May 2012

AK Position Paper

Opinion on the Proposal for a Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Enforcement Directive)

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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

We welcome the Commission's initiative to improve the implementation, application and enforcement of the Posting of Workers Directive. Studies, consultations, etc. have suggested for years that there are major problems with the practical implementation of the Posting of Workers Directive, and urgent attention is required.

The current proposal of the Commission to enforce the Posting of Workers Directive addresses some of these issues. It addresses many long-standing demands of the Austrian Federal Chamber of Labour with respect to the Posting of Workers Directive, such as

- improving cross-border cooperation between authorities
- effective monitoring and sanctions in the case of non-compliance
- improved law enforcement capabilities,
- cross-border enforcement of administrative fines.

It is regrettable that the proposal falls short in some respects. To achieve the aforementioned objectives, we consider the introduction of the following additional provisions to be necessary:

- Elimination of the binding effect of A 1 forms (for the prevention of bogus postings)
- Reversal of the burden of proof if working time records or service notes are not submitted
- Minimum time limits for filing claims in the courts
- Reimbursement for the necessary acquisition of information in connection with the enforcement of claims (at least when such additional remuneration is adjudicated)
- Limitation of the acceptable subcontracting chain (at least when public contracts are awarded)

Article 9 (national control measures) is strictly rejected insofar as that Member States may only adopt control measures referred to in this provision. This is clearly contrary to the basic objectives of the Directive, and is also inappropriate. Control measures must be adapted to the respective requirements and conditions. Blanket maximum targets that apply to the present and future and are binding upon all Member States are not only ineffective but counter-productive.

The AK position in detail

General Information

It is regrettable that the draft Directive represents only a partial solution to the problems, as is clearly shown in the underlying Commission staff working document

The current proposal by the Commission to enforce the Posting of Workers Directive is welcomed in principle. In particular, it addresses many long-standing demands of the Austrian Federal Chamber of Labour with respect to the Posting of Workers Directive. It is regrettable that the draft Directive represents only a partial solution to the problems, as is clearly shown in the underlying Commission staff working document. In Package C of this document, the EU Commission arrives at the conclusion that equal treatment of posted workers with regard to wages would suppress the wage cost difference that is an incentive for posting. In concrete terms, the – subsequently rejected – attempt at a solution provides Member States with the possibility to impose a wider set of conditions than currently foreseen in Article 3 of Directive 96/71/EC. It would also allow wages to be established for posted workers in excess of the minimum wage rate set by law or collective agreement in addition to the practically important reimbursement of expenses in the form of collectively agreed provisions that are legally or generally binding. In this way, it would be possible to take better account of the principle "equal pay for equal work". While the EU Commission has not pursued this approach any further, it has opted for option B, i.e. an improvement by means of administrative cooperation, record keeping and combating abuse. This will help to solve many outstanding problems but will also leave scope for wage dumping and unfair competition.

In Recital 8 of the proposed Directive, the Commission stresses the important role of trade unions and social partners in determining the different levels of applicable minimum rates of pay. However, to maintain the national specifics in the wage-setting process in the future, a change in the Posting of Workers Directive would be necessary, not least because some wage-setting mechanisms, such as Swedish collective wages at company level and the non-universally binding collective agreements in Germany, are not compatible with the current form of the Posting of Workers Directive as interpreted by the European Court of Justice (See ECJ cases Laval or Rüffert).

Comments on the individual provisions:

Article 1 (Subject matter)

We welcome the aim to improve the implementation, application and enforcement of the Posting of Workers Directive, including measures to prevent and sanction any abuse and circumvention of the applicable rules. However, the aim to take a uniform approach is judged more ambivalently. With respect to national control measures, the conditions in the Member States vary and the different type of measures adopted must therefore be appropriate and adequate (for details see Article 9).

