



September 2013  
AK Position Paper

# Consultation of Social Partners under Article 154 TFEU on enhancing EU cooperation in the prevention and deterrence of undeclared work

## 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.

Rudolf Kaske  
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 Labour.

Werner Muhm  
Director

## The AK position in detail

The Austrian Federal Chamber of Labour welcomes the initiative of the European Commission on enhancing EU cooperation in the prevention and deterrence of undeclared work and expresses the following opinion about the questions included in the abovementioned paper:

**Question 1) Do you consider the description of the problem in this paper correct and sufficient?**

The description of the problem is generally correct.

However, it is not correct that excessive bureaucracy is a significant factor in promoting undeclared employment. The declaration system in the area of Austrian social insurance is relatively simple and it involves little bureaucratic effort, so this cannot represent an understandable reason for the lack of declaration.

**There is an increased trend of dealing with more data which refer to foreign issues.** This makes the control more difficult and the situation will very soon become non-transparent to a great extent for the parties involved. Seeming advantages, such as no or little tax or social insurance contributions prove to be serious disadvantages when considered more closely, because it is about the access to health/unemployment insurance and pension system. Information campaigns targeted at the parties involved could be useful here, but are definitely not sufficient.

Apart from „mere“ lack of declaration for social insurance and bogus self-employment, the **manifestations** of undeclared employment include, in particular, too few declarations, fictitious posting of workers and **social fraud** by means of dummy companies. In the last case, it is about a phenomenon that is mostly spread in the construction industry, due to which enormous losses are suffered every year by the Social Insurance Institutions, state finances and Insolvency Remuneration Security Fund, as a result of systematic incorporation of dummy companies.

**Fictitious posting of workers** is a relatively new form of abuse which has been even more frequently observed in Austria, in particular, since the full opening of the labour market to the new member states (May 2011). The employees from the new member states who are employed only for work in Austria obtain employment contracts from employers with registered office in new member states. Officially, such an employee is posted for work, although the employee is never employed by the documented employer at the latter's domicile, neither beforehand or afterwards. This fictitious posting of workers actually leads to the evasion of the relevant social insurance and from the point of view of labour law it also has the result that, if the employees want to fully assert the claims they are eligible for, they must provide evidence against an apparent foreign social insurance declaration, that it is not a case of posting a worker.

Since posting forms (A 1) have the binding effect according to the European Court of Justice, the measures currently available to the Social Insurance Institutions against fictitious posting procedure are actually unsuitable, involve too much effort and are often not productive. Therefore, in the majority of cases, no relevant steps have been taken. Consequently, the binding effect promotes the abuse to a wide extent. Therefore, it requires urgent action, which can generally be taken on the basis of European framework conditions and only on the European Union level. Either the binding effect of the posting forms must be cancelled or other necessary measures are required to fight against this form of abuse.

**Question 2) Do you agree that action at the EU level is justified? If so, what should be the main scope and objectives of that action?**

An action at the EU level is basically justified and also necessary. As far as the scope and form of such action is concerned, the following must be differentiated:

**a) Fictitious posting of workers**

The problem of fictitious posting of workers is rooted in the EU law and in the relevant judicial practice of the European Court of Justice. Both of them make it impossible to initiate procedures against the abuse and cannot even prevent criminal actions (cf. especially the Herbosch Kiere case, ECJ 26.1.2006, C-2/05). Either the binding effect of the posting forms must be cancelled or other necessary measures are required to fight against this form of abuse (see above).

**b) Bogus self-employment**

Also in the case of bogus self-employment, abuse is partly promoted by the judicature of the ECJ, or the control measures of member states are limited. ECJ has described the control measures with respect to cross-border bogus self-employment as not compliant with the EU law in 2006 in a French case (ECJ 15.6.2004, Rs C-255/04, Commission vs. France), in 2008 in an Austrian case (ECJ 22.12.2008, Rs C-161/07, Commission vs. Austria) and in 2012 in a Belgian case (ECJ 19.12.2012, Rs C-577/10, Commission vs. Belgium).

