AK EUROPA

January 2010

AK Position Paper

Comprehensive Economic and Trade Agreement EU-Canada (CETA)

www.akeuropa.eu

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 would like to refer to the basic position on the European Commission's draft, which AK already submitted on 14th April 2009 as well as to our statements on free trade agreements of the EU with industrial countries. These positions remain unchanged and are upheld.

In particular we would like to point out again, that AK is very critical of bilateral free trade agreements as the benefit of such agreements is not obvious to the workforce. In particular with regard to the issues of investments, public procurement and services we are opposed to negotiations on a bilateral level. Furthermore, AK regards a sustainability chapter, which goes far beyond the previously discussed extend, as an essential part of a free trade agreement with Canada.

The AK position in detail

AK comments on the present specific subjects of negotiation as follows:

Ad Chapter Trade and Sustainable Development (MD 767/09)

General points on the sustainability chapter:

Apart from the ratification and implementation of the most important **environmental agreements** (among others the targets of the Kyoto Protocol, Montreal Protocol on Ozone Depleting Substances, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Stockholm Convention on Persistent Organic Pollutants, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity)a relevant sustainability chapter for the Free Trade Agreement between industrial nations in the sector of labour standards includes the entire **Decent Work Concept** of the International Labour Organization (ILO).

The Integration of the Social partners has to be unrestricted.

As for the remaining parts of the Agreement, the **dispute resolution process** must also be applied to the Sustainability Chapter. Apart from that, the option to enforce administrative penalties in case of violations (e.g. remuneration below the collective agreement) must be created.

On the text proposals of the Commission in detail:

Chapter X: Common provisions to Chapters X+1 and X+2

Art 1/2/d: It is necessary to find another wording: under no circumstances may **„better regulation"** focus on social legislation. Therefore "labour" has to be deleted from the passage "better regulation of trade, labour and environment issues". A „better regulation programme does already exist within the framework of the Internal Market.

Art 2/b.: The wording on the **Integration of the Social partners** has to be revised with regard to its assessment statement. It has to provide for the unrestricted option on integrating the social partners also in urgent cases; the expression "except in urgent circumstances" must therefore be deleted.

Art 4/2: **Board** on Trade and Sustainable Development: it has to be clarified where the senior officials will be recruited from (the Directorate General for Social Issues, the Directorate General for the Environment and the Directorate General for Trade) and how the EU Member States will be integrated.

Art 5: **Civil Society Forum**: a binding reporting duty of the Board to the **Civil Society Forum** and regular meetings

with the Board are essential for an exchange between these two organs.

Chapter X+1: Trade and Labour

Art 1: AK assumes that Article 2, which is mentioned here, refers to Chapter X+1 (binding implementation of the ILO Core Labour Standards).

Art 2: **Multilateral labour standards and agreements**: As already described above, in particular in the case of industrial nations, attention must be paid to the complete ratification, implementation and application of all eight ILO-Core Labour Standards: Canada has not even ratified three of the eight Core Labour Standards. These are Convention 29 (Forced Labour), Convention 98 (Right of Association and Collective und Collective Agreement Legislation) and Convention 138 (Minimum Age).

The AK stand for a promotion of the Decent Work Concept.

Art 3: AK expressly welcomes the passage on **"Upholding Levels of Protection"**, which should prevent the lowering of existing social standards to attract foreign investments.

Art 4/2: **Enforcement procedures**, administrative proceedings and review of administrative action: a problem is definitely subsection 2 lit a, according to which unannounced inspections of the Health and Safety Executive are called into question. This is particularly relevant with regard to technical workforce protection, the control of illegal employment and the control of posted workers.

The question as to how „final administrative action" is defined arises in connection with lit b. It would, however, also be problematic if this would also include security measures.

AK is in favour of **deleting** these sections.

Art 5/1: With regard to the binding ratification and implementation of the ILO Core Labour Standards, the EU must also insist towards industrial countries on the **Decent Work Concept** of ILO, mentioned here (see Statement dated 20.11.2008 on the Discussion Paper of the French Presidency on EU trade policy with industrial countries). Apart from the ILO Core Labour Standards, these also include ILO Conventions, which integrate the sectors of promoting productive employment through qualification, social security (old-age provision, unemployment insurance, maternity protection etc.) and the social dialogue (government, workforce, employees).

Art 5/2: AK is against this promotion of **voluntary Best Practice models** and initiatives - instead the focus should be placed on promoting the Decent Work Concept.

Art 8: **Institutional mechanism**:

Not yet clear are the **functions** of the institutions mentioned and their **co-operation**; for example, in particular the differences between Civil Society Forum and Sustainable Development Advisory Groups should be identified in more detail.