The prevention of social dumping is not listed, which is regrettable

In the second paragraph, the purposes of the Directive are stated as guaranteeing respect for an appropriate level of minimum protection for the rights of posted workers while simultaneously facilitating the freedom to provide services for service providers and promoting fair competition. The prevention of social dumping is not listed, which is regrettable. In addition, the Posting of Workers Directive and its implementation is in particular aimed at protecting working conditions and preventing crowding out effects in the host country. Therefore, this should also be mentioned. Furthermore, the legal basis should be expanded to include Art 153 of the TFEU.

Article 3 (Preventing abuse and circumvention of provisions)

This provision, which aims to prevent the abuse and foundation of letter box companies to circumvent labour standards, is welcomed.

Observations from the advisory centres of the Chambers of Labour in Austria have identified the problem. The most frequent enquiries regarding employment with an international dimension tend to involve employers based abroad that only employ workers in Austria to serve the Austrian market. Often, this is done under the pretence of the cross-border provision of services, i.e. the freedom to provide services: Typically, the company would not have a registered office in Austria, although its activities are geared towards the domestic market on a regular basis, thus meeting the conditions to have a registered office. The employers avoid having to become a member of the Chamber of Commerce and, consequently, the direct applicability of collective agreements.

We consider the focus of Article 3 on factual elements to be particularly positive. In such cases, the companies often try to disguise the actual conditions through formal acts such as entries in the commercial register, business or social security registrations. At the same time, we would consider it desirable to amend these provisions so that the consideration of the actual conditions and the listed criteria is not only an option but a requirement. The relevant stipulations are necessary to enable the authorities of both the host country and the country of origin to assess the posting.

On the other hand, the criteria must be formulated in an open manner. The last paragraph ("....are indicative factors in the overall assessment to be made and...") has been interpreted in this sense. The criteria listed thus do not limit the testing possibilities. The use of evaluation criteria to combat abuse,

however, would be rejected. Dishonest companies could very soon adapt to the new situation, and the predetermined set of evaluation criteria would make it difficult for the authorities to respond.

Problematic are the criteria "has a professional licence or is registered with the chambers of commerce or professional bodies" (lit a) and "the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand" (lit c). These are formal circumstances that can be arranged by the company to conceal the facts.

In the lit b, the word "posted" should be deleted, as this criterion should be taken into account regardless of whether it concerns a posted worker is or not. It is important to note that this criterion is only important with respect to the issue of the registered office of the employer and not the application of labour law. In this regard, the Rome I Regulation is relevant.

The criteria listed in lit e of the abnormally limited number of contracts performed and/or size of turnover realised in the Member State of establishment should be specified for reasons of legal certainty. In accordance with Regulation (EC) No 987/2009, it is proposed that a substantial part of the turnover and/or the number of contracts is realised in a Member State if the share is at least 25 percent.

As it would obviously make sense to have a (more) uniform interpretation across labour and social security laws, the criteria listed should be taken into account when defining the concept of posting in the social security context within the meaning of Regulation 883/2004/EC.

The binding effect of A 1 forms (formerly E101) should be eliminated. This is increasingly leading to abuses in the form of bogus postings. In particular, since the full opening of the Austrian labour market to new Member States, we have observed an increasing number of bogus postings in our advisory centres, both by letter box companies and transnational corporations. Workers from new Member States, which are recruited to work only in Austria, receive employment contracts from employers based in the new Member States. Formally, this work is then carried out as a posting, even though the workers have not been and will not be employed by the current employer in the country in which his registered office is located. These bogus postings effectively lead to the circumvention of social security laws and, from the labour law perspective, this can also lead to the employee having usually to prove that this is not a posting despite the social security registration.

The options currently available to social security institutions to combat bogus postings are unsuitable as they are too costly and often ineffective. In the vast majority of cases, therefore, the appropriate steps have not been taken.

