



Oktober 2015
AK Position Paper

TTIP: Sustainability chapter
(DS 1536/15 dated 30.09.2015)

About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.4 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 3.4 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

The AK position in detail

The Commission's proposal for the chapter on sustainability only contains non-binding measures to improve the exchange of information and collaboration. It basically only repeats, confirms and lists existing obligations under the ILO's core labour standards.

The BAK regrets that the EU Commission's proposal does not even stipulate as an objective that the ILO core labour standards should be **ratified**. The BAK requests the Federal Ministry of Science, Research and Economy (BMWFV) to insist that the USA comply with these fundamental human and employee rights in accordance with international obligations.

In this respect, the BAK refers to the **resolution of the European Parliament** dated 8 July 2015, the decision by the permanent EU sub-committee on European Union affairs of the parliamentary steering committee dated 15 January 2013 and the resolution passed by the National Assembly in September 2014. These minimum standards must be upheld and guaranteed by independent monitoring. In the event of any breach of these minimum standards, as a last resort the dispute resolution process of the Free Trade Agreement must be set in motion.

The BAK also advocates the deletion of the passage about the **"Adoption of a risk-based and precautionary approach"**. The BAK is strongly against any attempt to undermine the precautionary approach.

It is not possible to make an overall assessment of the chapter on sustainability because proposals for provisions on the following elements and common instruments are still outstanding: **structures and institutions for cooperation** in the area of labour standards, the **reporting requirement** on the implementation status of ILO core labour standards, provisions for a **complaints procedure** (for breaches of the agreement, mediation), an **enforcement** mechanism and reference to a dispute resolution procedure or sanction mechanisms.

Background

Implementation of labour standards and the trade union situation in the USA

One of the key topics from the point of view of employees is the maintenance of minimum labour standards, in order to avoid the "race to the bottom".

The USA has a constitutional obligation to ratify, implement and maintain all eight ILO core labour standards. However, the US government does not refer any ILO conventions to the Senate for ratification if this would entail changes to legislation at federal or subfederal level. As a result, to date the USA has **only ratified two of the eight ILO minimum labour standards**: the elimination of forced labour (No. 105, 1957) and the abolition of the worst forms of child labour (No. 182, 1999).

The other ILO core labour standards have been determined to be in conflict with US laws and practices, so they have not been sent to the Senate for ratification. The two trade union rights in particular – freedom of association (No. 87, 1948) and the right to collective bargaining (No. 98, 1949) – would require an extensive overhaul of existing US labour law if these minimum standards were to be met (ILO, Issue Analysis – U.S. Ratification of ILO Core Labor Standards, April 2007).

The BAK believes these two conventions are of particular importance in terms of fundamental and distribution policy perspectives. In addition, the USA has not yet ratified the Forced Labour Convention (No. 29, 1930), the Equal Remuneration Convention (No. 100, 1951), the Discrimination in the Workplace Convention (No. 111, 1958) and the Minimum Age Convention (No. 138, 1973).

The International Trade Union Confederation's (ITUC) latest Global Rights Index 2015 cites legal obstacles that hamper the establishment of trade unions (http://www.ituc-csi.org/IMG/pdf/survey_global_rights_index_2015_de.pdf): *“Even where a majority of workers have voted for the union, in a secret ballot election, employers can refuse to recognise the union and delay bargaining by filing multiple appeals with administrative agencies and courts... Unions have no right of access to employers' property for purposes of organising or communicating with workers regarding unionisation and no right of reply to employer claims about the union or unionisation.”* This is how the ITUC records the persistent violations of the ILO Conventions on Freedom of Association (No. 87, 1948) and on the Right to Collective Bargaining (No. 98, 1949).

In its 2012 survey of violations of trade union rights, the ITUC described the trade union situation in the USA as follows: *“The employer community in the US is extremely hostile to unions, and because employers are given wide latitude to oppose unionisation efforts and penalties for illegal retaliation against union supporters are weak, workers face enormous obstacles in forming unions. The percentage of private sector workers in unions has fallen to less than 7%, and although currently 37% of public sector workers are union members, elimination or curtailment of public sector bargaining rights is high on the agenda of conservative Republicans, who currently control the U.S. House of Representatives and the majority of state legislatures and governorships.”*

The **“right to work”** laws present a particular problem, as they have been introduced in around half of all U.S. states. In Ohio the opposition brought down the anti-union legislation by means of a referendum. The laws directly target the unions' finances. In the USA, union dues have traditionally been negotiated by management and unions and set out in collective bargaining agreements. The introduction of the “right to work” law means that these dues are now voluntary contributions. And the unions have to represent the interests of all employees in a company, including those who do not pay their dues. As a result, in all states that have introduced these laws, union membership has shrunk dramatically, and with it the unions' income. In the longer term, wages are also declining, meaning that employer contributions to health insurance and pensions have also shrunk. But the law also means that workers now have less protection. According

to a study by the Center of American Progress, employees in Right to Work states earn on average \$1,500 less per year than workers in other states. The BAK is very concerned by this way of competing through the financial starvation of US trade unions and its direct consequences for US workers in terms of wage dumping – which has a knock-on effect for European workers. Even in the EU there has been an increase in the number of companies who are trying to compete by paying low wages to the detriment of fairer income distribution and social harmony.

