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AK Position Paper

# Proposal on the conditions for entry and residence of third-country nationals for the purposes of highly qualified employment ("Blue Card Directive")

## 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

- AK EUROPA criticizes the fact that the draft fails to mention the social partners at all. Migration for the purpose of gainful employment is a labour market policy issue that concerns the social partners. Therefore AK EUROPA strongly advises that the social partners are integrated in both the text and the drafting process.
- AK EUROPA opposes the fact that the draft is only to be dealt with by the Justice and Home Affairs Council. As it is essentially a labour market policy issue, the Employment Council is equally responsible. The decision on the Blue Card must be jointly passed by the Justice and Home Affairs Council and the Employment Council.
- It is of crucial importance that the competence of deciding upon the access to the labour market remains with the member states.
- The Commission writes that the current situation and prospects of EU labour markets can be broadly described as a 'need' scenario. Generally speaking, it is important to emphasise that a possible lack of qualified human resources (this also includes a lack of highly qualified workers) first needs to be established objectively and that, even if an actual shortage exists, the attraction of third-country nationals should only constitute one option among many.
- It is particularly unclear what exactly is understood by "equivalent professional experience" as the equivalent of a "higher professional qualification" and how this is to be checked in practice. However, in concrete terms it is extremely questionable whether only three years of professional experience can be substituted fully for three years of higher education in terms of their learning outcomes.
- We welcome the fact that a labour market test can be carried out before the EU Blue Card is issued and we are just as positive about the requirement for an existing work contract. If a binding job offer is to be sufficient, it should be noted that in such a case we need to ensure that we can control whether the contract of employment has also in fact been brought about pursuant to the terms made in the offer.
- As regards the "right to further migration", we need to ensure that a member state is not allowed to admit as many people as it likes and allow them to then move to other Member States right away without further checks.

- The draft states that the right to adopt or retain more favourable provisions should not apply to the condition for entry into the first Member State. It is not clear how far this will restrict the Member States in creating alternative admission systems.
- The time limit for processing applications of 30 days does not seem long enough because an often complex assessment needs to be carried out by the authorities.
- As regards the payment of acquired pensions when moving to a third country, there is the danger that the principle of employment insurance will be infringed, thereby calling the financing of the social state into question. AK EUROPA therefore rejects paying out social security contributions before the insured event has occurred.
- It is still not clear if the EC does in fact have the competence to regulate the access to the labour market. AK EUROPA demands that this question is answered prior to any decision on the Blue Card.

# 1. General

In October 2007, the EU Commission submitted a proposal for a so-called “EU Blue Card”, a directive concerning the immigration of highly qualified third-country workers. The migration of highly qualified third-country workers should receive the same framework throughout the EU thanks to this directive.

We are first of all opposed to the fact that the draft fails to mention the social partners at all. Migration for the (sole) purpose of gainful employment is however a labour market policy issue that concerns above all the interests of the social partners. In connection with this, the social partners should therefore also be integrated in terms of content, as is advisable from an objective point of view and in keeping with many years of practice in Austria.

This draft is to be dealt with in the Council working group “Migration and Return Migration”. However, as mentioned it is essentially a labour market policy issue. It follows from this that the Employment Council should have the same rights as the Justice and Homes Affairs Council (and its preliminary committees) to deal with the draft. It is inconceivable for us for a resolution to be adopted without the consensus of these two councils.

It is unclear whether the EU has the power in general to enact such a directive (see Point 4 in detail). Irrespective of this point of law, it is also sensible to leave the regulations on access to the labour market up to the Member States

as the labour markets are extremely heterogeneous and the Member States can therefore also manage these best themselves.

We therefore consider the specific regulations in Austria sufficient to cover the need for qualified workers – besides the national regulation on key employees (Schlüsselkraftregelung), there are also provisions in place that open up the labour market to “new” EU citizens in several areas (in particular work permits for key employees and professionals, exemption from permits for nursing staff and advertising distributors). In connection with this, we would like to point out that the transitional periods for the countries that acceded to the EU on 1 May 2004 expire at the latest in 2011.

We also want to continue to keep to our principle whereby the need for highly qualified workers should also be covered by both the worker potential that already exists in Austria (as well as in the EU) as well as the potential from university graduates and graduates from technical colleges. However, this can only succeed if employers and public authorities as well as the European Union opt for a training and development offensive.

In its explanatory memorandum of the proposal (“General context”), the Commission writes that the current situation and prospects of EU labour markets can be broadly described as a ‘need’ scenario. Generally speaking, it is important to emphasise that a possible

Social partners should be integrated both in the text of the directive and the drafting process.

