AK EUROPA

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AK Position Paper

Directive of the European Parliament and the Council on conditions of entry and residence of third-country nationals for the purpose of seasonal employment

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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.

Herbert Tumpel
President

Werner Muhm
Director

Executive Summary

On 13.07.2010, the EU Commission has submitted a proposal for a Directive on seasonal work. The purpose of this proposal is to harmonise the regulations on the admission of third-country seasonal migrants across the EU.

The AK rejects the adoption of a Directive for the purpose on introducing a Europe-wide seasonal migration model.

The AK rejects the adoption of a Directive for the purpose on introducing a Europe-wide seasonal migration model. In contrast to the opinion of the EU Commission, the AK is taking the view that this proposal is in fact more of a "guest worker programme". The proposals with regard to short-term and temporary work migration assume that these people will leave the EU again once the season is over. In the case of Austria and Switzerland, this assumption has not been confirmed during the past forty years. However, by relying on the seasonal migration regulation both of them have failed to make the necessary investments for an integration policy (housing, labour market, education).

The AK has been pointing out for years that seasonal work on a large scale is in fact only a failed migration model. It is a completely wrong approach to introduce a Directive, which will virtually give the model new impetus, in particular, as Austria will have no need for low-qualified workers in the foreseeable future.

The AK also still rejects the circular approach as a migration model: this model, in particular the return migration, will not work. At the same time, due to the allegedly temporary character, no integration measures are implemented.

It is also impossible to carry out a labour market review for subsequent seasons if a permit for several seasons has been granted. The concrete requirement of the labour market cannot be determined.

From May 2011, the nationals of those states, which joined the EU in May 2004 (Bulgaria, Rumania from 01.01.2014), will also enjoy free movement of labour. It is difficult to comprehend, why the demand for seasonal migrants cannot be met from the large labour force potential that is already in the EU (Union citizens as well as third-country nationals).

The wording of the provisions does not make it clear whether for example, the construction sector would be recognized as seasonal and if seasonal

work would in this case also extend to this sector. This is strongly opposed by the AK.

In the opinion of the AK, a Directive concerning seasonal work would also infringe against the subsidiarity principle. This means in simple terms that the EU should assume only those tasks, which the Member States are not able to deal with alone or in a satisfactory manner. The labour markets of the Member States, however, are very heterogenic. There does not seem to be any apparent reason why issues concerning seasonal workers might be better solved at EU level than by the Member States themselves. The explanation of the EU Commission that in particular in case of seasonal migrants no intra-EU-mobility exists does not convince. It is therefore incomprehensible why this sector should be in need of harmonisation. Those Member States that want to introduce or maintain a Regulation on seasonal work are able to do this individually. Not only the various sectors differ from Member State to Member State in need of seasonal workers, but also the periods of the respective season strongly vary between the Member States (for example winter and summer tourist seasons, different harvest periods in Spain and Finland, etc). The AK does regard a justification of the subsidiarity principles across the Schengen area without internal borders as not conclusive as seasonal workers normally have no opportunity or time during the seasons to leave the Member State, for which they have been granted a seasonal work permit. The decision of a Member State concerning the rights of third-country seasonal workers normally have no impact on other Member States and lead in the opinion of the AK not to any distortions of the migration flows.

It is therefore incomprehensible why this sector should be in need of harmonisation.

Even after the coming into force of the Treaty of Lisbon, the contractual basis has not been clarified: Art 79 VAEU does not explain either to which extent migration for the (pure) propose of employment is covered by Art 79 VAEU. In the absence of relevant ECJ judicature it is not clear whether this attribution of competence does also include issues concerning access to the labour market; literature (on the "old" Art 63 EGV) does not provide a unified opinion. Clarification, for example by means of an independent expert opinion, however, would be required prior to adopting such a Directive. From the point of view of the AK, this legal basis does provide the opportunity to create legal acts concerning conditions of entry and residence and to determine the rights of third-country nationals, who are regularly residing in a Member State. However, in the opinion of the AK, it is not possible to derive any competence of the EU in respect of granting work permits from this. This results from the wording of Art 79 Paragraph 2 and from Art 79 Paragraph 5 VAEU, according to which this provision does not affect the right of the Member States to determine how many third-country nationals may seek employment in their capacity as employees or self-employed persons.

From the point of view of the AK, the EU therefore has no competence to pass legal acts in respect of work permits; Art 79 VAEU only provides a basis for entry and residence titles, but not for the admission to the labour market.