AK asks for clarification, where contact point, Board, Domestic Labour or Sustainable Development Advisory Groups and Civil Society Forum should be located (in Member States or within the Commission, in which Directorate General). In any case, transparent information must be provided with regard to the cases mentioned. This refers in particular to the European Parliament and the social partners.

Art 9: **Government consultations**:

Civil Society Forum and Domestic Labour and Sustainable Development Advisory Group do not appear in this consultation mechanism. However, in view of cooperating effectively with the civil society, in particular with trade unions with regard to implementing the Sustainability Chapter they are indispensable. In addition, a follow-Up mechanism has to be included in the Chapter. For example, complaints, which are submitted by the trade unions, should be dealt with by the relevant government within a certain period of time.

Art 10: **Panel of Experts**:

The **impartiality of the experts** and the immediate dealing with all complaints submitted should be guaranteed under all circumstances. The impartiality and expertise supports the appointment of an expert from ILO.

In our opinion, Governments should be obliged to **bindingly remedy resp. correct** any complained about shortcomings. The express reference in Item 8 to the non-binding character of the Panel Report is counterproductive and has to be deleted.

AD Chapter Trade and Services, Establishment and E-Commerce

1. Chapter 7: Trade in Services, Establishment and E-Commerce (MD 567d/09)

The present chapter does not refer to any sectors for "Business Service Sellers" or "Contractual Services Suppliers" and "Independent Professionals", which indicates a far reaching liberalisation in the services sector. As already mentioned in our Statement from April 2009, AK is against formulating the negotiations on liberalising the services sector without a priori exceptions. We would also like to emphasise that we reject liberalisations in the public services sector, which go beyond the standard of the CARIFORUM Agreement. This concerns in particular areas of audiovisual services, water supply, education and health and social services as well as public transport. Apart from that and with regard to a trade agreement with an industrial nation, the opening of the labour market may only apply to highly qualified employees. Any access openings made in the CARIFORUM Agreement for non-qualified persons (fashion models, chefs de cuisine…) may not be adopted. Should the negotiations result in opening these branches, it is necessary to retain the option for Economic Needs Tests (ENTs) or to introduce sectoral quotas instead, as provided for in the EU GATS offer. Furthermore and in view of the experiences of the current financial crisis we are opposed to any further liberalisation in the services sector.

The AK rejects the opening of the labour market within the scope of Mode 4.

Art 7.1. Objective, Scope and Coverage

What is missing here from the point of view of AK is the so-called **Labour Clause**[1]. These must be integrated into this article or alternatively into the schedule of specific commitments in the Appendix to this Chapter.

2. Comments on the report of the meeting of the Trade Policy Committee for Services dated 09. 12.2009

This report of the meeting asks the EU Member States to comment on the individual main issues with regard Mode 4. AK would like to comment as follows:

Length of stay

With regard to the „length of stay", we reject any extension to five years as proposed by Canada. A „temporary entry" of five years would lead to an enhancement of the residence status. It would no longer be possible to regard this as a "temporary move" and would therefore simply undermine the currently statutory immigration rules. As a result, workers would have a regularly residence permit after five years, which means that they could settle in any EU Member State.

1 All requirements of the laws and regulations of the EC Party regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements even if not listed below. Commitments on key personnel and graduate trainees do not apply in cases where the intent or effect of their temporary presence is to interfere with, or otherwise affect the outcome of, any labour/management dispute or negotiation.

Mode 4 Categories, in particular spouses and technicians

AK rejects the opening of the labour market within the scope of Mode 4 towards the current obligations of the CARIFORUM Agreement. The currently bad economic situation does not allow for any further concessions in this area. According to economic experts, Austria would need an economic growth of over 2.5 % to reduce the constantly rising unemployment. Following the current economic forecasts, however, there is no indication for such a high rate of growth in the near future. The prognosis of the Austrian Institute of Economic Research WIFO from December 2009 expects a rise of 1.5 % for 2010. At the same time, an unemployment rate of 8.1 % for persons working under employment contract has been forecast for 2010 - the highest value since 1953. Therefore, the unemployment, which is a result of the recession, is in danger of hardening. In such an economically challenged time, aiming at introducing any further liberalisation on the labour market within the scope of an economic agreement is not in the interest of the workforce.

What from our point of view also gives cause for concern is the option proposed by Canada to provide "Spouses" and "Technicians" with an independent title. This would mean an extension Dies compared to the current Agreements (GATS, CARIFORUM) and would not result in a controllable opening of the labour market. The EU Immigration Law regulates the provisions for third country family members - this means the right to family reunification

AK welcomes that the "Genetically Modified Organism" has been explicitly excluded from the present Agreement.

and access to the labour market after one year and includes "spouses". In our opinion, this offer should be sufficient and not be stretched any further. In addition we take the view that the category "Technicians" represents an independent sector and should therefore not be introduced as a horizontal category, as this would mean privileged access to the labour market for another group of employees.

