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AK Position Paper

Single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State

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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

Werner Muhm
Director

Executive Summary

- Application procedures that also and above all regulate access to the labour market are 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.
- The Employment Council should have the same rights as the Justice and Homes Affairs Council (and its preliminary committees) to deal with the draft
- The concept of a single application procedure in principle is not conducive as it finds itself in a tense relationship with existing directives and also established Austrian law.
- It is sensible to leave the regulations on access to the labour market up to the Member States.
- The EU migration policy must be viewed as a whole in future. AK EUROPA sees the migration plans of the European Commission as instruments for short-term, temporary migration and rejects the implementation of these models.
- There should also be defined the concept of the applicant, who can be both the third-country national him/herself and the worker.
- It is unclear whether persons who, whilst entering the territory for reasons other than that of work (in particular for the purpose of family reunion), might still seek such work in future also come under this regulation.
- It is possible that seasonal workers would fall under the directive in Austria (for instance in winter tourism and then in summer tourism). AK EUROPA rejects this at any rate.
- The definition of scope therefore needs to be revised from both a European law perspective (interaction with other relevant directives) and a national one.
- The designated period of three months for the competent authority to adopt a decision on the application is in any case necessary.
- As regards the information on completing the application, it would make sense to provide for a regulation akin to that in the directive on the recognition of professional qualifications, whereby the authority must inform the person within a month of any additional information that is required. Article 5(4) should therefore be amended to that effect.

- 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.
- It has still not been clarified properly whether the EC has the power in general for directives that regulate migration for the (sole) purpose of labour market access.

1. General

In October 2007, the EU Commission submitted a proposal for a so-called framework directive, a directive for a single application procedure and a "set of rights".
We are first of all opposed to the fact that the draft fails to mention the social partners at all. Application procedures that also and above all regulate access to the labour market are 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.

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

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.
From our point of view, there are several unclear points as regards content: whilst we welcome in particular the concept of a single application procedure in principle, it is (in this form) not conducive as it finds itself in a tense relationship with existing directives and also established Austrian law.

The reasons given in the proposal for justifying action in terms of the subsidiarity principle are not very convincing. There is no reference whatsoever in particular to facts alluding to the differences in how rights are granted to third-country nationals in the Member States and to what extent these differences lead to secondary movements. As regards the distortion of competition that is asserted, it should be noted that mere equal treatment before the law will probably have few effects, particularly as this largely exists anyway especially with regard to working conditions. However, if we really wish to prevent unfair competitive conditions, social dumping and unfair crowding out effects on the labour market, then we need to state this when actually granting rights. Effective government controls of working conditions, easier access to the law and better cross-border co-operation among authorities would be required above all for this. The strain of treaty violation proceedings, which ultimately further restrict the control possibilities, and all ECJ judgments like the Laval case that contribute to competition among wages are in any case not suitable for helping to bring about equal opportunities.

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

2. Comments on the content of the individual provisions

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

also manage these best themselves. Common action in future must at least take the structural differences in the Member States and the different channels for access to the respective labour markets into consideration; in particular it is still not clear how the Austrian labour market will shape up after the transitional periods governing the Member States that acceded on 1 May 2004 and 1 January 2007 expire.

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:
Unlike the view held by the EU Commission, we believe that circular migration does actually involve a "guest worker programme" to a large extent. 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).

Art 2 – Definitions

This article should also define the concept of the applicant, who can be both the third-country national him/herself and the worker as the existing national provisions in the area of work permits in particular grant employers the sole right to make an application for the most part.

Art 3 – Scope

According to the draft, the directive shall apply on the one hand to third-country nationals seeking to reside and work in the territory of a Member State, and on the other also to "workers" (already) legally residing in a Member State.