The provisions in detail

Section II Labour aspects

Article 4/2b: The **obligation to ratify** the ILO minimum labour standards is not mentioned. Reference is only made to future efforts towards ratification. The BAK believes it is vital to ratify the core labour standards. Here reference is only made to respect, consideration and effective implementation in the whole territory. It is only after the ratification of the core labour standards that there is a constitutional obligation to maintain them. In the USA, where trade union rights are under pressure on the domestic policy front, ratification is vital to create an international obligation to maintain and protect this human right. The ratification of the ILO core labour standards is not even mentioned in the objectives of the agreement.

Art 4/3a: *“...fostering and promotion of a preventative safety and health culture and the **adoption of risk based and precautionary approaches**...”*: The BAK is opposed to the inclusion of this passage. In addition, the *“adop-*

tion of risk based and precautionary approaches” contradicts the *“fostering and promotion of a preventative safety and health culture”*, which creates additional incongruity. This provision would undermine the precautionary approach and could cause the EU and its Member States to abandon the precautionary approach. The precautionary approach is a core element of European regulatory culture and offers the European authorities opportunities to take preventative action, which is why it is preferable to the risk-based approach.

We take a positive view of the reference to **labour inspectors** for the proper implementation of labour law (Art 4/6) and the mention of providing adequate protection against anti-union discrimination (Art 5/3c).

Articles 5-9 simply reiterate and confirm existing obligations (about the eight ILO minimum labour standards), and list measures for the exchange of information and collaboration. The BAK demands that **all eight ILO minimum labour standards** should not only be described but also **ratified, transposed into national law and applied** (see BAK requests below).

Art 21: The *Corporate Social Responsibility* chapter refers to the corporate responsibility and accountability of investors among the respective contracting parties in the host country. CSR is referred to as a voluntary instrument that builds upon the national laws of the respective host country. This definition falls far behind the current understanding of CSR, which makes companies responsible for the effects of their activities on society. So, for example, this responsibility can only be identi-

fied if the legislation in force and existing tariff agreements between social partners are upheld. In order for companies to meet their social responsibilities fully, they should have recourse to a procedure that integrates social, ecological, ethical and human rights and consumer interests in close collaboration with stakeholders in the company's management and their core strategy. Furthermore, the UN Guiding Principles on Business and Human Rights state that companies must meet their duty of care to uphold human rights in the value chain.

In order to ensure policy coherence, these basic principles must be included in Article 21/1, where **"voluntary nature" should be deleted** and **"domestic laws" should be replaced with "human rights in particular with regard to labour"**.

The TTIP should not grant foreign investors the right to claim damages in the event of indirect expropriation through regulations in the interest of the common good. These special rights will not entail any obligations. The BAK fundamentally rejects privileged investment protection. However, in order to create a balance between the rights and obligations of foreign investors, this chapter should look at the issue of enforceable obligations on the part of foreign investors. This is not the case at present. We call for the UN Guiding Principles on Business and Human Rights to be implemented in this chapter: companies have a duty of care to uphold and credibly document human rights in their value chain and this should be included in the chapter (Pillar II). In addition, complaints procedures with effective sanction mechanisms must be included

in the agreement. These must allow victims of human rights violations and their representatives to claim damages and compensation.

It is not possible to make an overall assessment of the chapter on sustainability because proposals for provisions on the following elements and common instruments are still outstanding: **structures and institutions for cooperation** in the area of labour standards, the **reporting requirement** on the implementation status of ILO core labour standards, provisions for a **complaints procedure** (for breaches of the agreement, mediation), an **enforcement** mechanism and reference to a dispute resolution procedure or sanction mechanisms.

BAK requirements for the chapter on sustainability

One of the potential advantages of a free trade agreement between the EU and the USA is the opportunity to strengthen the elements on labour/environmental standards in the proposed chapter on sustainable development and in this way provide a model for future agreements.

- In terms of sustainable development, future free trade agreements must give **equal weight to social and ecological objectives and economic interests**. The EU and the USA must ensure **coherence** in all their policy areas – including trade policy – and meet their international obligations, particularly with regard to human rights and United Nations', ILO and OECD conventions. So the free trade

agreement between the EU and the USA must be framed in such a way that these agreements are not violated. Both parties must **ratify, transpose into national law and comply with all eight ILO minimum labour standards.**

The BAK calls on the BMWFW and the EU Commission to make compliance with these international obligations a condition for the ratification of the free trade agreement. In this respect, the BAK refers to the decision by the permanent EU sub-committee on European Union affairs of the parliamentary steering committee dated 15 January 2013 and the resolution passed by the National Assembly in September 2014. These minimum standards must be upheld and guaranteed by independent monitoring. In the event of any breach of these minimum standards, as a last resort the dispute resolution process of the Free Trade Agreement must be set in motion.