If the employer fails or is not able to submit documents such as the social security registration or the service notes required by Directive 91/533/EEC on an employer's obligation to inform employees of

the conditions applicable to the contract or employment relationship, the authorities should be able to assume that this is not a posting. The same should apply if the employer refuses to cooperate with establishing the facts or does not comply with his obligations.

We expressly welcome the initiative to improve access to the terms and conditions of employment on the Internet

Article 5 (Improved access to information)

We expressly welcome the initiative to improve access to the terms and conditions of employment on the Internet. This would represent a considerable improvement in access to justice.

However, summarised information in other languages will not be sufficient in many cases. Therefore, there should at least be a more detailed presentation in English.

Consideration should be given to a pan-European database of labour and employment conditions pursuant to Article 3 of the Posting of Workers Directive as an alternative to the proposed solution to the information problem. While the necessary content would still have to come from the individual Member States, this alternative would have the advantage of using uniform standards. Specifically, this would mean that stakeholders (employers, employees, attorneys, consultants, etc.) would not have to deal with dozens of different sites with different structures and settings and instead would only have to become familiar with one central website. A model or starting point for this could be the solution found by the operators of www.worker-participation.eu with respect to the implementation of the SE Directive (see: http://www.worker-participation.eu/European-Company/Countries-Transposition/Compare-countries-transposition).

This alternative could also be designed in such a way that (merely) statutory provisions are shown directly, and a link to national websites is provided for information on minimum wages.

If the system proves effective, it could be extended to other important legal standards. As, according to Article 8 of the Rome I Regulation a choice of law leads to a "law mix", access to foreign legal standards plays an increasingly important role, not only in the case of postings but in the protection of employees under employment law.

The wording "in other languages" in lit m is vague, and should be specified in more detail.

The letters should be >a to f< instead of >k to p<. The same applies to Art 9 and Art 14.

Article 6 to 8 (Administrative cooperation)

Cross-border postings involve at least two Member States and administrative cooperation between Member States is therefore very important. If companies can operate freely across borders than this must apply to authorities as well, since otherwise law enforcement will fall by the wayside and giving rise to Wild West relations. Unfortunately, there has been hardly any progress in the cross-border cooperation of the authorities since the Posting of Workers Directive has come into force, and there is an urgent need for action. Chapter III of the proposed Directive or Articles 6 - 8 try to remedy this. We expressly welcome this, as well as the clear setting of time limits (maximum of 2 weeks or 24 hours in urgent cases). Without time limits, there is the danger that there will be no response to applications for weeks and any signs of the authorities' cross-border activity will come to nothing. However, the question remains: what would be the consequences of not observing the time limits or if there is no response at all? While infringement procedures would be legally feasible, they are certainly not practical. It would also be unrealistic to expect Member States to impose effective sanctions under Article 17 against their own authorities. Surely there must be other ways to handle effective enforcement. There should at least be a sort of clearing house at European level, which could mediate between the Member States if problems arise, monitor the observance of time limits and, if necessary, take action against individual Member States when the responses that have not been forthcoming or have been delayed on repeated occasions.

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Besides the question of enforcement of requests for information, there is another issue in the given context that remains largely unresolved: the language problem. This could be remedied, to some extent, by the Internal Market Information system (IMI). However, it will be necessary to develop this system further or to create other tools. In addition to IMI, a catalogue of 100 standard questions with automatic translation into other EU languages would be helpful. For example, a French authority A could then send query 25 to a Portuguese authority in French, and the Portuguese authority B would be able to read the request automatically in the required language, etc.

The words "if need be" in Article 7 (4) are redundant. In practice, a Member State of establishment will only make an application if it is necessary. In the given context, these words could also be interpreted in such a manner that the host Member State can judge

whether the application or verification is necessary. However, this would adversely affect the effectiveness of the provision.

The mutual assistance should be extended in two important aspects - the questioning of persons and the delivery of official documents. This is necessary because the persons to be questioned within the course of a procedure tend to go back to their respective countries of origin after being posted abroad. The same applies to deliveries. Maximum time limits should also be set for this type of assistance.