This proposal is obviously only dealt with by the Justice and Home Affairs Council. However, as has been pointed out above, seasonal work is a labour market issue. This means that the Employment Council and its committees must at least be involved in the proposal in an equal manner if not in a leading capacity.

The AK is extremely critical of the proposal of the EU Commission.

The defensive attitude of the EU Commission concerning this strategy is also to be criticised: it should be the objective to make working conditions as attractive as possible so that vacancies can be filled by the labour force potential that already exists in the Union. Instead, the lack of attractiveness is used as an argument to implement a EU-wide Regulation on seasonal work. The AK rejects this structurally conservative attitude.

Based on the reasons mentioned, the AK is extremely critical of the proposal of the EU Commission and urges the Secretary of State for the Home Department and MEPs to disagree with this proposal for a Directive on the introduction of a Europe-wide seasonal migration model both in Council and Parliament.

The AK position in detail

As outlined above, the AK rejects the present proposal. Any remarks on individual provisions of the proposals should therefore be seen in this light.

On Art 2 and 4 - Scope and more favourable provisions

Pursuant to Art 2, this Directive should only then be applicable if employees are resident outside the territory of the Member States. This wording does not make it clear whether persons, who are already resident in Austria and apply for a permit for seasonal work, are within the scope of the Directive (also compare Art 3 lit b). It is therefore necessary to clarify whether these persons nevertheless fall under the scope of the present proposal. Should this not be the case, it has to be clarified whether other - domestic - regulations may be maintained. Because Art 4 specifies that more favourable provisions (hence derivations from the Directive) should only be permitted with regard to Art 13 to 17. Students, asylum seekers or persons with "residence permit - restricted", should, however, be given priority as it makes sense to exploit the potential that is already in Austria, rather than recruiting seasonal workers from third countries.

It is necessary to define seasonal work accurately.

On Art 3 - Definition of terms

In the opinion of the AK it is necessary to define seasonal work accurately. Seasonal work is defined as an "activity, which due to an event or structure is linked to a season". As already outlined in the general part of this Position, it is also possible to subsume hereunder activities, which are not dependent on a season, and that for example the construction sector would also be included in this definition. Construction workers are currently affected by a high degree of wage and social dumping. Applying the Directive also to the construction sector would only increase the problem. It is therefore essential to find a definition, which clearly excludes the constructions sector and therefore no longer encourages wage and social dumping.

On Art 6 - Reasons for objection

Prior to granting a permit for seasonal work, the Member States may carry out a labour market review. With regard to the scope of the so-called "Student Directives" (Directive 2005/114/EG), the EU Commission is obviously of the opinion that the Austrian form of the labour market review, i.e. car-

rying out a specific Ersatzkraftprüfung (process of checking the availability of replacement candidates for vacancies on the labour market) is not in accordance with the provision of the Directive. Firstly, it remains to be seen whether the ECJ would follow the opinion of the EU Commission and secondly, the wording in the Student Directive does differ from the wording used in the present proposal. However, it must be clarified that a concrete (and not only general or abstract) review might be carried out in individual cases as to whether employees are available at domestic or EU level.

It must also be possible to refuse a permit if employers have not fulfilled their obligations from the employment contract and/or towards social insurance and the tax authorities in the past. The option of refusal if sanctions were already imposed because of undeclared work is not adequate (also see remark to Art 12).

The Member States may determine quotas for the admission of seasonal migrants. It must be clarified that a "zero quota" is also possible if there is no demand for seasonal migrants. This must be expressly stated in the Directive.

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On Art 11 - Length of stay

The permit for seasonal workers should not exceed six months per calendar year. In the past, the AK has on several occasions rejected national law provisions, which enabled granting work permits to seasonal workers for a period that exceeded six months as in the opinion of the AK this would contradict the seasonal character of the work. It must therefore be ensured that a limit of six month is not exceeded under any circumstances.

In practice, a Regulation just as the one, which has been proposed, could also mean that a permit would be issued from the beginning of July until the end of June of the following year, which would again contradict the seasonal character. This too must therefore be excluded.

