you have any further questions
please do not hesitate to contact

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