While we welcome the European guidelines for national control measures, we are strictly against the final catalogue

Articles 9 and 10 (Monitoring of compliance)

While we welcome the European guidelines for national control measures, we are strictly against the final catalogue ("only"). This is contrary to the goal of effectiveness and proportionality of the control measures. For instance, in the countries with the highest wages in Europe, the risk of wage dumping is much higher than in the Member States with the lowest wages. In this respect, the same measures may often be considered proportionate in one country and not in another. The measures considered proportionate when controlling Bulgarian employees posted to Denmark will differ from the measures used to control Danish employees in Bulgaria.

If there is a catalogue of predefined control measures, this may have the undesired effect of Member States not responding to changes. Control measures have the disadvantage that dishonest companies find ways to adapt and circumvent them. The control authorities would then typically respond by adjusting the control measures to the new requirements. While a small proportion of the dishonest economic operators will remain one step ahead, the problem can be kept relatively small if the control measures can be promptly adapted to the new circumstances. If the Member States are not able to react due to a catalogue of fixed control measures, then the dishonest companies will remain one step ahead of the control authorities, which could, under circumstances, make law-abiding companies rethink their current approach.

The option to respond during the review pursuant to Article 9 (3) would be far too cumbersome and impractical.

The guidelines pursuant to paragraph 1(s) represent a concrete example of possible developments in this sense. This provision stipulates that translations are only justified if the documents

It would make sense if the Member States were to impose certain control measures as minimum measures

are not excessively long and standardised forms are generally used. It would be easy for dishonest companies to circumvent this by keeping very detailed documents that are important for the control (e.g. employment contracts are extra long and written in the native language), or by not using any forms at all. It would therefore not be possible to carry out controls without having the documents translated. We therefore expressly reject this paragraph.

The usefulness of lit t is also limited, as it is not very practical to have only one contact person to "negotiate". This person should at least also be responsible for the delivery of documents. Consequently, it should be mandatory for this contact person to provide a valid delivery address. If the company cannot provide a contact person with a valid delivery address, then it should be possible to deliver using the notification by deposit at the workplace.

It is unclear whether or to what extent Article 9 should also apply to third-country nationals. In this regard, it must be possible to demand evidence that these nationals enjoy the right of residence in the sending state which extends beyond the period of posting, and that their return is legally possible. In addition, it should be possible to request citizenship information as well.

We would again like to point out that we would reject a final catalogue of control measures. However, it would make sense if the Member States were to impose certain control measures as minimum measures. The question of whether addition measures are necessary or whether to respond to certain acts of circumvention should be left to the Member States. Nevertheless, the minimum number of checks should be specified in a similar way to the Control Directive 2006/22/EC.

The problem of translations could be mitigated by the fact that certain standardised documents with translations into the EU languages would be prepared at the European level. A service note, for example, could contain 10 to 15 points that would be the same across all languages. One point could be, for instance, the pay per hour in EUR. The employer would then have the opportunity to use these standardised forms and thus save some of the translation costs.

With respect to Article 10 (2), which stipulates that controls must not be discriminatory and/or disproportionate, we would like to point out that under some circumstances, the incentive for wage dumping can be much greater for foreign companies than for domestic ones. This is particularly the case when there is a large wage gap

between the sending and host country. The empirical values and the risk assessment based thereon can be used to ensure that a greater number of foreign companies are controlled compared to domestic ones. This should not be regarded as discrimination as it is objectively justified.