ENT vs. Work permit

The CARIFORUM Agreement introduces mandatory Economic Needs Tests (ENTs) for the categories in the sector of Mode 4. The model of the "temporary entry of business persons" and the explicit integration of "work permits" in the text as proposed by Canada represents another approach as the ENTs used by the EU. A departure from ENTs means a conversion to work permit without Labour Market Check - this should not take place. The current challenging economic situation and the still rising unemployment figures do not allow to take such a step. The connection of workers' migration with business activities of employers should be maintained. AK therefore recommends maintaining the system of ENTs in any case. The conversion to a work permit without existing terms and conditions means a worker's mobility, which is independent of trade relations and is therefore rejected by Austrian Federal Chamber of Labour.

Ad Chapter: SPS Agreement (MD 622b/09)

AK welcomes that the "Genetically Modified Organism" has been explicitly excluded from the present Agreement. Thereby this economic agreement does not endanger the genetic engineering ban for food or the ban on the circulation of genetically engineered seeds in Austria. We hope that this position will be maintained until the negotiations are finalized.

Ad Chapter: (MD 645c/09)

With regard to subventions attention has to be paid to the fact that the relevant conditions are not stricter than those of the Community Law (in particular Art 87 f EC Treaty).

The present proposal differentiates between prohibited subventions (Art x3), which are only allowed within very narrow constraints (e.g. serious economic disturbances) and other subventions (Art x4), for which a more relaxed regime is determined on the basis of general permission facts (according to Appendix x). The latter approach basically complies with the entire State Aid Law in the EC Treaty and should therefore be extended to all subventions. From our point of view, the proposed differentiation into prohibited and less prohibited subventions makes little sense and is also not very clearly worded. This is also demonstrated by the fact that Art x3 already refers to subparagraphs („b" und „c"), which do not

AK is opposed to the planned agreement for different reasons.

even exit („a" and „b" were probably meant or perhaps not?). The fact that is possible to obtain more detailed regulations for „other subsidies" from an „Appendix", does further promote the secretive character of international trade law and should be avoided.

In view of public services, the principle, which takes effect in the Appendix („This principle should also apply to companies entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, in so far as it does not obstruct the performance, in law or in fact, of the particular tasks assigned to these companies.") should also be extended to the entire Agreement including the Services Chapter. This would also create the aimed at congruence to the EC Treaty (compare Art 86 Paragraph 2 EC) so that one can assume the same level of protection for the benefit of public services

Ad Chapter XX: "Intellectual Property Rights (MD 567f/09)"

Intellectual property rights provide the owner with a monopoly position. It is in the basic interest of the right holders to have strong property rights, which can also be enforced abroad. In view of the regulations on intellectual property, the interests of the public (e.g. access to information, promotion of innovation, data protection rights), however, must also be taken into account. The regulation of intellectual property rights therefore also raises the question regarding the appropriate extension of protective regulations. The regulations have to demonstrate proportionality; regulations that are too strict lead to negative consequences (e.g. innovation restraints, restriction to the access of knowledge).

AK is opposed to the planned agreement for the following reasons:

- Although the negotiation text does address the significant interests of different stakeholders, the negotiations and the text of the agreement, however, are not sufficiently transparent for the public so that interest groups affected do not have the opportunity to point to possible negative consequences of the regulations and to influence the negotiating text.
- In the Agreement, the contracting partners are expected to commit themselves to concrete civil rights measures, which enable the effective implementation of these rights. The negotiating text is based on the regulations of the EU Enforcement Directive (2004/48 EC). However, with respect to the proportionality of the determined measures, the regulations of this Directive are in particular controversial with regard to consumer and data protection issues. For this reason, the Directive provides an evaluation with regard to the impact of its provisions. By integrating the current provisions of the Directive in the text of the agreement, the Community commits itself in advance and moves the opinion-forming process to the level of the international

agreement. The required evaluation loses its meaning. In addition, it has been pointed out in advance that the text of the Agreement does not fully comply with the requirements of the Enforcement Directive: it has to be ensured with regard to enforcement measures that the legal position of third parties (procedural rights) is also taken into account.

- The Agreement should also include criminal law provisions. This must be rejected as there is no basis for this at Community level. The Directive proposal submitted by the Commission for harmonised criminal law provisions was met with great resistance (e.g. controversial, which property rights were included; imprecise or ambiguous terms create great legal uncertainty). It has not yet been decided. The present draft agreement now creates top-down regulation conditions, which still have to be clarified within the Community (under inclusion of the European Parliament).
- In general, activities of private persons should not be included in the Agreement. This is not taken into account in the text of the Agreement.

We have also noticed that the proposed text of the Agreement only concerns the commercial intellectual property right and the copyright.