Care should also be taken to ensure that the level of ambition of the chapter on sustainable development corresponds to the level of development of a highly-developed industrialised nation such as the USA. For this reason the EU Commission should also demand the ratification, implementation and adoption of the **ILO Occupational Safety and Health Convention** No. 155 and the **ILO Priority Conventions** (Employment Policy Convention No. 122, Labour Inspection Conventions No. 81 and No. 129 and Tripartite Consultation Convention No. 144).

In the longer term, it is important to work towards the implementation of the **Decent Work Agenda**, which the ILO claims will establish social justice for fair globalisation. The Decent Work Agenda encompasses the fundamental principles and rights that apply at work (ILO minimum labour standards), ILO conventions relating to productive, freely chosen employment, social security and social dialogue.

- **Reporting requirement on the implementation status of labour standards:** The governments of both parties to the agreement should report regularly on their progress in implementing the obligations of the agreement. This includes the obligations that are contained in the ILO Declaration on Fundamental Principles and Rights at Work and, where applicable, other agreements as mentioned above.
- **Non lowering standards clause (and upholding levels of protection clause):** This provision should guarantee that existing social and environmental standards are not lowered in order to attract foreign investors.
- **Sustainability checks – content, inclusion of social partners and follow-up:** Provisions on sustainability checks and measures taken should be included, based on the results of these checks. Sustainability checks should include all relevant social, ecological and economic effects of the agreement. Evaluations of sustainability checks on the effects

of the agreement should involve social partner organisations (representatives of workers and employers) and non-governmental organisations. A follow-up process must be specified after the sustainability check.

- **Forum for exchange of information between governments and social partners:** A forum for trade and sustainable development should be established. This should provide opportunities for the exchange of information about the implementation of the agreement between government representatives of the partner countries on the one hand and employee and employer organisations and NGOs on the other. This forum should ensure that the three member groups are given clearly defined and appropriate equal treatment. It should meet at least twice a year and provide its members with an opportunity to openly discuss social issues and problems.
- **Ensure that governments react to complaints from social partners:** It is vital that governments are obliged to act in response to official notifications from their social partners. This should become a binding mechanism that offers accredited employee and employer organisations and NGOs on both sides of an FTA the opportunity to make such demands for action. Such complaints should be processed within a set period of time (e.g. two months) and be part of a permanent follow-up and monitoring process in order to ensure that governments are dealing with complaints effectively.
- **Independent experts should assess complaints and make recommendations:** If a government's complaints are not satisfactorily addressed by the other party, they should be assessed by independent experts. The recommendations of these experts should be part of a fixed, rapid process, so that the assessments can be used for reports and recommendations, but also lead to guidelines for follow-up and monitoring. This should serve to maintain the pressure on governments to prevent violations of workers' rights in their territories. At least one independent expert should be a representative of the ILO.
- **The dispute resolution procedure should also be applied to the chapter on sustainability:** It should be made clear that the chapter on trade and sustainable development is subject to the same rules on implementation as for all other provisions in the agreement. The provisions in this chapter therefore serve as a basis for all elements of the agreement, and particularly for equal dispute resolution.
- **Prevent the ongoing violation of the minimum labour standards by imposing fines:** In the event that the consultation procedure between governments and social partners and NGOs and even the recommendations of independent experts after an appropriate period produce no positive changes in terms of labour law obligations, then the end of the dispute resolution procedure should entail the imposition of fines. These should

be high enough to act as a deterrent. The income from these fines should be used to improve social standards and employment conditions in the sectors and areas where the problems have arisen. In this respect, technical and administrative support in collaboration with international organisations, particularly the ILO, should be provided to address these problems.

- **Ensure compliance with the environmental agreement:** In order to live up to the title of this chapter on trade and sustainable development, it is necessary to ratify, implement and apply not only social standards but also multilateral environmental agreements. The environmental agreements selected in the framework of the EU's special preference system (APS+) also serve as suitable models for bilateral free trade agreements. This relates to the following agreements: The Montreal Protocol (ozone), the Basel Convention (hazardous waste), the Stockholm Convention (persistent organic pollutants), the Convention on Trade in Endangered Fauna and Flora, the Convention on Biological Diversity and the Rotterdam Convention (hazardous chemicals and pesticides). It is also essential to incorporate the Kyoto Protocol in the UN Framework Convention on Climate Change.
- A chapter on sustainable development should also be tied in to relevant agreements on the protection of **human rights** (particularly the accession to international rights via the UN's economic, social and cultural rights). A minimum require-

ment is the consolidation of human rights in the form of an "Essential elements" clause. It should at least reflect the wording of the EU's free trade agreement with Colombia. The reference to human rights cannot be limited to the preamble, but must have its own article.

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

Éva Dessewffy

T + 43 (0) 1 501 65 2158
eva.dessewffy@akwien.at

and

Gernot Fieber

(in our Brussels Office)
T +32 (0) 2 230 62 54
gernot.fieber@akeuropa.eu

Bundesarbeitskammer Österreich

Prinz-Eugen-Straße 20-22
1040 Vienna, Austria
T +43 (0) 1 501 65-0

AK EUROPA

Permanent Representation of Austria to the EU
Avenue de Cortenbergh 30
1040 Brussels, Belgium
T +32 (0) 2 230 62 54
F +32 (0) 2 230 29 73