In view of unemployment that is still too high AK EUROPA considers a possible lack of qualified human resources even in the skilled sector as an employment opportunity to be used primarily by the supply of workers at home.

lack of qualified human resources (this also includes a lack of highly qualified workers) first needs to be established objectively and that, even if an actual shortage exists, the attraction of third-country nationals should only constitute one option among many. General references to demographic necessities are not suitable for depicting such reasons. In view of unemployment that is still too high, the AK EUROPA considers a possible lack of qualified human resources even in the skilled sector as an employment opportunity to be used primarily by the supply of workers at home (if necessary using training and development measures).

The EU migration policy must be viewed as a whole in future. The EU Commission plans further directives in this area, namely a directive for seasonal workers, a directive for intra-corporate transferees as well as a directive for remunerated trainees. It is also driving forward its plans on circular migration. All these plans, which are to be implemented for the most part in 2008, involve instruments for short-term, temporary migration. We reject implementation of these models as we believe a guest worker programme is involved.

## 2. Comments on the content of the individual provisions

We need to ensure at any rate that the minimum wage for an EU Blue Card is in fact three times that set by the respective Austrian collective agreement.

### Minimum wage (Art 5)

We need to ensure at any rate that the minimum wage for an EU Blue Card is in fact three times that set by the respective Austrian collective agreement (or three times the standard local wage in those industries in which no collective agreement is applicable). The wording of the provision needs to make it clear that it is impossible for three times the guideline rate for social assistance to be used as the benchmark in Austria for the minimum income level.

We believe that whilst this is the intention with the present draft, the wording needs to be expressed more clearly as Art 5(2) Para 2 does not remove all linguistic doubts. This is urgently needed in order to be able to preclude all forms of wage dumping.

### Necessary qualifications for highly qualified employment (Art 2(b), (g) and (h) as well as Art 5(c))

The qualification requirements needed in order to be recognised as a highly qualified worker and be able to obtain an EU Blue Card need to be expressed more clearly.

According to the proposal, “highly qualified employment” requires either a “higher education qualification” or, if this condition is not met, “a minimum of three years professional experience in the profession” (explanation to Article 2).

It is particularly unclear what exactly is understood by “equivalent professional experience” as the equivalent of a “higher professional qualification” and how this is to be checked in practice. However, this is an important prerequisite for achieving the objective of the directive, namely migration of highly qualified persons. Whilst entitlement to the principle of counting professional experience as a professional qualification is not denied in principle, the European vocational training policy is increasingly heading in this direction (above all in connection with the development of a European qualification framework). However, in concrete terms it is extremely questionable whether only three years of professional experience can be substituted fully for three years of higher education in terms of their learning outcomes.

The definition of “higher education qualification”, which is necessary for highly qualified employment, is also unclear: according to the definition in Art 2(g), these certificates are to be acquired “in the Member State concerned”. This would only be possible in very few cases. In this respect, the reference to “higher education qualifications” in Art 2(b) should be based on Art 2(h).

This lack of conceptual clarity obscures what is clearly expressed in the “detailed explanation of the proposal” on Art 5: “Member States shall not ask proof of both [higher education qualifications and

professional experience].”

Recital 19 refers to Directive 2005/36/EC (“recognition of professional qualifications”). It should be added that this directive only applies to “regulated professions”. The number of regulated professions varies from Member State to Member State, although the vast majority of common professions in Europe are unregulated professions.

**Work contract, labour market test and number of persons to be admitted (in particular Art 5 – 9)**

We welcome the fact that a labour market test can be carried out before the EU Blue Card is issued and we are just as positive about the requirement for an existing work contract. If a binding job offer is to be sufficient, it should be noted that in such a case we need to ensure that we can control whether the contract of employment has also in fact been brought about pursuant to the terms made in the offer.

As regards the requirement of a work contract of at least one year, we should question whether the agreement of a probationary month or possibility of giving notice is permitted.

Large parts of Austrian law will be taken over due to the requirement of a work contract in conjunction with the labour

market test and the express assurance that the number of persons to be admitted falls under the competence of the Member States. We also take a positive view of the fact that a job-related system is involved and not a so-called “points system”, whereby migration is possible if the person has obtained a corresponding number of points irrespective of a specific need.

**Right to move to other Member States (Art 19 et seq.)**

As regards the “right to further migration”, we need to ensure that it is not possible for a Member State to admit as many people as it likes and allow them to move to other Member States right away without any further checks and be gainfully employed there. This is therefore of the utmost importance – as explained above under “General”, the labour markets of the Member States are extremely heterogeneous and the wage level also varies a lot. Wage dumping can therefore only be prevented if the criteria for highly qualified employment as well as (in Austria) pay that is three times that set by the collective agreement are required and reviewed for the second Member State. As the labour market situation is simply not the same and employment policy falls under the competence of the Member States (cf Art 125 et seq. EC Treaty), it is also important that the second Member State can carry out a labour market test prior to admission (ex ante assessment).