It is unclear whether persons who, whilst entering the territory for reasons other than that of work (in particular for the purpose of family reunion), might still seek such work in future also come under this regulation. In the process, the relationship with the directive on family reunion (Directive 2003/86/EC) should be examined in particular. In addition, it is unclear whether e.g. students residing in Austria in accordance with the existing national provisions, but also in accordance with the "Student Directive" (Directive 2005/114/EC) and taking up insignificant employment come under this concept. Something similar applies to the relationship with the "Researcher Directive" (Directive 2005/71/EC).

In its preliminary statements, the Commission writes that the proposal provides for a single application procedure for third country nationals "seeking to enter the territory of a Member State to work". However, this is also not suitable for bringing about clarification on the above issues raised as apparently persons who, whilst not exclusively, also enter to work (e.g. family members) are also covered by the directive. In addition, the Commission writes with reference to the above-mentioned existing directives that the concrete draft is in accordance with these – however, it does not explain how the Commission arrived at this view.

Seasonal workers should subsequently not be covered by the directive if they are admitted for not more than six months as seasonal workers over a twelve month period. However, it is possible that seasonal workers are admitted for more than six months of employment a year in Austria (for instance in winter tourism and then in summer tourism). These would then fall under the directive. From the AK EUROPA's point of view, this should be rejected at any rate.

Whilst it is sensible to exempt third-country nationals who fall under the posting of workers directive from the scope, it would however be necessary to regulate the issue of handling work permits for third-country workers who are posted in the country of destination throughout the EU in a clear and uniform manner and not leave it up to ECJ adjudication on the freedom to provide services. Particularly in the area of the

posting of workers, work permits are often issued easier in Member States as long as the third-country workers do not work in this Member State, but are posted to another one. A separate regulation would be needed here in order to prevent abuse.

The definition of scope therefore needs to be revised from both a European law perspective (interaction with other relevant directives) and a national one.

Art 4 – Single application procedure

AK EUROPA considers the provision of a single application procedure and a single permit to reside and work to be positive in principle.

AK EUROPA considers the provision of a single application procedure and a single permit to reside and work to be positive in principle. However, it is not always viable in practice and is also not always sensible. This concept cannot be implemented for the most part particularly in cases in which a labour market test shall take place prior to taking up work. In those cases in which the residence permit is granted irrespective of paid employment, although this is not out of the question (following a labour market test), a single application procedure does not make sense (in connection with this, residence permits for family members in the first year of residence and residence permits for purposes of study can again be given as examples).

A single application procedure and a single permit make sense for admissions only for the purpose of paid employment, like e.g. in Austria for key employees.

Positive is the fact that the material conditions shall be left up to the Member States also in accordance with the proposal.

For these reasons, the concept of a "single application procedure" also cannot meet with our universal approval in the version cited in the draft.

Art 5 – Competent authority

The designated period of three months for the competent authority to adopt a decision on the application is, with regard to several authorities acting together (for the most part the Labour Market Service and residency office / Niederlassungsbehörde in Austria), in any case necessary. As regards the information on completing the application, it would make sense to provide for a regulation akin to that in the directive on the recognition of professional qualifications, whereby the authority must inform the person within a month of any additional information that is required. Article 5(4) should therefore be amended to that effect.

Art 7 – Residence permits issued for purposes other than work

This draft provision is – also in the light of Regulation 1030/2002 – unclear. To wit, if access to the labour market can be made conditional upon a labour market test in a permissible way (as already mentioned, there are also rules for this in existing directives), it makes no sense to

3. Legal basis in the EC Treaty

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 ot the social state into question.

prohibit the Member States from issuing additional permits under labour market law in addition to a residence permit.

Art 12(a) – Working conditions

In accordance with this provision, workers shall enjoy equal treatment with nationals at least with regard to working conditions, including pay and dismissal as well as health and safety at the workplace. In terms of the Equal Treatment Act, it seems sensible to cite additional categories like transport, further training and education as well as sexual harassment in the directive.

Art 12(f) – Payment of acquired pensions when moving to a third country

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

For any further questions please contact

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