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AK Position Paper

Proposal for a Directive providing sanctions against employers of illegally staying third-country nationals

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 Labor.

Herbert Tumpel
president

Werner Muhm
director

Executive Summary

The fight against undeclared work and the associated exploitation of workers is a matter of considerable concern for the AK. We therefore welcome the fact that the EU Commission has submitted such a proposal for a directive.

However, we believe that the commitment to sanctions only for employers of illegally staying third-country nationals is far too narrow.

To be able to combat undeclared work effectively, particularly persons that are not allowed to work also need to be covered by the directive. As a result, all conceivable forms of undeclared work, including work without corresponding registration with the social security authorities, should therefore also be included.

This demand is justified because the degree of seriousness is the same: employers attempt here and there to benefit from illegal employment, with wage and social dumping still carried out in any case. Social security misses out on significant revenue, resulting in a weaker health, pension and unemployment insurance system. It becomes clear that the fight against undeclared work needs to be a key matter of concern if we are to secure financing of the welfare state.

It holds in general that the penalties for employers that employ illegal workers need to be a deterrent. It should neither be worth it financially nor in any other regard to employ illegal workers.

Given that employers with illegal workers also gain an unfair advantage over the competition, these aspects should also have some bearing on the directive. Fair competition can only be ensured if there are fair conditions and if all companies comply with the "rules". Although such provisions are not provided for in the draft, the Commission itself refers to distortions of competition when justifying the proposal and believes that these should be prevented (cf page 6).

We therefore propose extending the draft's legal basis: we should examine whether Article 137(1)(b) and (c) of the EC Treaty can also be included cumulatively. In addition, we should examine what legal basis could be used for the requested inclusion of competition law provisions. The corresponding legal basis in the EC Treaty would then also need to be added to the draft.

It is important that (as explained on page 6 of the draft) the Member States are free to retain or implement measures that go beyond the measures provided for in the directive

The AK propose extending the draft's legal basis: we should examine whether Article 137(1)(b) and (c) of the EC Treaty can also be included cumulatively.

Article 2(b) – Definition of employment

Whilst the definition of employment in Article 2(b) of the draft directive affects the key area of the worker concept in accordance with Austrian law, many of the non-standard employment relationships that are becoming increasingly common these days would not be included here. The directive should in any case also apply to work relationships and contractual relationships in which workers carry out their services at least de facto in economic dependency, irrespective of whether these are called employment contract, independent contractor relationship or contract for work and services. For this reason, the passage “[...] or in economic dependency[...]” should be added to the part cited so as to also cover the work relationships that are not technically bound by strict instructions.

Article 4 (and recital 5) – Employers’ obligations

The regulation stipulates that employers copy the residence permit and notify the competent national bodies. Illegal employment could therefore be reduced and a minimum additional burden would be placed on employers (page 5 of the draft directive). The AK shares this view.

However, it should be noted at this juncture that it was the EU Commission itself that vehemently rejected such an obligation in the

Austrian law on employing foreigners (Ausländerbeschäftigungsrecht) to present the right of residence and employment as a supposed violation of the freedom to provide services during the current reorganisation of the regulations on the posting of third-country nationals, even though this regulation’s aim is fair competition and the protection of working conditions, and the work involved for the employer would in fact have been minimal.

In addition, the regulation starts from the assumption that the authorities can also check the type of authorisations in practice based on the documents presented. However, this is by no means a matter of course for cross-border cases.

Transnational cooperation between authorities is (if at all) not guaranteed for the most part within a reasonable period. There has been a considerable need for action at the European level for years. We refer in particular to the fact that we have been calling for years for a central body to be set up at the European level to act as a nerve centre, coordinating point, catalyst and information point in connection with the posting of workers in order to improve cross-border cooperation between authorities. Such a body could also be very useful for the concrete directive.

Article 5 as well as Article 2(d)

For the purpose of clarification, we would like to point out that this regulation

must not lead to employers being able to employ all legally staying persons irrespective of whether a work permit that might be necessary exists. In connection with this, we repeat our demand for the directive to be extended to all forms of undeclared work.

Article 6 – Financial sanctions

Payments of the cost of return are advocated in terms of the principle of causal responsibility. We need to ensure that all costs incurred by the public authorities are reimbursed.

The possibility of preventing the employer making money by employing illegally staying third-country nationals should be incorporated explicitly into the directive in order to prevent employers being able to make a lot of money – despite penalties – out of illegal work.

Article 7 – Back payments to be made by employers as well as Article 14 – Facilitation of complaints

This article aims to regulate the claims of illegally employed persons. It is vital that these claims can also be lodged in practice. Regarding this, we consider the intended mechanisms (in particular procedures being triggered automatically) to be expedient. We need to ensure that all claims made by the foreigner, which he would have received if legally employed, can be lodged (in particular special payments, but also e.g. possible bonuses and all other

components of remuneration).

The back payment of remuneration to third-country nationals who are already back in their country of origin will be difficult in practice. Precautions need to be taken to ensure that the payments actually reach the right person. If employers have to reckon on a control a lot less than every six months because of the small number of inspectors on average, a correspondingly longer presumption period for the illegal activity performed should be provided for.

Recital 8 (which stresses that the employer should in any case pay remuneration and social security) is badly worded as the employer is required per se to pay any outstanding remuneration for work undertaken and any outstanding taxes and social security contributions.

A basic prerequisite for effective procedures is that these can be completed quickly and without too much cost risk. This should be emphasised in the directive. The relevant European regulations should also be improved so that procedures can also be completed quickly and without too much cost risk for cross-border cases within the Community. There is a considerable need for action here. For example, there is still no European trade directory or a similar body.

The AK welcomes the planned sanctions, which range from the exclusion from entitlement to public benefits through to a winding-up order.

We should also stipulate that Member States provide for legal actions taken by representations of interests in order to protect workers as well as establish fair competition. To make this easier, the penal authorities should convey information on infringements to the representations of interests, as has already been called for by the Austrian social partners in their paper "Labour market – Future 2010", point 3.6.1(1) (on posting).

Article 8 – Other measures as well as Article 13 – Sanctions against legal persons

The AK welcomes the planned sanctions, which range from the exclusion from entitlement to public benefits through to a winding-up order. The competition law provisions called for above should be added to these articles.

Article 9 – Subcontracting

This regulation (subcontractor liability) is in keeping with a demand that the AK has been making for many years. This represents an important step towards subcontractor liability in the EU and is consistent with the relevant endeavours being made in Austria.

With regard to liability for remuneration claims, we refer again to the fact that the relevant provisions in Austrian law (§ 7c AVRAG, § 14 AÜG) cannot apply in practice. To wit, the subcontractor is liable

in general only as deficiency guarantor and liability is not applicable if the subcontractor is insolvent. A corresponding – national – revision would therefore be needed.

Article 10 – Criminal offence

The AK expressly welcomes the fact that a concrete definition of the term "significant number" (namely four illegally employed workers) has been issued. It is therefore possible to avoid uncertainties regarding the term "significant".

We need to ensure that dividing sanctions into administrative criminal offences and offences punishable by a court cannot lead to negative conflicts of competence between courts and administrative authorities.

Article 15 – Inspections

We expressly welcome a minimum number of inspections based on a risk assessment. In connection with this, we would like to point out that implementation of the draft directive, which ensures that at least 10% of companies per year are subject to controls, is bound to make it necessary to increase the number of KIAB employees in Austria (those that control illegal employment). This should actually also be the aim in order to ensure the directive's effectiveness. Finally, the AK requests that its proposals are taken into consideration.

For any further questions please contact

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