AK EUROPA welcomes the fact that a labour market test can be carried out before the EU Blue Card is issued and we are just as positive about the requirement for an existing work contract.



According to the draft, applications should be processed within 30 days as a rule. This deadline does not seem long enough as an often complex assessment needs to be carried out during this period.

According to the draft, all criteria for highly qualified employment must also be fulfilled in the second Member State, with a national labour market test possible (“that he/she fulfils the conditions set out in Articles 5 and 6 for the second Member State” in Art 19(2) and “[...] allow the applicant to reside on its territory for highly qualified employment if the conditions set in this Article are fulfilled and under the conditions set out in Articles 8-15” in Art 19(3)(a). It also remains up to the Member States to determine a number also for the highly qualified workers that can move to a second Member State. The above demands have therefore been met at present.

#### **Retaining more favourable provisions (Art 4)**

The provision contained in the last sentence of Art 4(2) is unclear. Accordingly, the right to adopt or retain more favourable provisions should not apply to the conditions for entry into the first Member State. It is not clear how far this will restrict the Member States in creating alternative admission systems. If the restriction only applies to issuing the specific EU Blue Card, it is (vis-à-vis the right to further migration) understandable. However, if this means – which is not impossible given the wording – that generally speaking no more favourable provisions may be adopted for the admission of highly qualified persons, then we must reject it as impractical and

also disproportionate.

#### **Time taken to process applications (Art 12)**

According to the draft, applications should be processed within 30 days as a rule. This deadline does not seem long enough as an often complex assessment needs to be carried out during this period (among other things checking the minimum pay, the highly skilled activity, labour market test). The deadline for assessing applications for key employees is six weeks in Austria; a shorter period should not be provided for in the directive.

#### **Temporary unemployment (Art 14)**

If the holder of an EU Blue Card loses his or her job, s/he has three months to find another job, otherwise the Member States will withdraw the EU Blue Card. These three months do not seem, in particular if unemployment was not his or her fault, long enough. Article 9 of the European Convention on the Legal Status of Migrant Workers provides for a period which should not be less than five months.

#### **Payment of acquired pensions (Art 15)**

As regards the payment of acquired pensions when moving to a third country, there is the danger that the principle of employment insurance will be infringed, thereby calling the financing of the social

### 3. Focus should be on the overall underlying plan

state into question. We therefore reject paying out social security contributions before the insured event has occurred.

We reject implementation of these models on temporary migration for the following reasons:

With its migration policy, the Commission is driving forward its plans on circular migration, which AK EUROPA rejects.

The EU migration policy must however be viewed as a whole. Ultimately, the question arises of the benefits of this directive compared with the national admission policy for highly qualified workers of the individual Member States. After all, each country has an admission system for highly qualified workers.

Unlike the view held by the EU Commission, we believe that circular migration does actually involve a “guest worker programme” to a large extent. Such programmes have already failed in several European countries. The proposals on short-term and temporary labour migration work on the assumption that these people will leave the EU again after their work has finished. This view has not been borne out e.g. in Austria and Switzerland over the last 40 years. Trust in particular has also proved to be mistaken – because of the seasonal worker’s scheme, one can refrain from making the necessary investments in integration policy (housing, labour market, education).

The answer can really only be the following: the EU Commission plans further directives in this area, namely a directive for seasonal workers, a directive for intra-corporate transferees as well as a directive for remunerated trainees. It is also driving forward its plans on circular migration. All these plans, which are to be implemented for the most part in 2008, involve instruments for short-term, temporary migration.

## 4. Legal basis in the EC Treaty

In addition, it has still not been clarified properly whether the EC has the power in general for directives that regulate migration on (single) labour market access. The relevant measures should no doubt be based above all on Art 63(3)(a) EC Treaty. Accordingly, the Council can adopt measures on immigration policy in the following area: "Conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion." For want of relevant ECJ adjudication, it is not clear whether questions on access to the labour market are also covered by this competence provision.

There is no standard view on this in academic circles.

Before we think about such regulations, we should first clear up this question once and for all, for example with an independent report.

AK EUROPA kindly requests you to take these comments into consideration.

For any further questions please contact

**Mr. Johannes Peyrl**

(expert of AK Vienna)

T +43 (0) 1 501 65 2687

johannes.peyrl@akwien.at

**as well as**

**Mr. Christof Cesnovar**

(in our Brussels office)

T +32 (0) 2 230 62 54

christof.cesnovar@akeuropa.eu

**Austrian Federal Chamber of Labour**

Prinz-Eugen-Strasse, 8-10

A-1040 Vienna, Austria

T +43 (0) 1 501 65-0

F +43 (0) 1 501 65-0

**AK EUROPA**

Permanent Representation of Austria to  
the EU

Avenue de Cortenbergh, 30

B-1040 Brussels, Belgium

T +32 (0) 2 230 62 54

F +32 (0) 2 230 29 73