Article 11 (Defence of rights – facilitation of complaints – back-payments)

We agree fully with the objectives of facilitating law enforcement and ensuring the means of redress. The wording of the proposed measures is in part very vague, such as Article 5 lit a. In addition to the stated, further concrete mechanisms should be stipulated to ensure that the employees concerned can assert their claims accordingly. These additional concrete mechanisms or measures include, in particular, the following:

- Reversal of the burden of proof if working time records or service notes are not submitted: A situation where the requirement for working time records to be submitted to the authorities and the failure to submit these records resulting in consequences under administrative law but not civil law is insufficient. If the employer refuses to submit working time records during legal proceedings, the employee will still bear the burden of proof – at least that the legal situation in Austria - for his working hours. This is inappro-priate. The failure of the employer to produce working time records should lead to a reversal of the burden of proof in judicial proceedings. The same applies to a service note.

- Minimum time limits for filing claims: The time limits that are set out in employment contracts or collective agreements for filing employee claims tend to be relatively short. Considering that these periods are often too short for domestic workers, this is even more the case for workers from another Member State due to language issues and the greater geographical distance. Therefore, a minimum period of at least six months for filing the claim should be provided for.

- Reimbursement for necessary acquisition of information in connection with the assertion of claims: Due to language problems and the geographic distances involved, obtaining legal advice prior to filing a claim tends to be associated with considerable costs. At least in the case that a payment or wage arrears is sought in court, the employee should have the right to be reimbursed for these costs (in particular, interpreter, travel expenses).

Article 12 (Subcontracting – joint and several liability)

Subcontracting in the construction sector in particular is a breeding ground for illegal employment, welfare fraud and wage dumping. This has been evident at least since the study by Houwerzijl/ Peters (Liability in subcontracting processes in the European construction sector, 2008, a study commissioned by the European Foundation for the Improvement of Living and Working Condition), and the European Commission communication dated 24 October 2007 entitled: Stepping up the fight against undeclared work (Point 3A Drivers of undeclared work). Measures to curb misappropriation in connection with subcontracting are therefore most welcome.

Problematic, however, is the contract-related liability (paragraph 1, last subparagraph) - at least in connection with taxes and social security contributions. This means that the social security institutions or tax authorities have to prove to the client of the subcontractor which employees have been working on which dates and on what construction sites on the basis of which contract. Since the subcontractors often do not keep any records in this respect or these are not accessible to the social security institutions, gathering such evidence is often not possible or would involve a disproportionate cost. Experience in Germany has shown that a contract-related liability makes the provision less effective. In Austria, we have therefore opted for a different solution, which we briefly outline in the following text:

The Austrian legislation concerning contractor liability for social security contributions is similar to the reverse-charge system. With the reverse charge system, the client (= beneficiary) pays the VAT for the services rendered directly to the tax office, while in the case of contractor liability, the beneficiary deducts 20% from the wages and transfers this amount to social security. In this way, the client has fulfilled his obligation, as he transfers 80% directly to the contractor (=subcontractor) and 20% to the social security account of the contractor. While the contractor himself has no access to this account, he may request the payment of this amount if he has duly paid his social security contributions.

However, the client also has one more option. He may pay the wages in full to the subcon-tractor. In this case, however, he bears insolvency risk with respect to social security contributions. If the subcontractor becomes insolvent, then the social security institution may approach the client regarding any outstanding payments. This liability is

limited to 20% of the wages and the fact that it is not contract-related. This means that the social security institutions do not have to demonstrate that the arrears are related to an existing contract. In practice, it would be difficult for health insurance organisations to obtain this proof, or it would involve an unreasonable cost.

The client will not be held liable if the subcontractor appears on the so-called HFU-list at the time of performance. This is a list maintained by the social security institutions. Companies that have been providing construction services for at least 3 years and have paid their contributions duly can be put on the list upon request.

The liability for wages should refer to gross amounts, since the employer owes the employee his gross remuneration

Since introducing contractor liability, clients commissioning construction works tend to consult the HFU-list prior to paying out any wages. The wages are paid in full only if the subcontractor appears on this list. If this is not the case, then only 80% of the wages is paid out and the remaining 20% will be transferred to the health insurance account.

Since contract-related liability is problematic and there are better alternatives, the last sub-paragraph in paragraph 1 should be deleted.