It was especially difficult to understand in the Belgian case. The so-called LIMOSA system was referred to in this case. It is an information system for statistical and control purposes with reference to cross-border bogus self-employment. This system constitutes a unified electronic contact point for taking all work-related actions required in Belgium. It envisages an earlier registration of specific data for delegated employees and self-employed persons. Although this system keeps the administrative expenditure as low as possible and is perceived by the stakeholders to be an example of best practice (Auje van Hoek and Mike Houwerzijl, comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, March 2011, 115), the ECJ still came to the conclusion that the Kingdom of Belgium has not provided a sufficiently convincing justification to what extent „very detailed information“ is required, to quote the opinion of the European Court of Justice. In view of the factual circumstances that this information mostly and simply concerns identification data of the parties involved and the data about the type, start, envisaged

duration and place of performing work, the decision of the European Court of Justice cannot be understood.

Also here, a „correction“ on the European level is required, which unambiguously clarifies that it is for the member state to judge whether bogus self-employment has taken place or not, and consequently whether work has been performed. On the other hand, this Member State is obligated to take the control measures which are connected with this issue.

### c) Household services

Undeclared employment in the household provides a good example that it is not always possible or reasonable to put the entire issue of undeclared employment „in one basket“. Household services are not open for the control authorities to the same extent as the construction sites or other business establishments. The reasons for unreported household employment range from a simple lack of awareness about social law provisions to deliberate omission of the relevant provisions.

The following aspects should be taken into consideration in the case of undeclared employment in the household:

- Experience shows that a broad criminalisation of undeclared employment in the household is not reasonable. Many opportunities for high-quality standardized framework conditions should be created for employees and employers. Therefore, the transformation into legal employment forms should also take into consideration the acknowledgement of service quality, contrary to the usual image of less qualified women's work at home and also the quality of the le-

gal workplaces created in this way, with respect to the salary and work conditions, termination notice, holiday and sickness leave regulations.

- Basically, providing household services within the framework of socio-economic arrangements should be given preference over bogus self-employment solutions in terms of micro-entrepreneurs.
- The reciprocal effect between the development of benefit in kind in the area of childcare and care for the elderly must be considered as compared to promoting workplaces in private households.

With respect to this issue we would also like to make a reference to the EUTC conference report entitled: „Out of the Shadows: Organising and protecting domestic workers in Europe: The Role of Trade Unions“, Brussels 2005.

### d) Cross-border transport

Especially in the area of cross-border transport, there are obviously many situations where cooperation between two or more member states would be necessary to fight undeclared employment; however this rarely takes place. This is a result of, among other things, legal competence not being clarified for many issues. This is more or less the case in the main issue of applicability of the Posting of Workers Directive in the area of transport. With reference to this we would like to refer to the corresponding opinion of Prof. Windisch-Graetz ([http://akeuropa.eu/\\_includes/mods/akeu/docs/main\\_report\\_en\\_286.pdf](http://akeuropa.eu/_includes/mods/akeu/docs/main_report_en_286.pdf)). This opinion concludes that the transport sector is also covered by the Posting of Workers Directive. Only ship crews of the marine transport companies are explicitly excluded from this.

Control facilities for the working period are important for the control of the cross-border transport. There have been improvements in this area in recent years. However, there is still need for further improvements.

**e) General observations on taking action at the EU level**

An improved cooperation between the controlling authorities and member states is important for the avoidance of cross-border problems in the area of undeclared employment. Experience shows that such cooperation can only function reliably when it does not exclusively take place on a voluntary basis, but rather an obligatory mutual administrative assistance is necessary.

Further, it is important to regulate on the EU level which country is responsible for the controls. For this matter, a clear allocation of competence to every member state where the employment takes place should prevent a (further) limitation of control powers at the place of performing work by the judicial practice of the ECJ. Only broad control powers of all involved authorities combined with effective and well-functioning administrative assistance can contribute to achieving the objective and reduce undeclared employment in the cross-border area.

There is also a particular need for action in the area of cross-border delivery of administrative documents and enforcement. Also the different scope of claims secured upon insolvency always leads to enormous additional complications, as the practice shows.

As for the European platform, see the answer to question 3).

