August 2007

AK Position Paper

Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers

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About Us

The Federal Chamber of Labour is by law representing the interests of about 3 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 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labor.

Herbert Tumpel
president

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director

Executive Summary

As is the case in other documents from the European Commission, in particular the Communication from April 2006 on the posting of workers, a one-sided view is taken. The main priority is to remove putative restrictions or restraints for companies that post workers abroad.

However, the possibility to enforce the workers' rights that are protected by the Directive on the posting of workers plays a minor role even though the Commission has known for years that there are significant shortcomings in the monitoring of working conditions, cross-border administrative cooperation and enforcing fines. The measures planned in connection with this in particular are only partly suitable for solving the actual problems.

Control measures used – reasons evoked to justify the necessity to impose such measures

Which control measures are inadequate and which measures should be taken in the Member States in order to implement the Directive on the posting of workers accordingly remains completely ignored.

The Communication only discusses which control measures are problematic in terms of the freedom to provide services. It completely ignores which control measures are inadequate and which measures should be taken in the Member States in order to implement the Directive on the posting of workers accordingly. For example, there are no controls of the working conditions of posted workers in Austria. However, there can therefore be no guarantee, as called for in Article 3 of the Directive on the posting of workers, that the working conditions cited in this provision will also be complied with. The very idea of treading the civil law path can in no way ensure that the conditions are complied with. On the one hand – owing to the "retorsion measures" that the employer is expected to take (immediate termination of the employment relationship, no further employment involving assignments abroad in future etc.) – there is a considerable inhibition level in demanding or enforcing such rights. On the other, procedures abroad are particularly time-consuming, cost-intensive and risky.

The Commission also does not go into the reasons to justify the necessity to impose such measures enough. For example, there are weighty reasons for the requirement to name a representative in the sending country. As there is no possibility for the authorities involved in an administrative procedure to serve documents abroad, they require an address at home where they can serve them. However, this is missing in most cases. Authorities are therefore often unable to even launch a procedure or impose a fine in the case of infringements. The requirement to name a representative is therefore not excessive for this reason alone. Why this is persistently ignored is difficult to comprehend.

As regards the submission of documents, we refer to the final motions of the Advocate-General and to the ECJ judgment promulgated in the meantime in case C-490/04, Commission versus Germany. This involves among other things the obligation of companies posting workers to Germany to translate certain documents. The Advocate-General recognised that controllers face considerable difficulties in performing their duties if a document is not written in German. The obligation is therefore proper and proportionate.

Whilst there are alternatives, such as preparing documents in several languages, no such legal norm has been adopted to date – its absence cannot be replaced by the state receiving the workers being burdened with the translation (No. 84 et seq.). The ECJ followed these conclusions and they clearly show the need for action. Firstly, the outline conditions need to be created at European level so that the authorities can also verify and sanction things in the event of cross-border cases and claims under civil law can also be pursued. One or another requirement of Member States could then prove to be no longer necessary. If for example suitable measures are taken at European level so that documents can be translated quickly and without excessive costs, then the obligation of companies to translate documents will no longer be necessary. Similar observations also apply with regard to the appointment of a representative (cross-border notification), paying a deposit (cross-border imposition of fines) and in part to prior declaration and prior authorisation (cross-border administrative cooperation).

It is important that these measures not only exist, but can also be used appropriately in practice. For example, the Directive on the posting of workers provides the possibility to also pursue claims under civil law in the host Member State. In addition, there are agreements that provide for the cross-border delivery of documents, cooperation between the courts when taking evidence and the recognition and enforcement of decisions. Nevertheless, civil proceedings abroad hold de facto additional risks, extra costs and additional delays. In such cases, lawyers therefore advise on a positive outcome and the enforceability of an action only if there are extremely good prospects. Many rights are therefore not asserted at all. We therefore need to ensure that civil proceedings and enforcement measures abroad can be conducted without significant additional costs, risk or time delays.

The situation is even worse concerning the cross-border imposition of administrative penalties. On the one hand, there is no possibility in an administrative procedure – with the exception of individual bilateral agreements – of cross-border delivery and taking of evidence and de facto also no possibility of cross-border enforcement of administrative penalties in connection with posting operations. A framework decision regarding this was taken in 2005 and the concrete Commission Communication assumes that this decision can be applied to the posting of workers. However, this was not regulated clearly and the Austrian Ministry of Justice for example does not share this opinion.

It argues in the main that the Directive on the posting of workers does not contain the general wording "effective, proportionate and deterrent sanctions" and that infringements of the directive cannot therefore be regarded as an offence as defined by the last indent of the list of offences detailed in Article 5(1) of the framework decision.

This legal view is curious. Article 5 of the Directive on the posting of workers calls for suitable measures by Member States in case of non-compliance with this directive. This also includes administrative penalties and these are offences within the meaning of the provision cited.

However, irrespective of the question as to whether the framework decision can be applied here at all, cross-border enforcement is naturally more costly and more susceptible to hold-ups, and is not suitable in practice in many cases.

Access to information

Even though access to information is a fundamental starting point for the enforcement of working conditions, it should and can in no way be expected for employers to guarantee the enforcement of rights under civil law. We should start from the assumption that even with better access to information on labour law and social law, no clear statement on the law in force can be made in some cases solely on the strength of the often complex questions of law that the "combination law" to be drawn up from the rules of the sending and receiving country raises. In any case, the legal position that applies even to skilled workers cannot be recognised without advice from experts.

This is further complicated by the texts written in various languages that often follow a different logic regarding the correct interpretation of combination law. There are also the difficulties of international litigation (lengthy proceedings, high cost risk, greater risk of litigation owing to difficulties with delivery etc.). In many cases, law enforcement is therefore not possible with proportional means and risk. In addition, workers that assert their rights must be prepared for retorsion measures on the part of employers. Experiences in Austria with Hungarian workers have shown that when employees assert legal rights, employers resort to replacing them with less knowledgeable and cheaper labour. The possibility under civil law to assert rights can in no way replace controls by authorities.

Cooperation among Member States

One positive point is that the Commission clearly expresses the fact that there are considerable shortcomings and a need for action on administrative cooperation. In addition, it also recognises that the proper functioning of administrative cooperation among Member States is an essential instrument for compliance control. However, the planned measures (Commission Recommendation and Internal Market Information System) are insufficient.

The problem cannot be solved unilaterally or bilaterally by the Member States. We therefore need to set up a central body in Europe that functions as a nerve centre, coordinating point, catalyst and information centre for cross-border administrative cooperation in connection with the posting of workers. It should also draw up a report periodically, detailing the problems that have arisen and the measures proposed in order to solve these problems.

Planned measures of the Commission

Its one-sided view is also expressed here. Measures that aim to restrict the control possibilities of Member States are threatened with administrative criminal proceedings. On the other hand, no specific measures have been announced with regard to improving administrative cooperation and cross-border enforcement. A Commission Recommendation is the only thing proposed, with a committee being set up. Clear and specific measures on this are not proposed. We therefore have the impression that these measures are perhaps not desired at all, particularly as sufficiently concrete suggestions for improvement have already been submitted to the Commission by various parties.

The AK kindly requests you to take these arguments into consideration during the discussions at European level and implement the measures cited in the proposals made by the Social Partners in December 2006 as well as those in the current government programme in connection with the posting of workers as quickly as possible.

For any further questions please contact

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