We would like to comment as follows on the concrete regulations:

Nature and Scope of Obligations:

Item 3 refers to the fact that the text of the Agreement and its provisions should also include protection against unfair competition. We explicitly point out that the Enforcement Directive (basis for the negotiations) as such, however, does not cover Unfair Competition Law claims.

On the one hand, Austria should not accept any inclusion of "unfair competition". On the other hand, it would be necessary to examine to what extent the proposed provisions of the Agreement are compatible with the Austrian Unfair Competition Law (e.g. regulations with regard to the parties entitled to bring action). A possible inclusion of "unfair competition" would have to be discussed in a discussion group, which includes the stakeholders affected.

We have also noticed that the proposed text of the Agreement only concerns the commercial intellectual property right and the copyright. The text of the Agreement, however, is not suitable as a basis for unfair competition.

As the non-inclusion of "unfair competition" is a significant issue for us, we also would like to be informed how the Federal Ministry of Economy, Family and Youth BMWFJ will proceed.

Protection of Technological Measures; Protection of Rights Management Information

This provision obviously emulates the provision of Article 6 of the Copyright Directive 2001/29 EC. It guarantees right holders legal protection in case of bypassing technical measures (copy protection). The regulation of Article 6 of the Copyright Directive in itself is regarded as extremely problematic by AK. In practice, the protection for tech-

nical measures (copy protection) embedded in the Copyright Directive results in licenses/rights of utilisation and private copying being undermined. In view of our position on corresponding regulations within the Copyright Directive we have to reject an inclusion of provisions for the protection of technical measures and information.

Design Protection – Relationship to Copyright

It has to be made absolutely clear that granting design protection does not also automatically guarantee protection by copyright. Otherwise the text of the Agreement would contradict the Austrian legal position. The formulation "shall be eligible" does not achieve this clarification. The same applies to the following sentence ("the extent..."), which does not provide legal clarity either.

Enforcement of Intellectual Property Rights

It is noticed that the Enforcement Directive provides a definition of its area of application. Such a provision is not included in the text of the Agreement.

We would like to expressly point to the provisions of Article 2 of the Enforcement Directive, which in particular also maintain the validity of the provisions of Directive 95/46/EC (data protection). The application of the provisions of the Directives named in Article 2 must continue to be secured by the finalisation of an Agreement (e.g. Right to Information).

Entitled Applicants

We would once like to again draw attention to the fact that in case of including the Unfair Competition Law, the names of the persons and groups named in the text of the agreement do not comply with those entitled to bring action in Austria. Apart from that, the present formulation is exclusively in regard of the infringement of IP rights. With respect to the problem of including unfair competition, we once again refer to our plea mentioned above.

Measures for Preserving Evidence

There are no property rights in the interest of third parties (included in Article 7 Enforcement Directive).

Right of Information

AK was fundamentally very critical up to being opposed towards the Right of Information within the scope of the Enforcement Directive (data protection request, legal uncertainty regarding the scope of the provision in view of employees and consumer interests).

There is a lack of references to regulations on data protection. In its Article 2 (Area of Application) the EU Enforcement Directive limits the regulations of the Right of Information to the requirements of the Data Protection Directive.

Corrective Measures

The regulation must be extended by the element of the proportionality of measures (the Enforcement Directive refers to "appropriate measures").

As long as no uniform regulation with regard to criminal sanctions has been found within the Community, any inclusion of criminal sanctions in this Agreement has to be rejected.

Criminal Sanctions

As long as no uniform regulation with regard to criminal sanctions has been found within the Community, any inclusion of criminal sanctions in this Agreement has to be rejected: a regulation proposal presented by the European Commission has not yet been adopted. The Agreement would now require in advance the Common legal position without any further debate and parliamentary vote resp. without considering the public (stakeholders). From the point of view of consumers, any criminal law provisions must clearly exclude the inclusion of private user behaviour (the generally used formulation "on a commercial scale" is not sufficient).

Network blocks

Attention should also be paid to the fact that network access blockage is generally not included in the Agreement (e.g. basic right to data protection).

Border measures

The statutory exemption for private persons under Community law must also remain guaranteed.

AK reserves the right to submit further statements on the negotiations and asks for the position outlined in this letter to be considered.

For further information please contact:

Iris Strutzmann
(Expert of AK Vienna)
T +43 (0) 1 501 65 2167
iris.strutzmann@akwien.at

as well as

Frank Ey
(in our Brussels Office)
T +32 (0) 2 230 62 54
frank.ey@akeuropa.eu

Austrian Federal Chamber of Labour
Prinz-Eugen-Strasse, 20-22
A-1040 Vienna, Austria
T +43 (0) 1 501 65-0
F +43 (0) 1 501 65-0

AK EUROPA
Permanent Representation 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