The liability for wages should refer to gross amounts, since the employer owes the employee his gross remuneration.

The joint and several liability also plays a role in encouraging clients to proceed more carefully when selecting subcontractors, to avoid being held liable for a claim against a dishonest subcontractor. This form of liability is therefore highly preventative. The liability will lead to employees being paid what they are entitled to and the tax and social security contributions being paid and it will also help to promote fair competition. However, it would be a far greater deterrent and even more effective if the liability were to be extended to apply to the entire subcontracting chain.

In addition to the joint and several liability, other measures preventing malpractice in subcontracting chains should be taken. The subcontracting chains should be limited when awarding public contracts. In this context, the restriction of transferring the contract in whole or in part, depending on the size and complexity of the contract, to one, two or maximum three levels (limitation of the subcontracting chain) would be effective. This would be effective and proportionate. A guarantee retention would also make sense, as used in Austrian property development laws to guarantee damages and warranty claims. This means that the contracting authority should withhold part of the wages pending submission of wage payment confirmations.

Art 13 to 16 (Cross-border enforcement of administrative fines and penalties)

The introduction of cross-border enforcement of administrative fines and penalties is an essential step in sanctioning violations of the Posting of Workers Directive

The introduction of cross-border enforcement of administrative fines and penalties is an essential step in sanctioning violations of the Posting of Workers Directive. This was already clear when this Directive came into force, but it, nevertheless, took more than 15 years before we could see the first concrete European initiative. Unfortunately, it will theoretically take years until the cross-border enforcement is implemented in the Member States, and it remains unclear whether and to what extent this will work in practice. Nevertheless, the proposed provisions are generally welcomed. However, as long as the cross-border enforcement of administrative penalties does not work accordingly in practice, the Member States must be in a position to impose security measures or to take similar protective action. Otherwise, this would mean discrimination between the employers against which sanctions can be virtually imposed. In particular, the effectiveness of the Posting of Workers Directive would be severely affected. The words "work accordingly" mean that penalties can be enforced without undue delay, risk and effort.

The restriction in Article 13 (2), last subparagraph, that a recovery of a penalty may not be requested in another Member State as long as the instrument permitting its enforcement in the requesting Member State can be contested in that Member State should in any case be restricted. If this is not the case, there is no reason not to make the request for recovery. This also applies correspondingly to Article 15.

Unclear is also part of the sentence in the first subparagraph leg. cit. "in so far as the relevant laws, regulations and administrative practices in force in the requested authority's Member State allow such action for similar claims or decisions". Does this mean that it is not possible to impose an administrative penalty for breach of the posting notification when there is no such requirement in the country of origin? Or would it be impossible to impose a penalty for wage dumping because the country of origin provides other forms of enforcement for violations of the Posting of Workers Directive? In our view, therefore, this part of the sentence should be deleted. At the very least the meaning should be clarified. Any unclear points would give the addressed authorities too much leeway to reject the request, which would be counterproductive.

Article 14 (3) should be amended in such a way that the addressed authority should also give feedback when there are substantial obstacles to the request being successfully processed, for example, if the specified address is no longer valid. This is necessary to allow the applicant authority has the possibility to react and provide e.g. another delivery address.

In addition to cross-border enforcement of administrative fines and penalties, action is also needed with respect to payable social security contributions or taxes. Over the past few months, we have seen an increasing number of cases of workers being recruited by foreign employers for employment in Austria. For example, a hotel chain in Vienna does not clean rooms, as it contracts it out to another company. This company in turn employs Slovak chambermaids who are provided by a Slovak company. Since the chambermaids are recruited only to be employed in Austria and have not been and will not be employed by the employer in the Slovak Republic, this does not constitute a posting. While they are liable for social security in Austria, it will probably be necessary to collect the contributions abroad. To what extent this is possible in practice and whether this works or can work should therefore be established and, if necessary, appropriate measures should be taken.

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

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