As far as fighting against undeclared employment is concerned in the purely national context, we think that sharing best practices makes a lot of sense. However, it should be clear that the factual circumstances in the purely national context fall under the competence of member states.

**Question 3) Do you consider that a European platform as delineated above could be an appropriate vehicle for enhancing cooperation between member states?**

**Can you express your preferences as to the options listed under the different building blocks (i.e., membership, scope, tasks and form)?**

The creation of a European platform by the Commission, including the assignment of the representatives of member states and other stakeholder representatives is considered reasonable.

With reference to individual components, the following must be mentioned:

**a) Membership: should membership be mandatory or could Member States join voluntarily?**

The membership should be mandatory. In case of cross-border employment, some countries typically receive the workers and some countries typically post them (with respect to this, see [http://www.lrsocialresearch.at/files/Monitoring\\_der\\_Arbeitsmarktoeffnung\\_LR\\_Sozialforschung\\_2012\\_\(2012-06-02\).pdf](http://www.lrsocialresearch.at/files/Monitoring_der_Arbeitsmarktoeffnung_LR_Sozialforschung_2012_(2012-06-02).pdf); p. 22 and the following pages). But the countries which post workers have only limited interest in an effective control and this creates the risk that voluntary membership will make it possible for some

countries to stay away from the platform, thus, making it inefficient.

### **b) Scope**

#### **Should the platform deal only with cross-border issues or widen its scope to national issues?**

The cross-border and national problems may not always be clearly differentiated. However, the cross-border issues should be the starting point for the discussions on the platform, apart from establishing best practice methods.

#### **Should all the pillars be covered or should the platform's work be limited to labour inspections?**

All affected pillars should be covered.

#### **Should the platform also deal with the phenomenon of bogus self-employment?**

Yes. One may observe a growing trend that unqualified or less qualified jobs which are not traditionally performed as self-employment, are more and more often performed and recognized as (bogus) self-employment. This trend develops more in some member states and rather less in other member states, however it brings increased problems due to cross-border work.

### **c) Scope of tasks**

#### **How far-reaching should the tasks of the platform be? Should the tasks consist only of sharing information and best practices or should they go further by developing specific expertise and improving operational cooperation?**

The cross-border cooperation of member states in the area of fighting against undeclared employment is still in its

early days and therefore, there is more need for taking action here. The same applies to developing expertise. Therefore, the platform should cover the entire mentioned scope of tasks. Apart from establishing best-practice methods, the platform should basically focus on the cross-border aspects.

### **d) Form**

#### **What form should the platform take? Should it be established as an individual body or as a subgroup to an existing body such as SLIC, EMCO, SPC or as a part of an agency such as Eurofound?**

The result of creating the platform as a subgroup to one of the existing bodies or as a part of an agency might possibly be that the focus will only be on the specific scope of tasks and other tasks would be reduced.

This potential weak point could be avoided in advance by creating an individual body.

#### **Question 4) Do you think that the objectives could be achieved with already existing groups and committees if their coordination is improved and/or scope expanded?**

Creating an individual body would have the advantage that the scope of tasks is the central point. Moreover, we would like to make reference to the answer to question 3 d).

#### **Question 5) What role do you see for social partners in this framework?**

The role of social partners is considered to be very important, because they deal with the issues of working life daily and could contribute their experiences in

prevention and deterrence of undeclared work.

Therefore, the social partners should also be represented on the platform. Furthermore, the government officials represented on the platform should be obligated to inform the national social partner organizations about the meetings of the platform and provide them with the opportunity to express an opinion.

**Question 6) Would you consider negotiating any initiative in this field?**

Actually, an initiative in the area of Work without Documents is run by the Austrian trade unions, the Vienna Chamber of Labour and other interested stakeholders' representatives (Research Group for Undocumented Work; see [http://wien.arbeiterkammer.at/service/broschueren/Arbeitsrecht/Arbeiten\\_ohne\\_Papiere.html](http://wien.arbeiterkammer.at/service/broschueren/Arbeitsrecht/Arbeiten_ohne_Papiere.html)).

The objective of this initiative is to show the rights to the migrants who work without any documents and thus, help them to assert their rights.



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

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