Pursuant to Art 11 Paragraph 2, seasonal workers, who work less than six months for one employer, should be allowed to conclude an employment contract with another employer. It is not clear whether this would automatically go hand in hand with a claim to extent the residence title. The right of residence or seasonal workers must not necessarily be granted for six months; it may also be limited to the intended period of the employment. It has also not been made clear whether a labour market review is permitted in respect to the second job. Hence, it must be ensured that here too an effective Ersatzkraftprüfung (process of checking the availability of replacement candidates for vacancies on the labour market) is permitted in individual cases. Due to the fact that this provision contains many uncertainties, it is rejected by the AK.

Granting a permit for several years almost make a mockery of the labour market review.

Should the seasonal employment be terminated during the duration of the residence permit, it is important that the seasonal worker is covered by health insurance. This cannot be proven when the application is made as the planned duration of the employment should be the basis for the right of residence. That is why the Directive should be amended to ensure that the seasonal worker and the employer - in case the seasonal employment and associated with it the mandatory health insurance is terminated before the residence permits expires - will immediately inform the relevant authority and at the same time submit proof of voluntary health insurance - if not at the same time than at the start of the new employment at the latest - otherwise the residence permit will be withdrawn.

On Art 12 - Simplification of re-entry

Art 12 shall realise the "circular approach" and is therefore the core element of the proposal: the intention is to grant permits for up to three years or for seasonal workers, who have been in the respective country several times before, under a simplified procedure. The AK is strictly against both forms of circular migration. The AK has already voiced its fundamental concerns in the general part of this Position.

Granting a permit for several years almost make a mockery of the labour market review: in particular the last years have shown how quickly a serious economic crisis can appear on the horizon. Hence, a labour market review, whose concrete aim it is to determine whether a certain job could also be filled with other available employees, cannot be carried out for several years in advance but only for a very short period in the presence. For this reason, the AK is not in favour of granting a permit for several years.

It is entirely unclear what a simplified procedure could look like. If this would provide for a modified form of the labour market review it will be rejected by the AK. The details of any simplification must be far more specific to ensure that the interpretation is not exclusively left to the national courts and the ECJ.

As already depicted in the general part, the AK is of the opinion that return migration will not work. Persons, who are recruited, develop associations with Austria, which go beyond sheer seasonal work. Both legally as well as socially, return migrations are very difficult to implement and actually not desirable. Investments in the sustainable integration of these persons, however, are not being made because the focus has been clearly placed on the temporary character of the migration.

Although the Member States are able to ensure that employers, who have

not complied with their obligations, will be excluded from applying for seasonal workers; they cannot prevent, however, that a seasonal worker, whose permit originally applied to one employer, changes to an employer, who has been excluded from the seasonal contingent. This can be prevented by making the notification of change of employment mandatory. A change to an excluded employer should result in a withdrawal of both residence and work permit of the seasonal worker. This should be stated in Art 7 as an explicit reason for the withdrawal.

It must also be possible to exclude employers from being granted a permit for seasonal workers if they have failed to comply with their obligations towards social insurance and tax authorities.

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On Art 13 - Procedural safeguards

Thirty days are not sufficient to evaluate a complex issue in a one-stop-shop procedure. Although currently an application for being granted a work permit must be decided within six weeks (42 days), domestically there are always several authorities involved. Therefore it is necessary to provide for a longer decision-making period; at least six weeks length of procedure should be possible.

On Art 16 - Rights

Art 16 Paragraph 2 lit c states that season workers have to be paid state pension benefits when they move to a third country. From the point of view of the AK it is not clear what exactly is meant here, because it is highly unlikely that pension rights could accumulate after one or even after several seasons, as third-country nationals could hardly achieve the minimum amount of years to qualify for a pension exclusively by seasonal employment. This would require taking into account foreign insurance periods, which would, however require, the existence of a relevant social insurance agreement with the third country, in which the seasonal worker has accumulated the remaining insurance periods.

On Art 17 - Simplification of submitting complaints

In accordance with this provision, "third parties, who in accordance with criteria, determined by their national law, have a justified interest to ensure the compliance with this Directive" must be able to participate in this procedure. This must mean that it is necessary to introduce the option of a right of class action for trade union and the AK. This regulation is welcomed by the AK.

On Art 18 - Statistics

The transfer of data to the EU Commission also includes data concerning the "economic sector". This should be specified more clearly: it must be ensured that data concerning the "economic sector" are provided on the basis of the NACE version. It should also be included that the EU Commission has to publish the results for all European countries and Europe six months after the end of the transmission deadline at the latest.

It is necessary to introduce the option of a right of class action for trade union and the AK.

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

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